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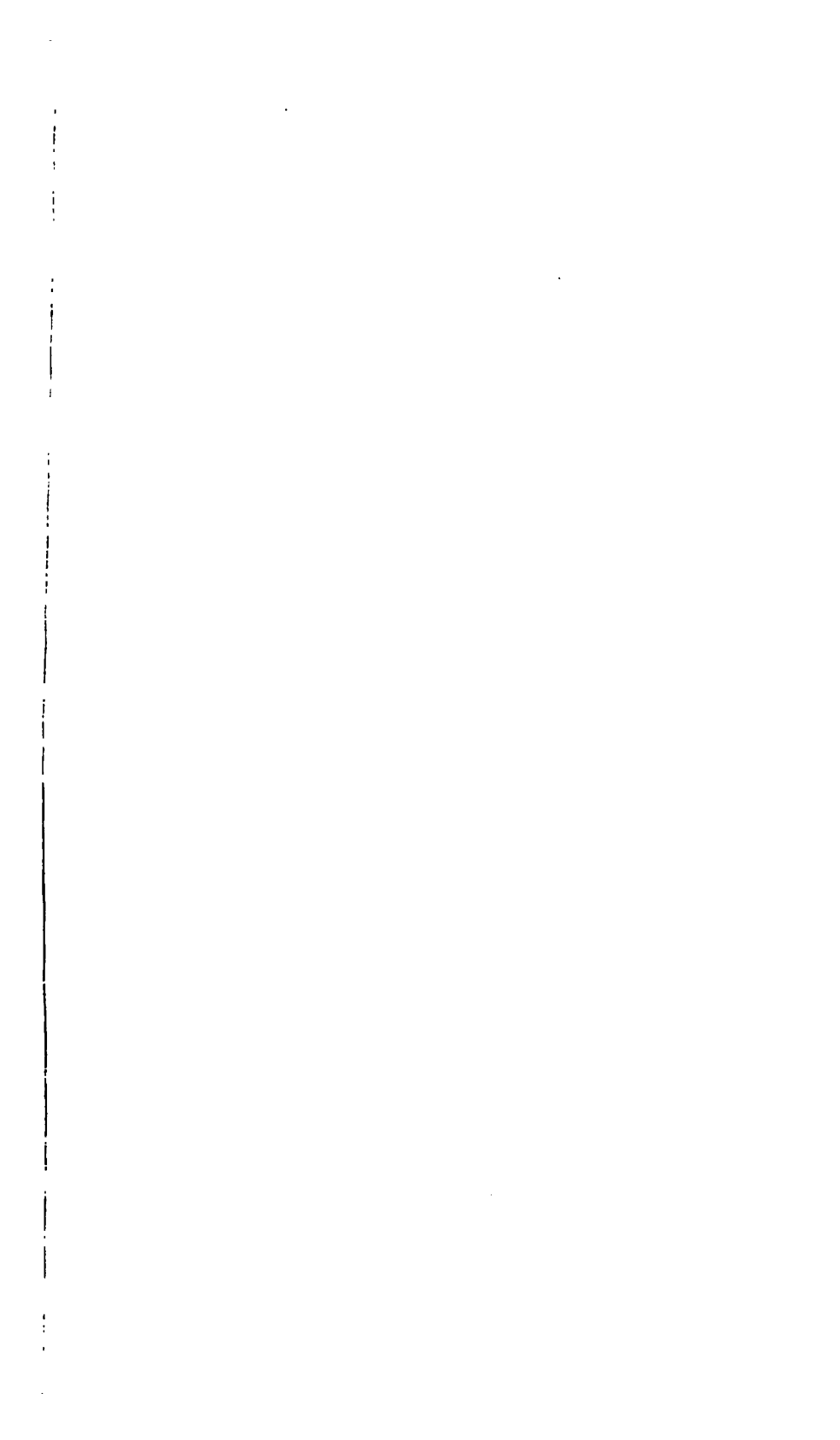
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

**By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."**

VOL. LI.

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AMERICAN STATE REPORTS.

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AMERICAN STATE REPORTS.
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CASES

IN THE

SUPREME COURT

OF

FLORIDA.

REYES v. MIDDLETON.

[26 FLORIDA, 99.]

CLOUD ON TITLE.—A CONVEYANCE WHICH SHOWS UPON ITS FACE that the grantor was at the time of its execution out of possession of the lands conveyed is void as to a party holding adversely to such grantor at the time of its execution, and is not a cloud upon his title.

CLOUD ON TITLE.—A CONVEYANCE VOID UPON ITS FACE, in the absence of rebutting proof, is not a cloud on the title, authorizing the interposition of equity for its removal.

SLANDER OF TITLE.—INJUNCTION DOES NOT LIE to restrain the libeling or slandering of title to land, if there is no breach of trust or contract right involved, and the mere alleged insolvency of the libelant does not authorize the interference of a court of equity. In such cases the remedy, if any, is at law.

M. C. Jordan & W. A. MacWilliams, for the appellant.

C. P. & J. C. Cooper, for the appellees.

100 TAYLOR, J. On the twenty-sixth day of July, A. D. 1888, George C. Middleton, Charles E. Gard, Burton W. Cole, William H. Erwin, Betsy P. White, William S. Vansickle, Isaac N. Vansickle, Marion R. Cooper, Frank F. Smith, Joseph Randall, as administrator of the estate of Erastus Randall, deceased, R. M. Simms, W. H. Simpson, Ira S. Bunker, Edgar F. R. Fripp, and T. B. George, all of the county of St. Johns, as complainants, filed their bill in equity in the circuit court of St. Johns county against Ramon C. Reyes, in his own right and as administrator of the estate of Jose B. Reyes, deceased, Carmen Reyes, Innocencia Reyes, Maria del Rosario Reyes, Gabina Andreu, and Emanuel P. Andreu, her husband, and Adolphus N. Pacetti, all of St. Johns county. The bill alleges, in substance,

that the complainants are severally seised and possessed in fee of certain portions of that tract of land situated in St. Johns county, Florida, known as section 37, in township 8 south, of range 29 east, located on Moultrie creek, the same being a Spanish grant confirmed to Jose B. Reyes, containing two hundred and twenty-three and one-tenth acres; the several respective portions thereof owned and possessed severally by the respective complainants being particularly described in diverse deeds of the same to them that are attached to the bill as exhibited thereto. That complainants are now severally in the actual possession of ¹⁰¹ the several portions of said section of land conveyed to each of them severally by said deed exhibits; and that they, and those under whom they claim, have been in the actual possession of same ever since the year 1873. That each of complainants have made improvements upon their several tracts of land by clearing, cultivating, and fencing same, and by building houses thereon, and planting orange groves thereon, and by the making and cultivation thereof, and that the said several tracts or portions of said land described in said deed exhibits are the homes of each of complainants severally to whom said tracts are in and by said deeds duly conveyed. That the said defendants set up and assert some pretended claim of title to, or interest in, said lands, by reason of their alleged claim that they, with the exception of Adolphus N. Pacetti, are the heirs at law of one Jose B. Reyes, the grantee to whom said lands were duly confirmed as a Spanish grant. That complainants have no personal knowledge whether or not the defendants are in fact the heirs at law of said Jose B. Reyes, but they say that said defendants have no title whatever to said lands, the same having been duly and regularly assessed in the year A. D. 1853, and duly and regularly sold on the first day of May, A. D. 1854, by one R. B. Canova, the then sheriff and ex officio tax-collector of St. Johns county, Florida, for nonpayment of taxes, and said lands having been then and there purchased by the state of Florida, and a deed for same having been executed by said Canova, as said tax-collector to the register of public lands of said state of Florida, and on the fourth day of February, A. D. 1873, sold and conveyed to one B. F. Oliveros by the then commissioner of lands and immigration of said state of Florida, in accordance with the statutes in such cases provided. That by reason ¹⁰² of said preceding sales and conveyances, the said Jose B. Reyes and those claiming under him were divested of title to said land, and the same became vested in said B. F. Oliveros, who, on the twenty-fourth day of February, A. D. 1874,

filed said deed for record in the clerk's office of St. Johns county, state of Florida, and that he entered into actual occupancy of said land in the year 1873, and that the said Oliveros and those claiming under him, including your orator, have been in the actual, open, notorious, adverse, and exclusive occupation and possession of said above-described real estate ever since the same was so taken possession of by said Oliveros up to the date of filing this bill, and that complainants are now in the actual, open, notorious, adverse, and exclusive occupation and possession of said lands, and neither of the said defendants are now, or ever have been, in the occupation or possession of any part of said land. That, by conveyances through divers different persons from the said Oliveros to complainants, they have acquired the title to said land, and are now seised of title in fee thereto that appear by the record of deeds of said county of St. Johns, and that defendants have no title whatever to said lands. That the defendant Adolphus N. Pacetti claims some interest in said land by reason of an alleged power of attorney to him, coupled with an interest in said land, executed by the other of said defendants to said Pacetti on the twenty-first day of September, 1883, and recorded in book of Miscellaneous Records, "C," pages 61 and 64 of records of St. Johns county, Florida; said alleged power of attorney purporting to authorize said Pacetti, in the name of the other of said defendants, or of said Ramon C. Reyes as administrator aforesaid, to sue for, recover, and gain possession of said land in consideration of an ¹⁰⁸ interest therein as therein stated, as will appear by a certified copy of said power of attorney attached to the bill as an exhibit. That for some years past, to wit, since about the twenty-first day of September, A. D. 1883, said defendants, and particularly said Ramon C. Reyes and Adolphus N. Pacetti, although out of possession of said land, and the records of said county showing the title of complainants to same as above set forth, have continuously and publicly stated to divers persons in said county, and in the city of St. Augustine particularly, that they, the said Reyeses, as heirs at law of Jose B. Reyes, owned said land, and that said Pacetti was their agent and attorney in fact, with said alleged one-half interest therein, in the matter of taking possession of, and asserting title to, said land, and in some manner have openly asserted that complainants had no title to said land; and said defendants, from time to time since the twenty-first day of September, 1883, have posted up, and caused to be posted up, in many public places, and distributed to divers persons in the city of St. Augustine, in said county, printed and written circulars warning and threat-

ening all persons against buying said land of complainants, and of law suits that will result therefrom, and offering to sell the same themselves through Ramon C. Reyes, in his own right and as administrator aforesaid, or through Adolphus N. Pacetti, thereby clouding and traducing the title of your orators to said land, all of which will more fully appear by reference to one of said circulars as posted up by said defendants, attached to the bill as an exhibit. That for several years, they desired and urged the defendants Ramon C. Reyes and Adolphus N. Pacetti to bring the proper actions at law against your orators to test the title between your orators and said defendants to said land, your orators being more than willing that ¹⁰⁴ said title should be tried and settled, but, although said defendants threatened from time to time to bring such action, they did not do so up to the sixteenth day of August, 1887, when said Ramon C. Reyes, as administrator, commenced an action in ejectment against one of your orators, Charles E. Gard, on the law side of this court, in which suit issue was joined, and the same was ready and called for trial, but said Reyes, as plaintiff therein, by his attorney, dismissed said suit, and, although your orators have waited some time since for said defendants to commence new actions to test their said alleged claim of title to said land, yet they have not done so, but continue to make their said alleged public assertions and claims of title to said land, although still out of possession of same, and to post and distribute similar circulars as to the title to said land. That said defendants, by said methods of claiming title to said lands, and warning others against the title of your orators, and offering to sell your orators said land, and by the record of said alleged power of attorney to the defendant Adolphus N. Pacetti, prevent your orators from selling or disposing of it, or raising money on it as security, and generally lessens its value in the estimation of purchasers and persons dealing in real estate, and your orators are therefore prevented from the entire use, enjoyment, and benefit of said property, and the title to same is, in fact and in law, clouded thereby, and your orators, being in possession, have no adequate remedy at law for said injury. That they fear and apprehend, and have reason to fear, that unless restrained by decree of this court, the defendants will continue to assert that the title to said land is in defendants, and will continue to publicly state that the said Reyeses, as heirs at law of Jose B. Reyes, own said land, and that said Pacetti is their agent and ¹⁰⁵ attorney in fact, for the purpose of asserting title to said land, and will assert that your orators have no title to said land, and will post up, and cause to be posted up, in public

places and distributed to divers persons, printed and written circulars warning and threatening all persons against buying said land of your orators, and of law suits that will result therefrom, and offering to sell same themselves through the said Ramon C. Reyes in his own right and as administrator aforesaid, or through the said Pacetti, thereby clouding and treading the title of your orators to said land. That by reason of defendants' alleged claim of title they may bring separate actions at law against each of your orators, thereby occasioning a multiplicity of suits. That said defendants, particularly Ramon C. Reyes and Adolphus N. Pacetti, have no property above their legal exemptions out of which any judgment for damages could be satisfied that your orators, or either of them, might obtain against said defendants, or either of them, for said alleged slanders upon the titles of your orators to said land.

The prayers of the bill are that the defendants and all persons claiming through or under them be perpetually enjoined from alleging or asserting title in themselves to said land, or any claim thereto, or right therein, and from instituting any suits to assert title to, or to recover possession thereof, and from disturbing complainants in any manner in the enjoyment, use, and possession of said land; and that complainants' title hereto may be decreed to be good and indefeasible as against said claims of title thereto of the said defendants. That said power of attorney from the defendants Reyes to the defendant Pacetti be decreed to be delivered up and canceled, and adjudged to be null and void, and canceled of record where same is recorded. There is a prayer for general relief.

The defendants demurred to the bill upon a ground of a want of equity in the bill, and because the complainants claim to hold separate interests in separate pieces of property, and the damages, if any, would be separate and distinct, and the complainants are, therefore, improperly joined; and for uncertainty. This demurrer was overruled, and this ruling is the first error assigned. Attached to the bill as an exhibit thereto is a power of attorney from the defendants Reyes to the defendant Pacetti, authorizing the latter to sue for and recover possession of any and all lands and claims to which the Reyeses may be entitled by inheritance or otherwise, and to put the Reyeses in possession thereof; and this instrument contains also an agreement with Pacetti entitling him to one-half of all lands and other property that he may recover for the Reyeses in consideration of his services in and about the recovery thereof. This instrument, the bill assumes, is a cloud upon the complainants' title, and its delivery and cancellation, as such

cloud, is prayed for. We do not think that it constitutes such a cloud upon the complainants' title as will authorize the maintenance by them of a bill in equity for its removal. Upon its face, when its features as a conveyance to Pacetti of an interest in the lands is considered, it shows that the grantors were, at the time of its execution, out of possession of the lands proposed by it to be conveyed, and, according to the well-settled rule of this court, it was, therefore, a nullity, and void upon its face as to the complainants who were, at the time of its execution, in possession of the lands in dispute adversely to such grantors: *Doe ex dem. Magruder v. Roe*, 13 Fla. 602; *Levy v. Cox*, 22 Fla. 546; *Gould v. Carr*, ¹⁰⁷ 33 Fla. 523. It is further the well-settled rule of this court that a deed or other instrument that is void upon its face, and that cannot sustain an action, in the absence of rebutting proof, cannot be said to be such a cloud upon a title as will authorize the interposition of equity for its removal: *Davidson v. Seegar*, 15 Fla. 671; *Barnes v. Mayo*, 19 Fla. 542; *Sloan v. Sloan*, 25 Fla. 53. We do not think, therefore, that the bill here makes out such a case as will authorize a court of equity to exert its power of removing cloud upon title.

The next ground of relief set up by the bill, and the one mainly relied upon by the complainants, is, that the defendants are and have been traducing and slandering the title of complainants to the lands described by declaring themselves to be the true owners thereof, and that complainants had no title thereto, and by posting up notices or placards warning purchasers from buying any of said lands from any one but themselves, under penalty of purchasing law suits, etc. Under this last phase of the bill there is no allegation as to any overt act of interference by the defendants with the complainants in their quiet use, enjoyment, and possession of the lands; neither is it alleged that the defendants have interfered in any way directly with the land itself, by any attempt to possess themselves, or to dispossess the complainants thereof, but the substance of the allegations is, simply, that the defendants are and have been libeling and slandering the title of complainants to said lands, and the prayer of the bill upon this phase of it is, that they be restrained and enjoined from so slandering and libeling it in future. There is no allegation that the defendants have brought, or are about to, or threaten to, bring any ¹⁰⁸ action or actions against the complainants or any of them to test their claims to the land, or to question complainants' title thereto. It seems to be well settled that a court of equity will never lend its aid by injunction to restrain the libeling or slandering of title to property, where there is no breach of trust or contract involved,

but that in such cases the remedy, if any, is at law; and that the alleged insolvency of the libellant, in such cases, will not, of itself, authorize the interference of the court of equity: *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69; 19 Am. Rep. 810; *Wetmore v. Scovell*, 3 Edw. Ch. 515; *Brandreth v. Lance*, 8 Paige, 24; 34 Am. Dec. 368; *Mauger v. Dick*, 55 How. Pr. 132; *Life Assn. of America v. Boogher*, 3 Mo. App. 173; *Singer Mfg. Co. v. Domestic Sewing Machine Co.*, 49 Ga. 70; 15 Am. Rep. 674; *Clark v. Freeman*, 11 Beav. 112; *Seeley v. Fisher*, 11 Sim. 581; *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. App. Cas. 142.

It is further contended here that the complainants are entitled to the relief prayed, upon the ground of the prevention of a multiplicity of suits, and this contention is based upon the idea that the complainants are numerous, and that each of them owns a separate parcel of the land in controversy, and that each of them is subject to a several action of ejectment by the defendants for the respective parcels of the land owned by each. We do not think that the facts set up by the bill disclose a case calling for the interposition of a court of equity to prevent a multiplicity of suits; but besides this the bill distinctly alleges that the defendants will not bring ejectment to test the title, though often solicited and invited to do so by the complainants.

100 It follows from what has been said that the demurrer of the defendants to the bill of complaint should have been sustained, and that the court below erred in overruling same. The decree appealed from is reversed with direction to sustain the defendants' demurrer to the bill, and that the bill be dismissed.

CLOUD ON TITLE.—A lien or encumbrance to throw a cloud on the title to real property, so as to give the owner a right to relief in equity, must be one that is regular and valid on its face, though in fact void from circumstances which must be proved by extrinsic evidence; *Murphy v. Mayor*, 6 Houst. 108; 22 Am. St. Rep. 345. See, further, the extended note to *Scott v. Onderdonk*, 67 Am. Dec. 110.

INJUNCTION TO PREVENT SLANDER OF TITLE.—A court of equity has no power to restrain a slander or libel, and it can make no difference whether the words are uttered concerning a person or his title to property: *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492; 33 Am. St. Rep. 476, and note. An injunction will not issue to restrain defendant from libeling complainant, when the libels complained of are nothing more than false representations as to the character of his property and as to his title thereto: *Covell v. Chadwick*, 158 Mass. 28; 25 Am. St. Rep. 625, and note.

JACKSONVILLE ELECTRIC LIGHT COMPANY v. CITY OF JACKSONVILLE.

[36 FLORIDA, 229.]

MUNICIPAL CORPORATIONS CAN EXERCISE ONLY SUCH POWERS as are expressly granted, and those necessarily or fairly implied in or incident thereto, and those essential and indispensable to the declared objects and purposes of the corporation. Any fair reasonable doubt concerning the existence of the power is to be resolved against the corporation, and the power denied.

MUNICIPAL CORPORATIONS AND THEIR OFFICERS CAN- NOT DO ANY ACT, make any contract, or incur any liability not authorized by their charter, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted or forbidden are void.

MUNICIPAL CORPORATIONS.—WHILE STRICT CON- STRUCTION should be applied to grants of power to municipal corporations which may result in imposing public burdens, or are out of the usual range, yet if a power is necessarily or fairly implied in or incident to those clearly given, it is not to be impaired by strict construction.

MUNICIPAL CORPORATIONS—IMPLIED POWERS—GEN- ERAL WELFARE.—A charter conferring upon a city council power to provide for lighting the city by gas or other illuminating material, or in any other manner, authorizes the erection and maintenance, at public expense, of an electric plant of sufficient power to light, not only the streets and public places in the city, but also to supply, in connection therewith, electric lights for the inhabitants of the city in their private houses.

MUNICIPAL CORPORATIONS.—ALL POWERS CONFERRED upon a municipal corporation should be construed with a view of carry- ing out the purposes of its creation as a public agency.

MUNICIPAL CORPORATIONS.—SUPPLYING INHAB- ITANTS OF CITIES WITH ELECTRIC LIGHT is such a municipal purpose as authorizes its delegation by the legislature to municipal cor- porations.

J. E. Hartridge and Henderson & Raney, for the appellant.

A. W. Cockrell and Son, for the appellees.

263 MABRY, C. J. The motion made by appellant in this court involves its power to grant a temporary injunction pending an appeal in a case where such injunction had been refused by the circuit court. If this court had such power, it must be because of its authority to issue all writs necessary or proper to the complete exercise of the jurisdiction conferred on it by the constitution in other matters than those in which it exercises original jurisdiction. The case of *Cohen v. L'Engle*, 24 Fla. 542, does not expressly affirm the jurisdictional authority of this court to grant the injunction asked for, and we are without a direct adjudication on the point in this state. An examination of this question has led to an investigation of the entire case presented by the record, and as it has been argued by counsel, and we have reached

a conclusion thereon, we have decided to dispose of the appeal on its merits, without reference to the power of the court to grant a temporary injunction pending the appeal.

The question presented on the merits is whether the city of Jacksonville has the power to erect and maintain an electric plant of sufficient power and capacity to light the streets and public places of the city, and, at the same time, supply from said plant the inhabitants thereof with electric lights for their private residences and business houses. The original bill alleged that the city, through its board of public works, had failed to comply with the law regulating the letting out of contracts to the lowest bidder, in awarding the contract for the erection of the plant in question, but ²⁶³ this is denied by the answer, and it is not contended here that appellant was entitled to an injunction on this ground. The supplemental bill would seem to go to the extent of alleging that the city had declared its purpose to engage in the manufacture and sale of electricity for commercial purposes without reference to its use by the inhabitants of the city, but there is nothing to show a purpose to dispose of electric lights to any other persons than the inhabitants of the city for use in their private residences and houses, and the question presented is as we have stated it. We have been unable to find any authorities bearing directly on the question involved in the merits of this case than those cited in the briefs of counsel, and the decisions cited speak of the paucity of adjudications on the point. The general rule stated by Judge Dillon (1 Dillon on Municipal Corporations, sec. 89) is recognized as a correct summary of the decisions on the question. The author states the rule as follows: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incident to the powers expressly granted; and 3. Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers ²⁶⁴ granted are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute." The same author says (sec. 91) that "the rule of strict construction of corporate powers

is not so directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipalities and public bodies which are out of the usual range, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property, or as it may be compendiously expressed, any common-law right of the citizen or inhabitant." While a strict construction should be applied to the grant of power, yet if a power is necessarily or fairly implied in or incident to those clearly given, it is not to be impaired by a strict construction: *Kyle v. Malin*, 8 Ind. 34. In speaking of the powers of municipal corporations, it is said in *Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475: "They may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing this they must (unless restricted in this respect) have a choice of means adapted to ends, and are not to be confined to any one mode of operation." In construing a charter giving to a city the right to pass ordinances for the prevention and suppression of fires, and to appoint and remove fire wardens, and to prescribe the powers and duties of such fire wardens and of fire engineers and firemen, and to raise money to support the fire department, it was held that although no express grant of power was conferred to purchase engines and apparatus, yet such power was necessarily or fairly implied as incident to the power expressly given: ²⁶⁵ *Green v. City of Cape May*, 41 N. J. L. 45. The charter of the city of Greenville, construed in the case of *Mauldin v. City Council of Greenville*, 33 S. C. 1, provided that the council might purchase, hold, possess, and enjoy any estate, real, personal or mixed, and sell, lease, alien, and convey the same provided that it did not exceed at any time \$100,000, and also to make and establish all such rules, by-laws, and ordinances respecting roads, streets, markets, and police department of the city, and the government of the city, as should appear necessary and requisite for the security, welfare, and convenience of the city for preserving health, life, and property, and securing the peace and good government of the same. The further power was given to levy taxes sufficient to discharge and defray all expenses of carrying into effect the ordinances, rules, and regulations established as provided, with the limitation that the tax should not exceed seventy-five cents upon every one hundred dollars of real and personal property assessed. The city was also authorized to borrow money for the public use of the corporation by issuing bonds bearing a certain rate of in-

terest, and not to exceed \$100,000. It was held that the city had the express power to purchase, and the implied power to operate, an electric light plant, so far as it is used for lighting the streets and public buildings of the city, but so far as it was used for furnishing light to private residences and places of business at a compensation, it was not for the public use of the corporation, and therefore its purchase and maintenance to that extent were ultra vires. Aside from the express power to buy and hold property the city had only the powers granted by what is usually called the "general welfare clause" in municipal charters. After referring to the ²⁶⁶ rule announced by Judge Dillon, given above, the court say: "Now, tested by this principle, so clearly stated, how does the matter stand? Clearly the charter does not give the power to purchase this plant in express words. It does not so give even the power to light the city, but we assume that this latter power may be fairly implied from the grant of the police power." Under a statute giving cities power to establish and maintain electric light plants, or to authorize the erection of the same, upon a majority vote of the city, and to issue bonds for the purpose of establishing electric plants, the total amount not to exceed five per cent of the assessed taxable property within the city, Judge Shiras held that the city had the power to erect an electric plant for the purpose of furnishing light to its inhabitants in their stores and houses, as well as for lighting the streets and public places of the city. He says that it had been "the uniform rule that a city, in erecting gas works or water works, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use; and the statutes of Iowa now place electric light plants in the same category": *Thompson-Houston Electric Light Co. v. City of Newton*, 42 Fed. Rep. 723; 3 *American Electrical Cases*, 507. An Indiana statute conferred upon municipalities the power "to light the streets, alleys, and other public places" of cities and towns with electric light or other form of light, and to contract with any individual or corporation for lighting such streets, alleys, and public places with electric light or other form of light, on such terms and for such times, not exceeding ten years, as might be agreed upon. Other provisions in the act authorized the granting to any person or corporation the right to ²⁶⁷ erect and maintain the necessary fixtures for supplying electric light to the inhabitants of the municipality, but it was conceded by the court, in the case of *City of Crawfordsville v. Braden*, 130 Ind. 149, 30 Am. St. Rep. 214, that no provision was made in terms for the municipality to supply electric light to its inhabitants. It would seem from the

terms of the act in conferring power upon the municipality to light the "streets, alleys, and other public places," that it was the purpose of the legislature to confine the corporation to such use in supplying electric light, but the court held that the corporation had the right to furnish the inhabitants light for their private residences and business houses, as well as lighting the streets and public places of the city. It appears that this right is based, in the case cited, upon the general police power of the city. The charter of the city of Nashville conferred the power "to provide the city with water by water works, within or beyond the boundaries of the city, and to provide for the prevention and extinguishment of fires, and organize and establish fire companies." The right of the city to establish water works, and in addition to making provision for the extinguishment of fires, to furnish water to the inhabitants, was affirmed in the case of *Smith v. City of Nashville*, 88 Tenn. 464. The act passed on in the case of *Linn v. Chambersburg Borough*, 160 Pa. St. 511, expressly authorized any incorporated borough to manufacture electricity for commercial purposes for the use of the inhabitants of said borough, and the constitutional power of the legislature to confer such right was recognized. The court said: "In view of the fact that electricity is so rapidly coming into general use for illuminating streets, public and ^{and} private buildings, dwellings, etc., why should there be any doubt as to the power to authorize such corporations to manufacture and supply it in like manner as artificial gas has been manufactured and supplied?" A statute in Kansas gave to cities of the second class authority to provide for and regulate the lighting of the streets, and to make contracts with any person, company, or association for such purpose. The city of Hiawatha entered into a contract with the General Electric Company to construct a plant to be used by the city exclusively for the purpose of lighting the public streets, without any intention to furnish lights to private citizens or to use of the same for any private purpose. The court held that the city had the right to construct the plant: *State v. City of Hiawatha*, 53 Kan. 477. The right to furnish to individuals for use in their private houses was not involved or considered. It was enacted in Ohio that "the council of any city or village shall have power, whenever it may be deemed expedient and for the public good, to erect gas works at the expense of the corporation, or to purchase any gas works already erected therein." Former statutes gave municipalities the right to contract with gas companies to supply cities with gas, and the right of a city to erect gas works therein without any avowal of the purpose for which they were

acted, although a contract had formerly been made with a gas company to supply gas was affirmed in the case of *State v. City of Hamilton*, 47 Ohio St. 89. The power of the legislature to authorize incorporated cities and towns to erect and maintain electric plants to light the streets and other public places of the municipality as well as supply light to private individuals, is expressly stated in *Linn v. Chambersburg Borough*, 160 Pa. St. 511, and the ²⁶⁹ *Opinion of the Justices*, 150 Mass. 593.

The authority of the city of Jacksonville to erect the electric plant in question, and, in addition to lighting the streets and public places therein, to supply the inhabitants light for their private residences and houses, must depend upon the charter act of 1887, chapter 3775. The act of 1893 (c. 4239) gave the right to the city to issue bonds under conditions therein stated to refund the bonded indebtedness of the city, and for such other municipal purposes as might be provided by ordinance in submitting the question of the issuance of the bonds to a vote of the people. The issue of \$75,000 of bonds for the erection of an electric plant having been carried, the city undertook the construction of the plant. Unless the erection of the plant was a municipal purpose within the meaning of the charter powers of the city, it could not be created at public expense. The act of 1887 provides that the city "may purchase, lease, receive and hold property, real and personal, within said city; and may sell, lease, or otherwise dispose of the same for the benefit of the city; and may purchase, lease, receive and hold property, real and personal, beyond the limits of the city, to be used for the burial of the dead; for the erection of waterworks; for the establishment of poor houses, pest houses, houses of detention and correction; for public parks and promenades, and for any other public purpose that the mayor and city council may deem necessary or proper; and may sell, lease, or otherwise dispose of such property for the benefit of the city to the same extent as natural persons may." Among the powers conferred upon the city council are the following: "To make regulations to secure the general health of the inhabitants and to prevent and remove nuisances; ²⁷⁰ to provide the city with water works within or beyond the boundaries of the city; to provide for the prevention and extinguishment of fires, and to organize and establish a fire department; to provide for lighting the city by gas or other illuminating material, or in any other manner; . . . to make appropriations for lighting the streets and public buildings, and for the erection of all buildings necessary for the use of the city; . . . to pass all ordinances

necessary for the health, convenience, and safety of the citizens, and to carry out the full intent and meaning of this act, and to accomplish the object of this incorporation." Among the limitations upon the city council are the following: "The mayor and city council are forbidden to make any appropriations of money or credit in the way of donation, festivities, pageants, excursions or parades, nor shall they be authorized to subscribe for stock in any railroad company or in any other corporation, or give or lend any money, aid, or credit to any person or corporation whatever, and they are hereby prohibited from employing or appropriating the revenues and taxes in any other manner than for purposes strictly municipal and local and according to the provisions of this act." Under the provisions regulating the duties of the board of public works, that body is given exclusive control over the lighting of all such public places as may be deemed necessary, and "shall have exclusive power to organize and control the fire department, the water works and its appurtenances, the gas and other illuminating works of the city, and its jails and houses of correction and detention."

There can be no doubt about the power of the city of Jacksonville to erect and maintain at public cost an electric plant of sufficient power and capacity to light ²⁷¹ the streets and public places in the corporation. Counsel for appellant do not insist here that the city does not possess such power, but the contention is, that no power exists to erect and maintain such plant for the additional purpose of supplying the inhabitants of the city with electric light for use in their private residences and houses. Under a strict construction, as applied in the South Carolina decision, the city would have the power, even under the general welfare clause, to erect and maintain an electric plant to supply light for the streets and public places of the city. The grant of power to the city of Jacksonville to provide for lighting the city by gas or other illuminating material, or in any other manner, is clear and explicit, and this carries with it the power of choice of means to accomplish the end. Should this power be construed into a right to light the streets and public places of the city, but not to supply the inhabitants thereof with light for use in their private houses? The power of lighting the city is given in connection with the powers of providing the city with water and the establishment of fire departments for the prevention and extinguishment of fire. The Tennessee court construed a clause in the charter of the city of Nashville, similar to the one in the Jacksonville charter into a power to supply water not only for the pub-

lic use of the city, but for private use by the inhabitants. The statute in Iowa simply gave the power to cities to erect electric plants without designating the purposes for which light might be generated, and it was held that it could be furnished by the city to its inhabitants for private use in their residences. The Indiana decision clearly sustains the power claimed by the city of Jacksonville in this case; and, if the South Carolina case can be considered the other way, the preponderance of adjudication ²⁷² seems to be in favor of sustaining the power claimed in the case before us. The South Carolina court did not have before it a statute like ours, and we are of the opinion that a fair construction of the grant "to provide for lighting the city by gas or other illuminating material, or in any other manner," will authorize the erection and maintenance of an electric plant not only for lighting the streets and public places of the city, but also for supplying, in connection therewith, electric light for the inhabitants of the city in their private houses. The power given is to light the city, and the connection indicates that the legislature was conferring powers for the benefit of the people generally of the city. The restrictions contained in the fifth section prohibiting the appropriation of the revenues of the city in any other manner than for purposes strictly municipal and local and according to the provisions of the act, do not curtail the right, if given in the grant of the power mentioned. Express authority is given to appropriate revenue to accomplish the purposes of the act. The city of Jacksonville is a municipal body, and, of course, all the powers conferred upon it should be construed with a view of carrying out its creation as a public agency of the state. None of its grants should be held to confer powers disconnected with municipal purposes. That the supplying the inhabitants of a city with electric light is such a municipal purpose as will authorize its delegation by the legislature to municipal bodies is sustained by all the authorities we have found. To the extent of supplying light to the inhabitants of a city for use in their private houses, we discover nothing that cannot, in the light of the decisions, be called a municipal purpose, and ²⁷³ beyond this we are not called upon to go, and do not go in this decision.

It is not insisted here that the dismissal of the bills, independent of the refusal to grant the injunction prayed for, was error. No other relief was asked for except the injunctions.

Our conclusion is, that the decrees appealed from should be affirmed, and it will be so ordered.

MUNICIPAL CORPORATIONS—POWERS.—Municipal corporations have no other powers than those which have been expressly delegated, and their appropriate incidents: *Wilson v. Beyers*, 5 Wash. 303; 34 Am. St. Rep. 858; *Phillips v. Denver*, 19 Col. 179; 41 Am. St. Rep. 230, and note. To the same effect see *In re Pryor*, 55 Kan. 724; 49 Am. St. Rep. 280, and note.

MUNICIPAL CORPORATIONS—POWERS—CONSTRUCTION OF. A municipal corporation is a mere local agency of the state, having only such powers as are clearly and unmistakably granted by the state, and the powers so granted are strictly construed: *Whiting v. West Point*, 88 Va. 905; 29 Am. St. Rep. 750, and note with the cases collected.

MUNICIPAL CORPORATIONS—POWER TO FURNISH LIGHT TO PRIVATE CONSUMERS.—A municipal corporation may establish and maintain works for lighting its streets, and may, at the same time, furnish the light to the inhabitants to light their residences and places of business: *Crawfordsville v. Braden*, 130 Ind. 149; 30 Am. St. Rep. 214, and note.

LUSK v. REEL.

[36 FLORIDA, 413.]

EXECUTION SALES—INNOCENT PURCHASER.—A judgment creditor who purchases land at a sheriff's sale under his judgment, without notice, actual or constructive, of a prior unrecorded deed by the judgment debtor conveying the property thus purchased, is entitled to protection as an innocent purchaser.

EXECUTION SALES—INNOCENT PURCHASERS—MISTAKE.—As against one who holds land under an unrecorded deed, a judgment creditor, or other party who purchases the land at execution sale, against one to whom the land had previously been conveyed by mistake, is entitled to protection as an innocent purchaser, if, at the time of purchase, he was without notice, actual or constructive, of such unrecorded deed.

EXECUTION SALES.—EXECUTION PURCHASERS, equally with subsequent innocent purchasers, are protected against unrecorded deeds.

EXECUTION SALES.—POSSESSION UNDER AN UNRECORDED DEED, RELIED ON AS NOTICE to a purchaser at an execution sale, to be effective, must be such actual possession as to give notice thereof at the time that the judgment under which the sale is made, was rendered.

J. M. Cheney, for the appellants.

J. H. Murphy and L. G. Starbuck, for the appellee.

422 **MABRY, C. J.** The bill filed in this case in May, 1891, is to enjoin proceedings in ejectment, and to cancel a deed made by the sheriff of Orange county, as a cloud upon the title to a lot of land claimed to be owned by the complainant. It contains, substantially, the following allegations: That complainant is the owner in fee simple and has possession of the following described

property: Lot 1 of block A of Davis' addition to the town of Orlando, Orange county, Florida, and that complainant "holds said land by warranty deed, duly executed to him by one Walter T. Davis, on the fifth day of March, 1887, and duly recorded in the office of the clerk of the circuit court of Orange county, on the eleventh day of April, A. D. 1888, in book 60, at page 66." ⁴²³ That on the eighteenth day of May, 1887, Davis sold to one P. C. Hodges, lot 8 in block B of the same addition, but, by mistake, lot 1, owned by complainant, was embraced in the deed to Hodges, who never gave any valuable consideration for said lot, and who never intended to purchase the same, and has always disclaimed any title or interest therein. Further, that by virtue of an execution in favor of said Lizzie A. Lusk, and against said P. C. Hodges, issued out of the circuit court, on the fifth day of August, 1887, the sheriff of Orange county levied upon and sold, on the fifth day of March, 1888, the lot owned by complainant, and also said lot 8; that upon discovering his lot had been levied upon and sold, complainant applied to Davis and the attorneys of Lizzie A. Lusk to have the mistake corrected and his lot freed from the cloud resting upon the same by reason of the sheriff's deed to Lizzie A. Lusk, and that it was agreed by and between her attorneys and the said Davis and Hodges that, upon the execution by Davis of a good and sufficient deed to Lizzie A. Lusk for said lot 8, she would release to complainant her claim on said lot 1 in block A; that, in pursuance of said agreement, Davis conveyed by warranty deed to Lizzie A. Lusk, on the third day of May, 1888, the said lot 8, and complainant represents that by fraud and misrepresentation, as stated, she obtained said deed from Davis, and refuses to release and free the said lot from the cloud upon the same. That on the — day of May, 1888, Lizzie A. Lusk, by her next friend, George Porter, and W. I. Lusk, instituted a suit of ejectment against complainant to recover possession of said lot 1, the declaration in the cause being filed and summons issued on the eighteenth day of May, 1888, and the indorsement on the latter by the sheriff recites that it was served upon ⁴²⁴ the defendant on the twenty-second day of the same month; that on the 4th of June following, judgment by default was entered by the clerk, and defendants are seeking to recover final judgment in said suit, and thereby deprive complainant of the possession of said lot of land; that complainant had no recollection of being served in the ejectment suit, and, if he was served, the fact had entirely escaped his memory, and he had a good and meritorious defense at law to said suit. It is also alleged that

the said sheriff's deed to Lizzie A. Lusk was a cloud upon the title of complainant in said lot, and tends to depreciate the value thereof, and ought to be canceled. The prayer is for process, and that the sheriff's deed to Lizzie A. Lusk be canceled as a cloud upon complainant's title to lot 1, and that the ejectment proceedings be enjoined.

Injunction was issued as prayed for in the bill, and defendants demurred, on the grounds that there was no equity in the bill; that a purchaser at sheriff's sale takes whatever title the record shows to have been in the judgment debtor at the time the judgment was entered; that the attorney had no authority to agree to convey land of his client, and, if he makes such agreement, he in no way binds his client. This demurrer was overruled, and after motions made and denied to dismiss the injunction, defendants appealed.

From the allegations of the bill it is made to appear that the complainant, Reel, obtained a deed from Davis to lot 1 in block A, on the fifth day of March, 1887, but did not record it until the eleventh day of April, 1888. In the mean time, and on the eighteenth day of May, 1887, Davis conveyed said lot to Hodges, against whom an execution in favor of Lizzie A. Lusk issued on the 5th of August, 1887, and the lot sold by virtue thereof on the 5th of March, 1888, a few days over a month before ⁴²⁵ Reel recorded his deed. It is not alleged that Lizzie A. Lusk, the execution creditor and purchaser at sheriff's sale, had any knowledge, actual or constructive, that Davis had conveyed the lot to Reel, or that the conveyance of the lot by Davis to Hodges was by mistake. As we construe the allegations of the bill, there is no averment of actual possession of lot 1 by Reel prior to the time of filing the bill, which was in May, 1891. It is alleged that Reel owned the lot, and had possession of it, and held it by warranty deed executed by Davis, on the 5th of March, 1887, but this possession has reference to the time of filing the bill. There is no allegation that Reel was in actual possession, so as to give notice of any interest he might have had in the lot at the time of the issuance of the execution, or the sale of the property to Lizzie A. Lusk. Under our recording statute (McClellan's Digest, sec. 6, p. 215), creditors and subsequent purchasers stand upon the same footing in respect to notice of a prior conveyance not recorded: *Massey v. Hubbard*, 18 Fla. 688; *Carr v. Thomas*, 18 Fla. 736; *Eldridge v. Post*, 20 Fla. 579. It was held in *Emerson v. Ross*, 17 Fla. 122, that the recorded deed of an administrator, upon the sale of the lands of a deceased intestate for value and without notice, will vest a good title as against a prior unrecorded

ed of the deceased intestate. It was there said that "the object of the statute is to make patent, to disclose to the world, the order of the legal title, in order that purchasers for value might be protected against the secret deeds of the grantor." A purchaser at a sheriff's sale can claim the protection of an innocent purchaser, and where a judgment creditor has no notice, actual or constructive, of an unrecorded deed made by a judgment debtor before the rendition of a judgment, it is immaterial ⁴²⁶ whether the purchaser at a sale under the execution has notice of such unrecorded deed or not: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334; *Gower v. Doheney*, 33 Iowa, 36; *Rogers v. Inssey*, 36 Iowa, 664; *Lessee of Scribner v. Lockwood*, 9 Ohio, 84. It is also true that, where a deed is executed to one through mistake, a purchaser from him for value and without knowledge, actual or constructive, of such mistake, is entitled to protection: *Harrison v. Cochelin*, 23 Mo. 117; *Ells v. Tousley*, 1 Paige, 280. Our statute is, that "no conveyance, transfer, or mortgage of real property, or of any interest therein, shall be good or effectual, in law or in equity, against creditors or subsequent purchasers for valuable consideration and without notice, unless the same shall be recorded," etc. An execution creditor, equally with a subsequent purchaser, as we have seen, is protected against unrecorded conveyances, transfers, or mortgages of real property, and, in the present case, appellee shows in his bill that, before his deed was recorded, the property therein described had been sold under execution against one to whom the admitted owner had conveyed it, and who was the holder of an apparent good legal title, nor is it alleged that the purchaser at the execution sale had any notice, actual or constructive, of the existence of appellee's unrecorded deed before the sale. The allegation that the ejectment suit was instituted against appellee in May, 1888, does not show that he was in possession when the judgment was rendered, or even when the sale was made, and, as we construe the bill, it does not state anything from which notice of the unrecorded deed before the rendition of the judgment can be inferred. This is a vital point in the case, and the bill here is wanting in sufficiency and certainty. It is entirely insufficient, and, unless there is something ⁴²⁷ in the other allegations to rescue the bill from the infirmity mentioned, the demurrer should have been sustained. It is stated that Lizzie A. Lusk, through fraud and misrepresentation, obtained, under the circumstances mentioned, the deed from Davis to lot 8, and that she refused to release and free the said lot from the cloud upon the same. This has reference, we assume, to releasing lot 1 from the alleged cloud of the

sheriff's deed, though the connection would make it refer to lot 8. It is immaterial to which it refers, as we are unable to say how the bill can be assisted by it.

The purpose of the bill is not to cancel the deed from Davis to Lizzie A. Lusk for lot 8, but to cancel the sheriff's deed to her for lot 1. Davis and Hodges would be necessary parties to a proceeding to have the former deed set aside, but there is no such purpose in the present suit. Nor is the bill framed for the purpose of obtaining a specific performance, if that could be done, of the alleged agreement with the attorneys of Lizzie A. Lusk to have her convey lot 1 to appellee. The agreement is set up in the bill, but there is no prayer for its specific performance, and the only relief sought is to have the sheriff's deed to Lizzie A. Lusk set aside and the ejectment suit enjoined. The bill makes no proper case for such relief, and we need not devote any attention to the allegations in reference to the agreement. Neither is it deemed necessary to refer to the allegations in reference to the ejectment suit, as it is apparent that there is nothing in what is stated on that subject to aid the bill in other respects.

Our conclusion is, that the demurrer should have been sustained to the bill, and the decree will be reversed, with directions that such order be entered, with leave to appellee to amend his bill if desired.

EXECUTION SALES.—A judgment creditor who purchases at a sale under his judgment, and does not pay the purchase price otherwise than by a credit upon such judgment, is regarded as a purchaser in good faith and for value, and protected against all equities and defects in the title of which he had no notice, actual or constructive: *Riley v. Martinelli*, 97 Cal. 575; 33 Am. St. Rep. 209. But see *Boes v. Morgan*, 130 Ind. 305; 30 Am. St. Rep. 237, and note.

EXECUTION SALES—RIGHTS OF PURCHASER—UNRECORDED DEED.—Where a judgment creditor has no notice, actual or constructive, of a prior unrecorded deed, his lien is complete, and a purchaser at a sale thereunder takes such title as the records show to be in the judgment defendant, without regard to whether the purchaser had notice or not: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334. A purchaser at a sheriff's sale is within the protection of the recording acts: *Heister v. Fortner*, 2 Binn. 40; 4 Am. Dec. 417, and note; *Jackson v. Town*, 4 Cow. 599; 15 Am. Dec. 405; *Draper v. Bryson*, 26 Mo. 108; 69 Am. Dec. 483, and note.

SMITH v. GUFFORD.

[36 FLORIDA, 481.]

EXEMPTIONS—EQUITY—INJUNCTIONS.—A bill in equity alleging that complainant therein is the head of a family residing in the state; that he does not own personalty exceeding the statutory limit of exemption; that a distress warrant for rent has been levied upon his personalty other than farm products raised upon the land for the use of which rent is due; that the property levied upon is exempt to him under the constitution, and praying for an adjudication of his right of exemption, and that such property be set apart to him as exempt, and that an injunction be granted to restrain the sale of such property under the warrant, is sufficient to entitle a court of equity to grant the relief prayed for.

CONDITIONAL SALES—TORT TO PROPERTY—RIGHT TO RECOVER.—If a person holds an animal under a contract of conditional sale, and such animal is negligently killed by a third person, either the vendee or the vendor may sue and recover for the loss, but a recovery by either is a bar to further recovery. If, in such case, the vendee recovers, the vendor acquires a right of action against him for money had and received for his use and benefit to the extent of the amount originally agreed to be paid by the vendee for the animal.

CONDITIONAL SALES—EXCHANGE OF PROPERTY—EXEMPTIONS.—If the vendee in a contract for the conditional sale of an animal, recovers damages from a third person for negligently killing it, and, with such damages, purchases another animal, the original vendor acquires no title to, or lien on, the animal last purchased, and, as against such vendor, the conditional vendee can hold it as exempt from execution sale under a distress warrant for rent and advancements.

INJUNCTIONS TO RESTRAIN FORCED SALES of property claimed to be exempt under the constitution are not injunctions to stay proceedings at law, within the meaning of a statute merely prohibiting the granting of injunctions to stay proceedings at law unless bond is given. In the former proceeding, no bond is absolutely required, although it may be exacted by the chancellor in his discretion.

B. S. Liddon, for the appellant.

D. L. McKinnon, for the appellee.

481 TAYLOR, J. The appellee, Aesop Gufford, filed his bill in equity in the circuit court of Jackson county against Isaac Smith, the appellant, in which he alleges that, in the year 1891, he rented from Smith about twenty-three 482 acres of land to cultivate as a farm for that year, the said Smith agreeing to advance him supplies for himself and family while making the crop. That he had rented the same land the year previous, 1890, and, to secure the rent agreed to be paid for said year 1890, and the advances of supplies that had been made during said year 1890, he executed to Smith a mortgage on all the crops to be made by him during the year 1891. That Smith advanced him supplies to the amount of thirty or forty dollars during the year 1891, the exact amount of which he did not know. That he made on said land that year fifty to seventy-five bushels of corn,

which was then on said land, and one thousand and fifty-three pounds of lint cotton, and ninety-one pounds of seed cotton, that he turned over to said Smith with directions to credit the same on the rent and advances for 1891, but he failed to do so, and had sued out a distress warrant and levied it, not only on the corn and fodder grown on said land, upon which he had a mortgage, but also upon a horse of your orator with which he had cultivated the crops, claiming a lien upon him for said rent and advances, notwithstanding your orator had more than paid him the rent and a portion of the advances. That he believes that the cotton delivered, and the corn and fodder on the place, and the labor that he has performed for him during the year, will fully pay all that he owes for rent and advances for the year 1891, and that he offered to give up all the corn and fodder without going to law, and that this was all that he had to pay with, except the one horse that was worth fifty or seventy-five dollars, and that said horse is the only means that he has to make a living for himself and family. That he is the head of a family, and resides in Jackson county, Florida, and claims the benefit of the constitution and ⁴⁸⁴ laws of Florida exempting property from forced sale. That after the levy of said distress warrant upon said corn, fodder, and horse, he applied to the deputy sheriff who made the levy to have said horse set aside as exempt, as required by the statute in such cases provided, but the said deputy sheriff refused to do so, and has advertised said horse, together with the other property levied on, for sale on the 27th of February, 1892, which is on Saturday, and not a legal sale day. That all of his personal property of every kind and description, exclusive of that mortgaged to the defendant, which he does not claim or ask to have exempted, is not worth exceeding one hundred and twenty-five dollars. The bill prays that said horse may be adjudged to be exempt, and that the sheriff be required to set apart said horse and such other personal property as may be exempt, not to exceed one thousand dollars in value. That the defendant be restrained from selling or otherwise disposing of said horse, and for general relief.

The defendant demurred to the bill upon the ground of a want of equity. The demurrer was overruled, and the defendant answered the bill admitting the renting of the land to the complainant and the agreement to advance supplies to him, but he denies that he exacted, or that the complainant gave him any mortgage to secure, the rent of said land for the year 1891, or the advances made to him in 1891, but says that the mortgage made to him by complainant was for the purpose of securing past in-

debtedness due from complainant to him for rent of the same land, and for advances made to him, and for a horse sold to him during the year 1890. This mortgage was upon no other property than the crops of all kinds to be raised during the year A. D. 1891. The answer admits the receipt of some money from cotton raised by complainant, ⁴⁸⁵ and that he is also entitled to some credit for labor performed for him, and alleges that an account attached to said answer as an exhibit shows all the items of debit and credit between them. This account shows a balance due from the complainant to the defendant, after all credits, of one hundred and thirty-one dollars and seventy-nine cents. The answer denies that the complainant ever instructed the application of the credits for cotton and labor to the rent and advances of the year 1891. The suing out by the defendant of a distress warrant, and the levy thereof, as alleged in the bill, is admitted. The application of the complainant to have said horse set apart to him as exempt is admitted to have been made. The answer further alleges that the defendant should not be restrained from selling the horse mentioned in the bill by virtue of his distress warrant, because he says that, in the fall of the year 1890, he purchased for and furnished to the complainant a horse, in contemplation of renting land to the complainant for the year 1891. That he paid thirty-nine dollars for this horse in cash, and sold him to the complainant for the same price, with interest at the rate of one per cent per month, but with the distinct understanding between them that said horse should remain the property of this defendant until he should be fully paid for, and that complainant should acquire no title to him until the happening of such event, and that, regarding the horse as his own, he therefore did not include him in the mortgage given upon the crops. That this horse was killed by a railroad train about September or October, 1891, and that complainant has never paid anything for him. That the complainant, about December 1, 1891, collected from said railroad company eighty dollars for said horse, and immediately invested sixty dollars of the identical money received by him from the railroad company for this defendant's horse ⁴⁸⁶ in another horse, that is the identical one now levied on by defendant's distress warrant. That he insists that, in law and in equity, he has all the rights against the horse purchased by the complainant with this defendant's money that he had against the original horse sold by him to the complainant as aforesaid; and he also claims that he is entitled to the twenty dollars received by complainant from the railroad company that was not used in the purchase of the horse in dispute.

Upon the application of the complainant for an injunction to restrain the sale of the horse as prayed in the bill, complainant made an affidavit positively denying the alleged conditional sale of a horse to him by the defendant, and alleging that the defendant loaned him thirty-nine dollars in 1890, and that he put some more money of his own with it and purchased the horse that was killed by the railroad out of a drove himself. That the defendant had nothing to do with the purchase of that horse whatever. At the hearing for the injunction, the defendant produced the affidavit of one Silas Smith, who swore that he had repeatedly heard the complainant say that the horse that was killed by the railroad was not his horse, but belonged to the defendant, and would not become his property until he paid for it, and that he had never paid for it. That he heard him so declare only the week before the hearing of the application for injunction. Upon the bill, answer, and these affidavits, the judge, on February 22, 1892, granted an injunction restraining the defendant and the sheriff from selling or otherwise disposing of the horse levied upon under the distress warrant until the further order of the court. From this order the defendant has taken this appeal.

The first assignment of error is the overruling of the defendant's demurrer to the complainant's bill. There ⁴⁸⁷ was no error in this ruling. The complainant's bill contained a sufficient statement of the following facts: That the complainant was the head of a family residing in this state; that he did not own exceeding one thousand dollars' worth of personal property; that, besides his crops grown on the defendant's land, the defendant had caused a distress warrant for rent to be levied upon a horse that the complainant claimed to be exempt to him as the head of a family under the constitution of the state, and he prays therein that the court of equity shall adjudge his right of exemption to said horse, and that he be set apart to him as exempt from seizure and sale under the distress warrant levied thereon for the collection of rent and other indebtedness due to the defendant. Since the enactment of chapter 3246 of the laws of Florida, approved March 7, 1881, entitled: "An act to enlarge the equity jurisdiction of the circuit courts," there can be no doubt that the facts set up by the bill entitle the complainant to the interposition of the court of equity to grant the relief prayed: *Oathcart v. Turner*, 18 Fla. 837; *McMichael v. Grady*, 34 Fla. 219.

The second and last assignment of error is, that the court erred in granting the temporary injunction. We do not think there was error in granting the injunction. By causing his distress

Warrant to be levied on the horse in dispute, the defendant thereby admitted that it was the property of the complainant, who was defendant in said distress proceeding, yet, in his answer to the complainant's bill claiming the exemption of the same horse, the defendant puts himself in the inconsistent position of having levied the distress warrant upon his own property, for the collection of a debt due by another, since his answer to the bill alleges that the horse levied on did not belong to the ⁴⁸⁸ defendant in the distress warrant, but belonged to him. That he had conditionally sold a horse to the complainant in the fall of 1890, the title to which was to remain in him as vendor until the complainant as vendee fully paid for it. That the horse so conditionally sold was wrongfully killed by a railroad train while in the complainant's possession, before having become complainant's property, and that the complainant collected eighty dollars from the railroad company therefor, and with sixty dollars of the money so collected purchased the horse now in dispute. That, under these circumstances, he has all the rights against the horse so purchased that he had upon the original horse conditionally sold to the complainant, and that he is also entitled to the twenty dollars that was collected from the railroad, but not used in the purchase of the horse. If this contention of the defendant appellant's answer were true as a proposition of law, as well as of fact, then he mistook his remedy by treating the horse as the complainant's property by levying his distress warrant upon him for the collection of the indebtedness due by the complainant. If the horse belonged to him, by reason of having been purchased with money collected for the wrongful killing of another horse that he owned, then his remedy should have been replevin or trover, instead of distress for rent. The inconsistency of the defendant does not stop here. In his argument upon the appeal here, he abandons the contention of his answer, to the effect that he is the owner of the horse purchased with money collected from the railroad, and now claims that, under the provisions of section 12, page 703, of McClellan's Digest of our laws, he is entitled to a lien upon a horse in dispute, because it was acquired by the complainant in exchange or barter for a horse advanced by him to the ⁴⁸⁹ complainant to make a crop with. The provisions of the statute invoked are as follows: "Landlords shall have a lien on the crop grown on rented land for rent for the current year, and for advances made in money or other things of value, whether made directly by them, or at their instance and request by another person, or for which they have assumed the legal responsibility, at or before the time at which such advances were made, for the

sustenance or well-being of the tenant or his family, for preparing the ground for cultivation, or for cultivating, gathering, saving, handling, or preparing the crop for market; and they shall have a lien also upon each and every article advanced, and upon all property purchased with money advanced, or obtained by barter in exchange for any articles advanced, for the aggregate price or value of all such property or articles so advanced; and such liens for rent and advances shall be paramount and have preference to all other liens." We do not think that the provisions of this statute can be applied to the case made by the facts alleged in the defendant's answer, so as to give the defendant the lien provided for therein. The statute undertakes to give a lien upon each and every article advanced, and upon all property purchased with money advanced, or obtained by barter in exchange for any articles advanced. The defendant's answer does not claim that the horse he furnished was "advanced" to the complainant, in the sense contemplated by this statute, but the claim of the answer is, that he himself was the owner of the horse killed by the railroad; that it was not to become the property of the complainant until paid for; that the complainant had the right to its possession only by virtue of his right to become its owner in future upon full payment thereof. Even if we could say that ⁴⁹⁰ the horse thus conditionally sold to the complainant was an "advancement," within the purview of this statute, still, according to the allegations of the answer, we do not think that the horse in dispute can be said to have been obtained by the complainant either with any money advanced to him by the defendant, or by barter in exchange for the horse that was so advanced. The horse conditionally sold by the defendant to the complainant was wrongfully killed, so the answer alleges, by the railroad company. The identity of the property was thereby destroyed, and, if the allegations of the answer be true, the defendant, vendor of that horse, or the complainant, conditional vendee, either, could have sued for and recovered the damage produced by such wrongful killing. The conditional vendee could have sued because of his special ownership, and the vendor had also the right of action because of his retained legal ownership, the recovery by one, however, being a bar to any further recovery by the other: *Kent v. Buck*, 45 Vt. 18; *St. Louis etc. Ry. v. Biggs*, 50 Ark. 169; *Harrington v. King*, 121 Mass. 269. The recovery for the horse here having been had by the conditional vendee, the defendant, vendor, acquired upon such recovery a right of action against the vendee, to the extent, at least, of the price the vendee had

agreed to pay for the horse, for moneys had and received by such vendee for his use and benefit, the recovery being had for the destruction of the property of which he was the owner. But this was all. The horse over which the defendant retained the conditional ownership completely lost its identity when killed, and to say that the defendant can claim a lien upon any property that the complainant may have purchased with moneys recovered from a railroad ⁴⁹¹ company, in the shape of damages in tort for the wrongful killing of such horse, would be carrying the doctrine of equitable substitution of securities considerably beyond the confines of any case we have met with in the books. But besides all this, the defendant's answer distinctly negatives any claims on the defendant's part to any lien on the horse killed or the one purchased with moneys recovered for the one killed, but, on the contrary, alleges absolute ownership of the horse killed, and an equitable ownership of the one purchased with moneys collected for the one killed.

Under the allegations of the bill and answer, we think that the horse in dispute was exempt to the complainant, under the constitution of this state, from levy and sale under the defendant's distress warrant for rents and advances, and that the injunction was properly granted: *Hodges v. Cooksey*, 33 Fla. 715.

It is further contended that the injunction was improperly granted without requiring the complainant to give a bond. There is no merit in this contention. Injunctions granted simply to restrain the forced sale of property that is exempt from sale under any process of law by the constitution, are not injunctions to stay proceedings at law, within the meaning of the statute prohibiting the granting of injunctions to stay proceedings at law unless bond is given: *Lewton v. Hower*, 18 Fla. 879. The statute (Laws 1881, c. 3246), authorizing our courts of equity to restrain by injunction the sale of all property, personal as well as real, that is exempt from forced sale under the constitution, does not in terms require the giving of a bond by the applicant for such injunction, and we do not think that a bond in such cases is ordinarily necessary. ⁴⁹² There is nothing in the statute, however, to abridge the discretionary power of the chancellor to grant the injunction in such cases upon such conditions as to bond, etc., as the circumstances of the cases may seem to require.

The decree appealed from is affirmed.

INJUNCTIONS TO RESTRAIN SALE OF EXEMPT PROPERTY.—A judgment debtor has no right to enjoin the sale of his personal property under execution, on the ground that it is exempt by law

from sale under judicial process, unless the property possesses special value to the judgment debtor alone: *Parson v. Hartman*, 25 Or. 547; 42 Am. St. Rep. 803, and note. See, also, the note to *Walker v. Hunt*, 96 Am. Dec. 781.

BLOXHAM v. CONSUMERS' ELECTRIC LIGHT AND STREET RAILROAD COMPANY.

[36 FLORIDA, 512.]

RAILROADS.—THE WORD "RAILROAD," IN ITS BROAD-EST SIGNIFICATION, includes a street railroad, although it extends over the streets of a single city, and is wholly located within the limits of a single county.

RAILROADS.—WHEN THE WORD "RAILROAD" IS USED IN STATUTES, there is no definite rule of construction as to whether it includes street railroads, as it may or may not include them. The meaning of the word must depend upon the context, and the general intent of the statute in which it is used.

STATUTES, CONSTRUCTION.—BESIDES JUDICIAL CONSTRUCTION of statutes, there exists what is called practical construction, having especial application to statutes for the regulation of the different departments of the government, and it consists in the interpretation put upon them by the actual administration of them by such departments. Such construction, while not of such high authority as judicial construction, is, when not in conflict with the constitution or the plain intent of the statute, of great persuasive force and efficacy.

TAXATION OF RAILROADS—STATUTORY CONSTRUCTION. If, after the enactment of a statute requiring the executive department of the state to assess all railroads for taxation, such department, for a series of years, has, under such act or acts of similar import, assessed all railroads for taxation, including street railroads, and such taxes have been paid to the state without objection or question as to the validity of such acts, the courts may take judicial knowledge of the practical construction thus placed upon such statutes, and if it does not defeat the manifest purpose of the statutes, should not interfere therewith, when, after the lapse of such period, it is contended for the first time that a street railroad is not a railroad within the meaning of such statutes.

TAXATION.—COLLECTION OF TAXES BY AN AUTHORIZED OFFICER CANNOT BE ENJOINED merely because he might adopt a mode which would be fairer and more equitable, if the mode pursued by him is authorized. It is only when the tax is illegal, or is being illegally collected, that an injunction can be granted.

TAXATION—LIEN FOR TAXES.—If property assessed for taxes by the state is sold under a decree, to which the state is not a party, ordering a sale thereof free from all encumbrances and liens, the lien of the state is not thereby divested.

TAXATION.—LIENS FOR TAXES do not stand upon the footing of ordinary liens, and are not displaced by a sale under a pre-existing judgment or decree, unless so directed by statute.

TAXATION — LIEN FOR TAXES — POWER OF COURT TO DIVEST.—Private parties have no right, in proceedings in which the state is not a party, to have a decree entered by consent, which will divest it of its statutory tax lien upon property involved in the suit, and force it to collect its taxes in some other manner than that prescribed by a constitutional statute. No court has jurisdiction or authority to enter a decree having such effect.

W. B. Lamar, attorney general, and W. A. Carter, state attorney, for the appellant.

P. O. Knight, for the appellee.

⁵³⁶ LIDDON, J. The appellee, who was complainant in the court below, brought its bill of complaint to enjoin the appellant (defendant below) from selling a certain line of street railroad for the payment of certain state and county taxes. The property in question is an electric street railroad located upon certain streets of the city of Tampa, and wholly situated within the county of Hillsborough. The taxes sought to be collected are for the year 1893, and have not been paid. The property was levied upon, and a sale thereof advertised. A demurrer to the bill of complaint, for general want of equity, and upon other grounds, was overruled, and a temporary injunction granted, restraining the sale of the property. The appeal is taken from these orders.

Without attempting to give, even in a digested form, the allegations of the bill of complaint, it is sufficient to say that two principal grounds are set forth why the proceedings to sell the property should be enjoined. Inverting the order in which they are stated in the bill of complaint, these reasons, briefly stated, are as follows: 1. That the assessment of the property by the comptroller, under the statute regulating the assessment of railroads, was null and void, and that the same should have been assessed by the county tax assessor under the general statutes for the assessment of real and personal property; 2. That the property, after assessment, passed out of the hands of the parties owning it at the time of such assessment, and was ⁵³⁷ sold at a judicial sale, in proceedings to which the state was not a party; that the order under which such sale was made directed "that the same be sold free from any mortgages, judgments, mechanics', laborers', materialmen, and other liens or encumbrances of any kind whatsoever, and that all parties consented thereto." That the property sold for a large sum of money, which was paid into the registry of the court, where it still remained. That such sale was confirmed, and a deed made to the purchaser, conveying the property to him in fee simple, free from all liens and encumbrances. That the complainant is now the owner of the property. That the property was sold pendente lite, and that it was the intention of said sale that the money for which said property should be sold should be brought into court, and should represent the property, and that any liens and encumbrances whatever existing against the same should be paid out of said fund, and that said property should be sold free from any and all liens

and encumbrances whatever. Wherefore it is claimed that the property should not be held liable for the taxes, but that the same should be paid out of the funds in the registry of the court.

Under the first objection, that the assessment of the property by the comptroller, under the statute regulating the assessment of railroads, was illegal and void, it is urged that a street railway extending over the streets of a single city, and wholly located within the limits of a single county, is not a "railroad" within the meaning of the word as used in the statute. If a street railroad is not a railroad in contemplation of the statute, the assessment is illegal, but if it is such a railroad, the assessment is legal and proper. The question presented requires an examination of the ⁵³⁸ statute: Laws 1893, c. 4115, secs. 48, 49. The forty-eighth section of the act provides, among other things, in substance, that certain officers of a railroad company, or the "receiver of any railroad, whose track or roadbed, or any part thereof, is in this state," shall annually make a return to the comptroller of the state, under oath, showing the total length and value of such road, including branches, sidetracks, lots, parts of lots, terminal facilities, etc., in this state; the total length and value thereof in each county, city, or incorporated town, and the number and value of all locomotives, engines, cars, etc. If such return is not made, or the same, when made, is not satisfactory to the comptroller, then he, with the assistance and advice of the attorney general and treasurer of the state, have the power to assess the property from the best information obtainable, specifying the values in each county. The value of the rolling stock is apportioned to each county pro rata, the length of the track, branches, and sidetracks in the same, and the respective county assessors and the authorities of cities and towns notified accordingly; and, upon the valuation thus apportioned, the taxes shall be assessed as upon the property of individuals. The forty-ninth section, among other things, provides that the comptroller, upon certificates showing default of payment in any county, shall have the power to issue a warrant directed to the sheriff of any county where such defaulting railroad, or any part thereof, is located, by which such sheriff is authorized to sell the entire road, or such part thereof as may be necessary, to pay such taxes and the costs and expenses of sale. The proceeds of such sale are to be divided among the counties where such taxes are due. The legislature, especially in the forty-eighth section, ⁵³⁹ seems to assume that every railroad in this state extends into and is situated in more

than one county thereof. The forty-ninth section, however, implies that a railroad may be wholly located in one county. It is plain that the purpose and intention of the act is, that railroads, and the rolling stock and appurtenances used in the operation of the same, should be taxed as an entirety; that where it extends into different counties, there should be uniformity in the valuation and assessment thereof in such counties, and that the value of the rolling stock, which is almost constantly in motion, going from one county to another, should be properly taxed without double taxation or any dispute as to the situs of such property for taxation. The word "railroad," in its broadest signification, would undoubtedly include a street railroad; all railroads being more or less alike in their physical construction. It is said that when the word "railroad" is used in a statute, there is no definite rule of construction as to whether it includes street railways. It may or may not include them. The meaning of the word must depend upon the context, and the general intent of the statute in which it is used: 19 Am. & Eng. Ency. of Law, 788; *Chicago v. Evans*, 24 Ill. 52. The word "railroad," as generally used, applies to commercial railways engaged in the transportation of freight and passengers for long distances, and, as a general rule, having steam engines for motive power, and making stops at regular stations for the receipt and discharge of freight and passengers. The term "street railroad" applies only to such roads, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public are not excluded from the street as a public highway, which runs at a moderate rate of speed compared ⁵⁴⁰ with commercial railroads, which carries no freight, but only passengers from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at street crossings or other places irregularly, as the convenience of its patrons may require, for the receipt and discharge of its passengers. The cars upon such roads may be propelled by animal or mechanical power: *Williams v. City Electric Street Ry. Co.*, 41 Fed. Rep. 556. No case has been pointed out to us by counsel, and after much investigation we have been unable to find a judicial definition of the word "railroad," occurring in any taxing statute similar to ours, as to whether or not it would include a street railroad.

Besides the judicial construction of statutes, there is known to the law another kind of construction. This kind of construction has especial application to statutes made for the regulation of the different departments of the government, and is the

interpretation put upon them by the actual administration of them by such departments. As distinguished from judicial construction, it is called the practical construction of statutes. While not of such high authority as a judicial interpretation of the act, such practical construction of the class of statutes referred to, when not in conflict with the constitution or the plain intent of the act, is of great persuasive force and efficacy. The system of taxation of railroads by the state comptroller, in the manner prescribed by the sections of the act hereinbefore referred to, has existed in this state ever since the enactment of chapter 1713, of the laws of Florida, of 1869. Slight modifications have at various times been made by different legislatures, but the general system has remained unchanged. It is ³⁴¹ well known to all who are familiar with the history of the state, and with the method of taxation prevailing therein, that for at least twelve years past the comptroller of the state, under and by authority of the statute under which the action sought to be enjoined is taken, or statutes of similar import, has assessed all railroads, including street railroads, as being included within the general term "railroads," as the same is used in the law. Street railroads located in a single city have been no exception to the general rule. The taxes for many years have been paid to the state under such assessments without objection; thousands of dollars have been so collected, and no attack whatever has been made upon the validity of such assessment. This long prevailing construction is a matter of which the court can take judicial notice: *Westbrook v. Miller*, 56 Mich. 148. It is notorious that acts for the general collection of revenue are generally formulated by, or under the advice of, the comptroller of the state. Since this method of assessing taxes upon street railroads has been in force, the legislature has several times, repealing former acts, re-enacted the same provisions, thus giving legislative sanction to the practical construction of the act by the department of the state government which has charge of the assessment and collection of taxes from railroads. "Where there are different statutes in *pari materia* made at different times, or even expired and not referring to each other, they shall be taken and construed as one system and as explanatory of each other": *Lord Mansfield in Rex v. Loxdale*, 1 Burr. 445, cited in *Doggett v. Walter*, 15 Fla. 367. The question of the force and authority of a practical construction of a statute has often been passed upon by the courts. In *Westbrook v. Miller*, 56 Mich. 148, an ³⁴² opinion delivered by Judge Cooley, it is said: "The construction placed by an executive department upon a statute affect-

ing the performance of its duties is not lightly to be questioned, especially when it has become established by long usage and relates to matters of form only. But practical construction must not be allowed to defeat the manifest purpose of the statute." Further, it is said in the same case: "When, in the performance of executive duties, it becomes necessary for the executive department to construe a statute, great deference is always due to its judgment; and the obligation is increased by the lapse of considerable time before its acts are called in question." Many authorities from the supreme court of the United States, and from subordinate courts of the federal system, are cited to sustain the propositions announced.

The question involved is the method of taxation of the property in dispute. No question is raised of the liability of the property to taxation. No showing is made of any double assessment, or unequal, unjust, or oppressive taxation. The taxes on the property for the year for which the assessment was made have not been paid. The property has not discharged the burden of taxation which rests upon it as upon all other property in the state not specially exempted by law. In such a case, we think the greatest deference and respect should be paid by this court to the long prevailing construction of the statute made by the executive department of the state government, and we will not interfere with the same. We do not rest our conclusion upon the case of *Westbrook v. Miller*, 56 Mich. 148, but have examined many other authorities upon the subject which practically unanimously agree with that case. Among other cases of similar import are *Johnson v. Ballou*, 28 Mich. 379; *Malonny v. Mahar*, 1 ⁵⁴³ Mich. 26; *Solomon v. Commissioners of Cartersville*, 41 Ga. 157; *Scanlan v. Childs*, 33 Wis. 663; *Union Ins. Co. v. Hoge*, 21 How. 35; *Chesnut v. Shane*, 16 Ohio, 599; 47 Am. Dec. 387; *Wetmore v. State*, 55 Ala. 198; *Edwards v. Darby*, 12 Wheat. 206; *United States v. Gilmore*, 8 Wall. 330; *Kiersted v. State*, 1 Gill & J. 231; *Brown v. United States*, 113 U. S. 568, and various authorities cited therein; *United States v. Lytle*, 5 McLean, 9; *People v. Dayton*, 55 N. Y. 367; *Wright v. Forrestal*, 65 Wis. 341; *Sutherland on Statutory Construction*, sec. 309, et seq. In the case cited from 41 Georgia the court said, adopting the practical construction of a statute made by the executive department of the government, that if the matter were before them as an original, independent proposition, they would be inclined to hold differently, but yielded their own views to such practical construction.

This brings us to the consideration of the second ground upon which it was claimed that the injunction should issue. The allegations of the bill of complaint as to the manner of complainant's acquiring a title to the property is very vague and indefinite, there being no direct statement whatever that it acquired title through the judicial sale mentioned. We will consider the case, however, as if the bill contained such an averment. The property had been assessed for its taxes, and a lien for the same thereby acquired by the state before the judicial sale. The contention, however, is that although the state was not a party to the proceedings in which the sale was made, yet, by virtue of the direction of the court that the property be sold free from any mortgages, judgments, mechanics', laborers', materialmen, or other liens and encumbrances ⁵⁴⁴ whatever, such sale divested the state's lien, so that it cannot subject the property itself to the payment of the taxes assessed against it, but must intervene by petition in the suit, and obtain payment of the taxes from the funds in the registry of the court. It is contended that it would be inequitable for the state to now subject the property in the hands of complainant to the payment of taxes, when there is a fund in court from which such payment can be secured. Disposing of this minor contention first, we will quote the language of the supreme court of Rhode Island in the case of *People's Savings Bank v. Tripp*, 13 R. I. 621, text 622: "The complainant contends that the collector ought to be enjoined, because the levy and sale are inequitable and unfair. But, in our opinion, we cannot enjoin him merely because we think he might adopt a mode which would be fairer and more equitable, if the mode he is pursuing is authorized by the statute. The collector is an official of the government, and has as much right as the court to use his own judgment in the execution of his office. It is only when the tax is illegal, or is being illegally collected, that the courts, which go furthest, grant an injunction." Other remarks applicable to this point will be used in disposing of other questions in the further course of this opinion.

The state's lien for taxes, having attached by the assessment of the property, could not be divested by a subsequent judicial sale, even though the decree under which the sale was made should have directed that the property should be sold free from all encumbrances. The case of *Mesker v. Koch*, 76 Ind. 68, is very much like the present one. The complainants, in the case cited, alleged that they had purchased the property at a judicial sale. The firm against whom the property ⁵⁴⁵ was assessed had

gone into bankruptcy; that the taxes claimed were set forth in the bankruptcy schedule of indebtedness; that the same was a preferred claim, and that funds to pay the same had been in the hands of the assignee in bankruptcy, which fact was known to the treasurer. A demurrer to the bill was sustained. The court, affirming the decision, quoting *Stokes v. State*, 46 Ga. 412, 12 Am. Rep. 588, held "that the state can enforce the payment of its taxes by a sale of the property upon which they are a lien, though the owner has been adjudged a bankrupt, and the assignee has sold the property to a third party. . . . The state has the right to follow the property into whosoever hands found. . . . The bankrupt law does not attempt to deprive a state of this power. True, it makes provision for the payment of the state taxes, if the state chooses to come into the bankrupt court and claim them, but she cannot be compelled to come in. Hence, the assignee, by sale of a bankrupt's property, cannot divest the right of the state to enforce the payment of her taxes on the property, wherever it may be found." In the case of *Stokes v. State*, 46 Ga. 412, 12 Am. Rep. 588, the property had been sold under an order directing that the same be sold free from encumbrances. The trial court instructed the jury as follows: "That if it appears that the tax was assessed upon this land for the year 1868, as the property of Hunt and Bryan, then the bankrupt court had no power to divest the lien of the taxes on the land in favor of the state, and that no sale or order of said court could interfere with the right of the state to collect said tax, and that said land, in whosoever's hands it might be, was still liable for the tax." This charge was affirmed as a correct statement of the law by the appellate court. The principle ⁵⁴⁶ stated in the cases quoted from are upheld by various authorities, among which are *Black on Tax Titles*, sec. 187; *Freeman v. Mayor etc. of Atlanta*, 66 Ga. 617; *Atlanta etc. R. R. Co. v. State*, 63 Ga. 483; *Osterberg v. Union Trust Co.*, 93 U. S. 424; *Isaacs v. Decker*, 41 Ind. 410; *Bodertha v. Spencer*, 40 Ind. 353. The sale under the decree of the court in the present case did not divest the state's lien for taxes. A proper interpretation of the decree of the court does not show that it intended to divest the state of its tax lien, even if it had the power so to do. Several classes of liens and encumbrances are expressly mentioned in the decree. The lien for taxes is not so mentioned. We need not invoke the doctrine of *expressio unius exclusio alterius est*, to show that a tax lien was not included in the decree, for it is well settled that such a lien does not stand upon the footing of an ordinary lien, and is not dis-

placed by a sale under a pre-existing judgment or decree, unless so directed by statute. The lien continues until the taxes are paid, and the bill is demurrable, unless it allege a payment or a tender of the taxes. Besides authorities above cited, see *Rinard v. Nordyke*, 76 Ind. 130, and *Iler v. Colson*, 8 Neb. 331.

In reference to the contention that the state ought to intervene by petition in the suit pending in the court below, and collect its taxes from the money, the proceeds of the property, in the registry of the court, the undoubted weight of authority is, that while the state might so intervene if it chose, it cannot be compelled to do so. Private parties have no right, in proceedings in which the state is not a party by consent, to have a decree entered which will divest it of its statutory tax lien upon the property involved in the suit, and force it to collect its taxes in some other manner ⁵⁴⁷ than that prescribed by the statute. No court has jurisdiction or authority to enter a decree having such effect. The state by its legislature has ample power to choose its own method of collecting its taxes. When the method chosen violates no constitutional provision, no court can require it to adopt any other method. To compel it to intervene in litigation to become a party to suits between private individuals or corporations, would impair the functions of the state government, would involve expense of court costs and counsel fees, delay, and inconvenience in the collection of the public revenues. In this way taxes might be lost, the collection of them endangered, and the costs of collection would certainly be swelled by the fees and expenses of litigation: *Annelly v. De Saussure*, 12 S. C. 488, text 511; *Smith v. Gatewood*, 3 S. C. 333.

The counsel for appellee relies with much confidence upon the case of *In re Tyler*, 149 U. S. 164, and upon cases cited by the court in said opinion. What we have said disposes of the case before us, but, in view of the earnestness with which the cases mentioned have been pressed upon our attention, we deem it not inappropriate to refer briefly to them. We cannot enter into any critical analysis of each case, because such a course would extend this opinion to undue length. The case of *In re Tyler*, 149 U. S. 164, was a habeas corpus proceeding to relieve from punishment for contempt a South Carolina sheriff who had levied a tax execution or warrant upon property in the hands of a receiver appointed by a United States court. An injunction had been previously issued against the levy, and the taxes sought to be enforced had been held illegal by the court. The supreme court denied the writ of habeas corpus upon the ground that the property ⁵⁴⁸ in question was in custodia legis, and that the

duty of the court to protect it from all interference extended to the levy of a tax warrant. Without expressing any assent to or dissent from the doctrine announced, it is sufficient to say that the facts of this case are entirely different from the Tyler case. The property here levied upon is not in the custody of the court. It has been sold under order of court to private parties, and is in their exclusive ownership and possession. There is no ground for the contention in the present proceeding of an interference with the property in the possession of a receiver, an officer of the court. The money (the proceeds of the sale of the property) may be considered as in *custodia legis*, but the property itself is free and discharged from the care and custody of the court.

In the case of *Central Trust Co. v. New York etc. R. R. Co.*, 110 N. Y. 250, the converse of the proposition contended for by appellee was asserted. There the state intervened and sought to enforce the payment of taxes of a railroad, that had gone into the hands of a receiver, from funds in his hands arising from the operation of the road. The statute pointed out a different remedy, and it was claimed that the statutory remedy should have been pursued. The court held that the state was not confined to the statutory remedy, but that the court might order the taxes paid upon the petition of intervention.

Several other cases cited by appellee show that where the proceeds of property subject to payment of taxes has come into the custody of a court, such court might, upon the intervention of the state, direct the taxes paid by the receiver or officer holding such funds. But none of them hold that the state, in a case where the ⁵⁴⁹ property has been sold and discharged from the custody of the court, is compelled to seek payment of its taxes from the proceeds of the property in the custody of the court. On the contrary, one of the cases cited by appellee (*Savannah v. Jesup*, 106 U. S. 563), shows that the course pursued by the state in the present instance is a correct one. In that case the court said: "If the city had a valid claim for taxes, . . . two courses were open to it—to postpone action under its executions until the proceedings in the circuit court of the United States were concluded, and its possession of the property, by receivers, had ended; or, with leave of court, to file a petition *pro interesse suo*, submitting its claim for judicial determination. It adopted the latter course." It is useless to further cite or analyze the cases in appellee's brief. The most that can be claimed for any of them is, that they forbid an interference, by virtue of a tax warrant, with property actually in the custody of the court.

None of them are authority for the proposition that a tax warrant cannot be levied upon property which has been discharged from such custody. The doctrine is laid down in *High on Receivers*, section 602, that real estate which has been held by a receiver, where the title did not vest in him, after the termination of the possession of the receiver is subject to the lien of a judgment and execution against it the same as if there had never been any receivership. If this is true of the lien of an ordinary judgment, the reason is much stronger for applying it to the lien of the state for taxes, which is the highest of all liens.

The decrees appealed from are reversed, with directions to the court below to enter an order dissolving the temporary injunction granted in the cause, sustaining ⁵⁵⁰ the demurrer, and dismissing the bill of complaint, the order dismissing the bill of complaint not to be entered if complainant desired to make a further case by amendment. In such event, the usual course will be taken.

RAILROADS.—A dummy line over which cars carrying passengers exclusively are drawn by small steam-engines called dummies is a railroad, within the meaning of the statute prescribing the precautions to be observed by railroads: *Katzenberger v. Lawo*, 90 Tenn. 235; 25 Am. St. Rep. 681. The terms "railway" and "railroad" are synonymous, and have no distinct and independent meaning in themselves. Hence, general authority to railroad companies to lease their property and franchises will include street railway, as well as steam railroad, companies: *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; 30 Am. St. Rep. 763.

STATUTES—CONSTRUCTION.—A statute requiring a certain thing to be done, and leaving its exercise to the judgment and discretion of a designated agent, does not vest an arbitrary discretion in him; it only vests a lawful discretion, which must be exercised in a lawful manner, as he is amenable to the statute for abusing the discretion placed in him: *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305.

INJUNCTION TO RESTRAIN TAXATION.—While equity will not interfere to correct mistakes, or to set aside the judgments of assessors or boards of equalization in relation to values, it will interfere when the officers fraudulently or capriciously refuse to exercise their judgment by adopting a rule or system of valuation designed to operate unequally: *Andrews v. King County*, 1 Wash. 46; 22 Am. St. Rep. 136, and note. See, also, the extended note to *McCord v. Pike*, 3 Am. St. Rep. 95.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

CORNIFF v. COOK.

[96 GEORGIA, 61.]

APPEAL—ASSIGNMENT OF ERROR—TIME.—A demurrer to a rule nisi having been overruled, and no exceptions pendente lite having been filed, it is too late to assign as error the judgment overruling the demurrer, in a bill of exceptions sued out more than sixty days after the date of such judgment.

ATTACHMENT—SUFFICIENCY OF LEVY—POSSESSION AND REMOVAL OF PROPERTY.—If an officer, having property within his view, and where he can control it, professes to levy upon it, and to assume control of it, by virtue of a writ of attachment, the levy is valid, although the officer leaves the property, to be kept for him, in the hands of the defendant in attachment. Hence, if a constable levies upon goods in clubrooms belonging to a corporation, and makes an inventory thereof, the property being at the time under his view, in his immediate presence, and constructively in his possession, and the defendant in attachment, through its president, agrees, immediately afterward, to hold the goods subject to the order and control of the officer, who shortly thereafter makes an entry of levy upon the attachment, the levy is sufficient, although the constable does not take actual manual custody of the goods, or lock up the house, or remove the goods therefrom.

INSTRUCTIONS—REQUESTS FOR.—It is not error to refuse requests for instructions which are not applicable to the facts disclosed by the evidence.

ATTACHMENT—BURDEN OF PROOF.—An officer, justifying an attachment, has the burden of proof to show, by a preponderance of evidence, that he did, in fact, effectually levy it; but such preponderance is not to be determined alone by the number of witnesses testifying to a particular fact. The jury should be instructed to take into consideration the opportunities of the witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest, or lack of interest, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial; and from all these circumstances to determine upon which side is the weight, or preponderance, of the evidence. Hence, after such a charge, it is not error to refuse to instruct the jury that "the question whether the burden of

proof has been carried is to be settled by looking at the number of witnesses testifying in favor or against certain facts, their demeanor on the stand, character, interest, etc."

NEW TRIAL.—THERE IS NO ERROR IN DENYING a new trial, where the evidence warrants the verdict.

Rule against a constable. A justice put into his hands an attachment, sued out by Chamberlin, Johnson & Co., upon the property of the Southern Travelers' Club, a corporation, for the purpose of having it levied upon certain property, a schedule of which was annexed to the attachment. The object of the levy was to secure a judgment for the purchase money. The indebtedness amounted to four hundred and five dollars and forty-two cents with interest. The constable, Cook, went to the club-rooms, seized the property described in the schedule, levied upon the same and indorsed the levy upon a piece of paper which he fastened to the attachment. The club's janitor had charge of the property, and Cook left it with him, the latter agreeing to keep it for the constable. The president of the club, Wellhouse, and Cook immediately afterward had an interview, in which Wellhouse said that, if the constable would allow the property to stay in the rooms, it should not be disturbed or removed, that the reason he did not wish to have it moved was because he wanted to have a meeting of the club to raise money to pay off the debt, and promised to keep the property for Cook, and, in case the money was not raised, Cook could then remove it. Another constable, Corniff, from an adjoining district, in about an hour and a half after Cook had made his levy, undertook to levy upon the same property, and closed up the doors of the hall and rooms of the club under several distress warrants. Cook then demanded that Corniff turn the property over to him, which demand was refused. Upon going back to the hall, Cook found that the property had been removed therefrom, and Corniff refused to tell him where it was. After notice of sale Cook's attorney was about to give notice of the prior levy, when it was agreed between him and counsel for the creditor whose process was held by Corniff, that the property might be sold and the funds held until the questions should be settled by rule as to who was entitled to the proceeds of the sale. The property was sold on the premises for four hundred and eighty-two dollars, and that sum was held by Corniff. Copies of the attachment, affidavit, and levy by Cook were annexed to his petition. The prayer of the petition was that Corniff be required to show cause why he should not turn over the proceeds of the sale to the petitioner, to be held by him to answer such judgment as Chamberlin, Johnson & Co., might recover against the club. On February 27, 1893, a rule nisi

was issued. Corniff interposed a demurrer which was overruled on February 20, 1894. In brief, Corniff then answered that, as constable, he had seized the goods under several distress warrants; that they had not been levied on, and that the club was running along as usual when he went to its rooms. A general traverse was filed by Cook, in whose favor there was a verdict, and Corniff's motion for a new trial was overruled. No exceptions pendente lite were filed, and the bill of exceptions was not certified by the judge until July 31, 1894.

Mayson & Hill, for the appellant.

Goodwin & Westmoreland, for the appellee.

“ LUMPKIN, J. 1. Upon the rule of practice announced in the first headnote, we will attempt no comment. The question involved is too well settled to require further notice at our hands.

2. The evidence as to what was done by the constable, Cook, when he went to levy the attachment sued out by Chamberlin, Johnson & Co. upon the property of the Southern Travelers' Club, is somewhat complicated and confused; but, after giving it a very thorough examination and study, we think a fair summary of its real purport and meaning is stated in the second headnote. Counsel for the plaintiff in error strenuously insisted that the porter of the club, in charge of its property at the time Cook went to make the levy, could not, under the circumstances, become the agent of Cook to retain possession of the property; and further, that inasmuch as the constable did not take absolute manual possession and control of the goods, there should have been a joint promise by the porter and the president of the club to hold the property for the constable, in order to make the levy valid. Both of these contentions are, in our opinion, successfully answered by the fact that after the constable left the clubhouse, the president of the corporation agreed with the constable that, if he would allow the property to remain where it then was, it should be held subject to the officer's order. The president was the alter ego of the corporation; and, this being so, it is entirely immaterial whether the porter did or did not join with him in promising to hold for the constable; ⁶⁵ and it is also of no consequence whether the porter, regarded as an agent of the corporation, could, or could not, become also the agent of the constable to keep the property for him.

The evidence of Wellhouse, the president of the club, as to what occurred between himself and Cook, at first glance, seems

to conflict with the evidence of the latter, but, upon a careful examination, it will appear that, at best, the statements of Wellhouse are (if not evasive) merely negative, and that he really does not deny the account of the transaction given by Cook. The question, therefore, is, taking Cook's version as correct, whether or not what he did in the premises amounted to a legal and valid levy? We think it did, and this position is well sustained by the most respectable authority. The evidence, as we understand it, shows that the constable, armed with the attachment, went to the clubhouse for the purpose of levying upon the goods of the corporation; that they were in his view, in his immediate presence, under his control, and constructively in his possession. He made an inventory of them, and then went to the president of the corporation, who agreed to hold the goods subject to the order and control of the officer. It was really at the instance of Wellhouse that this arrangement was entered into, he fearing the goods would be damaged if the officer insisted upon removing the same from the premises. Taking all the facts together, it amounted simply to this: that the officer left the property, to be kept for him, in the hands of the defendant in attachment. A few quotations from standard works will suffice to show that, under these circumstances, it was a good levy.

"In all cases, there must be something more than a mere pen and ink levy. It is not sufficient that the officer merely makes an inventory of the property and indorses the levy upon his writ. He must go where the ⁶⁶ property is. He must have it within his view. It must be where he can exercise control over it. And he must exercise, or assume to exercise, dominion, by virtue of his writ. He must do some act by reason of which he could be successfully prosecuted as a trespasser, if it were not for the protection afforded him by the writ. But, in order to make him responsible as a trespasser, it is not essential that he should remove the property, nor that he should touch it. It is enough that, having the property within his view, and where he can control it, he does profess to levy and to assume control of the property by virtue of the execution, and with the avowed purpose of holding the property to answer the exigencies of the writ; for one who to that extent assumes dominion over the goods of another is a trespasser, unless he is justified by a valid writ": 2 Freeman on Executions, sec. 260, and cases cited. "The levy of an execution is the seizure by the officer of the debtor's property, under the writ, and the taking possession of it, or subjecting it to his control. In order to constitute a valid levy upon personal property, it must be within the view of the officer, and subject to his

control at the time. Some of the courts seem to hold that there must be a manual seizure, and actual possession taken by the officer; but, according to the weight of authority, it is sufficient if the property is under the control of the officer, and he may even leave it with the debtor to hold as his agent. He must, however, openly and unequivocally assert his title and right of dominion under the writ. The test generally adopted for determining the validity of a levy is this: Have the acts of the officer, in asserting his title to the goods under the writ, been such as would make him liable as a trespasser but for the protection afforded by the writ?" 7 Am. & Eng. Ency. of Law, 148, 149, citing numerous cases. To the same effect see Murfree on Sheriffs, section 641, from which we make the ⁶⁷ following extract: "As it would in many, probably most, instances, be highly inconvenient to the sheriff and to all concerned, for the officer to keep actual personal possession of chattels levied on, during the interim between the levy and the day of sale, the law provides that during that period the property may remain in other hands, due precaution being taken for its safety by bond or otherwise. If the sheriff chooses to leave the property in the hands of the defendant, he may do so, but it will be at his peril. So far as all others are concerned, creditors and subsequent purchasers, the levy will be good, unless there are other circumstances indicating fraud, which coexist with the fact that the defendant is, by the sheriff's appointment, the custodian of his own property." The following from the opinion of Frost, J., in *Weatherby v. Covington*, 3 Strob. 27, 49 Am. Dec. 623, is a very clear and pertinent statement of the law upon the question under review: "It is not necessary to a levy that the sheriff should actually seize and keep possession of the goods. It is sufficient if, the goods being in the possession of the defendant, and the sheriff having power to take them, with the consent of the defendant, he indorses a levy on the execution. The sheriff must, by some unequivocal act or declaration, assert his title to the goods, under the execution, so that the legal possession and control be manifestly transferred from the defendant to him. It is not material whether the right of possession be acquired by an actual exercise of official authority, or by the voluntary act of the defendant. A written acknowledgment of a levy is as effectual as an actual levy; and if the goods, in either case, remain in the possession of the defendant, he is the bailee of the sheriff."

It would be easy to cite many other authorities, but we are content to allow the correctness of our judgment to rest upon

those above referred to, especially in view ^{as} of the fact that our own code (section 2625) recognizes that a constructive seizure of personal property by a levying officer may be valid.

3. Following up the contentions which have been stated in the preceding division of this opinion, counsel for the plaintiff in error, at the trial below, presented to the judge certain requests to charge, embodying the views of counsel as to what would be necessary to constitute a valid levy. The refusal of the court to give these requests is complained of as error in the motion for a new trial. We find no merit in this complaint. Whatever may be said in support of the requests as abstract propositions of law, they were really not applicable to the facts of this case, as we gather them from the brief of evidence before us.

4. After charging the jury that the burden of proof was upon Cook to show to their reasonable satisfaction by a preponderance the evidence that he did in fact effectually levy the attachment in his hands, the trial judge said: "The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or set of facts. In determining, however, upon which side the preponderance of the evidence lays, the jury should take into consideration the opportunities of the witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial; and from all these circumstances, determine upon which side is the weight or the preponderance of the evidence." The court refused to give in charge to the jury a request, the material portion of which is copied in the fourth headnote. In view of the charge given, we have no hesitation in saying there ^{as} was no error in refusing the request, because the language adopted by the judge accurately conveyed to the minds of the jury all which the request, properly construed, ought to convey. If the purpose of the request was to have the jury understand that they were bound to believe two witnesses in preference to one, it would not do at all. The case of *Dowdell v. Neal*, 10 Ga. 152, relied upon by counsel for the plaintiff in error, will not support any such idea. It is true Judge Nisbet said that if three witnesses were all free from suspicion and of equal credibility, then two of them were to be believed rather than the other who was in conflict with them; but, at the same time, he utterly repudiated the idea that the question of credibility is to be determined by

mere numbers, and distinctly stated that the jury may, if they deem proper, believe one witness as against two or more. So, in the present case, the rule laid down by the court may be regarded as sufficiently clear and accurate to answer all practical purposes: See *Clark v. Cassidy*, 62 Ga. 408, headnote 3, and also page 411.

5. As will have been seen by what has already been said, this court is satisfied that the evidence warranted the verdict. The trial judge very properly refused a new trial. We affirm the judgment all the more readily because the verdict is not only consistent with the law, but also with the real justice of the case. It is always to be regarded as fortunate when both law and justice coincide in bringing about the correct termination of a lawsuit.

Judgment affirmed.

ATTACHMENT—SUFFICIENCY OF LEVY.—To constitute a valid levy, the officer must do such acts as, but for the protection of the writ, would amount to a trespass: *Hibbard v. Zenor*, 75 Iowa, 471; 9 Am. St. Rep. 497. To constitute a valid attachment of personality, either actual or constructive possession is necessary. The property must be under the control of the officer; and he must continue in control by remaining present himself, by appointing an agent in his absence, by taking a receipt for the property, by inventorying and marking it, or by a seasonable removal of it: Note to *Hemmenway v. Wheeler*, 25 Am. Dec. 418; monographic note to *Hollister v. Goodale*, 21 Am. Dec. 677, on what is necessary to attach personality. The officer need not actually handle the goods attached; but he must be in view of them, with the power of controlling them, and of taking them into possession: *Nichols v. Patten*, 18 Me. 231; 36 Am. Dec. 713. It is not necessary that they should be removed, but they must, in all cases, be put out of the control of the debtor: Note to *Hollister v. Goodale*, 21 Am. Dec. 677. It is held in *Gower v. Stevens*, 19 Me. 92, 36 Am. Dec. 737, that a sheriff cannot constitute the debtor his agent to keep the property attached; but goods in a building are sufficiently attached where the officer enters the building, publicly proclaims that he attaches all the property therein, locks up the building, and delivers the key to an employé of the debtor, with directions, assented to by such employé, to keep the property for him: *Shephard v. Butterfield*, 4 Cush. 425; 50 Am. Dec. 796.

INSTRUCTIONS—REFUSAL OF, WHERE INAPPLICABLE.—It is not error for the court to refuse to charge the jury upon a point not involved in the evidence: *Boyd v. Insurance Co.*, 90 Tenn. 212; 25 Am. St. Rep. 676; or to refuse instructions not appropriate to the issues as tendered and accepted: *De Votie v. McGerr*, 15 Col. 467; 22 Am. St. Rep. 426; or not applicable to the case made by the pleadings or proof: *East Line etc. R. R. Co. v. Scott*, 72 Tex. 70; 13 Am. St. Rep. 758; note to *Virginia Midland Ry. Co. v. White*, 10 Am. St. Rep. 882; *Chicago etc. Ry. Co. v. West*, 125 Ill. 320; 8 Am. St. Rep. 380. An abstract instruction, inapplicable to any evidence in the case, is likely to be misleading, and should not be given: *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160; 49 Am. St. Rep. 21.

BURDEN OF PROOF—PREPONDERANCE OF EVIDENCE—NUMBER OF WITNESSES—INSTRUCTIONS.—The general rule is,

that the burden of proof is upon him who asserts the affirmative of an issue: *Notes to Fort Smith v. Dodson*, 14 Am. St. Rep. 66; *Foster v. Reid*, 16 Am. St. Rep. 439. After a charge that the "preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or statement," and that the jury should consider the "opportunities of witnesses for seeing or knowing the particular things about which they testify, their conduct and demeanor, their interest or lack of interest in the suit, the probability or improbability of the truth of their statement," it is not error for the court to add in its instruction that "if, however, the witnesses who testify differently to the same fact are of equal candor, fairness, intelligence, and truthfulness, and equally well corroborated by all the other evidence, and are upon an equal footing as to interest in the result of the suit, then the preponderance of evidence as to that fact would be determined by the number of witnesses," especially when the greater number of witnesses were on the side of the party complaining of the instruction: *Northern Pac. R. R. Co. v. Holmes*, 3 Wash. Ter. 543.

A NEW TRIAL WILL NOT BE GRANTED where there was evidence to sustain the verdict, unless there was manifest prejudice on the part of the jury: *Gulf etc. Ry. Co. v. Benson*, 60 Tex. 407; 5 Am. St. Rep. 74.

REED v. SOUTHERN EXPRESS COMPANY.

[95 GEORGIA, 108.]

ANIMALS—INJURIES BY—LIABILITY FOR.—If domestic animals, such as oxen and horses, injure anyone in person or property when they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury, unless he knows that they are accustomed to do mischief; and such knowledge must be alleged and proved; but, if they are wrongfully in the place where they do the mischief, the owner is liable, though he had no notice that they were accustomed to do so before.

ANIMALS—BITE OF HORSE—LIABILITY FOR.—If a draught horse attached to a vehicle is momentarily left standing in a street near the sidewalk, and bites a person passing by, the owner of the horse is not liable for the injury occasioned, where it is not shown that the horse was, or ever had been, of a vicious nature, or that the owner had any reason to apprehend that it would suddenly bite anyone.

Action for damages.

R. J. Jordan, for the plaintiff.

Dorsey, Brewster & Howell, and Erwin, Du Bignon & Chisolm, for the defendant.

100 SIMMONS, C. J. Ordinary draught horses attached to a wagon of the express company were momentarily left standing, unattended, in the street, adjacent to the sidewalk, in front of a railroad depot, while the servant of the company who had charge

When they went into the depot. The plaintiff was then passing along the sidewalk, and, as she passed where the horses were standing, one of them turned his head around and bit her, thus injuring her severely. She brought this action against the express company, to recover for the damages thereby sustained, alleging that it was negligence to leave the horses near the sidewalk unattended. She does not allege that the horse that bit her was vicious, or, if it was vicious, that the company or its servant had knowledge of the fact; nor is there any evidence, except as to what occurred on this occasion, which would tend to show that the horse was vicious. She relied solely upon the ground that the horse was left near the sidewalk unattended. She was nonsuited by the trial court, and brings that judgment here for review.

Under these facts, we do not think the defendant was liable. There is no general propensity on the part of horses to bite persons who come near them, and when this is done at all, it is done by one that is exceptionally vicious. Where no such disposition has been discovered in a horse, the owner is under no obligation to anticipate that it will suddenly bite some passer-by who chances to come within its reach, and is not bound to guard against such an occurrence; and if the horse does bite somebody, and is not wrongfully in the place where this happens, the owner will not be held liable for the injury. The rule on this subject has been stated thus: "If domestic animals, such as oxen and horses, injure anyone in person or property when they are rightfully in the place where they do the mischief, the owner of ¹¹⁰ such animals is not liable for such injury, unless he knows they are accustomed to do mischief; and such knowledge must be alleged and proved. But if they are wrongfully in the place where they do the mischief, the owner is liable, though he had no notice that they were accustomed to do so before": 1 Am. & Eng. Ency. of Law, art. Animals, p. 578, and authorities cited. See, also, Cooley on Torts, 341, 342, 2d ed., 402. In this case, it appears that the horse was in its rightful place in the street; and it not appearing that the defendant or its servant in charge of the horse had any reason to suppose, before the injury occurred, that the horse was vicious, or had a tendency to bite persons, the injury was not one which the defendant was bound to anticipate and guard against, and the leaving of the horse unattended was not such negligence as would entitle the plaintiff to recover. Of course, if the horse had before manifested a disposition to bite people, and the defendant or its servants knew of it, it would be

negligence to leave the horse standing near the sidewalk unattended.

Judgment affirmed.

ANIMALS—INJURIES—LIABILITY OF OWNER.—The owner of a domestic animal is not, in general, liable for an injury committed by it while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such vicious propensity: *Morgan v. Hudnell*, 52 Ohio St. 552; 49 Am. St. Rep. 741. Knowledge of the owner that his beast was vicious must be alleged and proved, in suits for injuries by domestic animals, if they were rightfully in the place where the mischief was done, for, unless he knew that they were vicious, he is not liable; but, if he did have such knowledge, he is liable. The gist of such actions is the keeping of the animal after knowledge of its vicious propensities: *Decker v. Gammon*, 44 Me. 322; 69 Am. Dec. 99; note to *Knowles v. Mulder*, 16 Am. St. Rep. 632. A party injured by a vicious horse may recover damages of the owner: *Note to Fake v. Addicks*, 22 Am. St. Rep. 719. The owner of a dangerous animal is liable for any damage caused by it, after notice of one instance of similar misbehavior on its part: *Kittredge v. Elliott*, 16 N. H. 77; 41 Am. Dec. 717; *Woolf v. Chalker*, 81 Conn. 121; 81 Am. Dec. 175; and the vicious act, on the prior occasion, may be shown to prove the viciousness of the animal: *Robinson v. Marino*, 3 Wash. 434; 28 Am. St. Rep. 50.

LOVE v. ATLANTA.

[95 GEORGIA, 129.]

MUNICIPAL CORPORATIONS—WHEN NOT LIABLE FOR TORTS OF SERVANTS.—In the discharge of its purely governmental functions, a municipal corporation, to which has been delegated a portion of the sovereign power, is not liable for torts committed in the discharge of such duties and in the execution of such powers.

MUNICIPAL CORPORATIONS—EXERCISE OF GOVERNMENTAL FUNCTIONS.—The preservation of the public health is one of the duties that devolves upon the state as a sovereign power, and, if this duty is delegated to a city, all steps and measures taken by it toward that end are in the exercise of a purely governmental function.

MUNICIPAL CORPORATIONS—PRESERVATION OF PUBLIC HEALTH—NONLIABILITY FOR TORT OF SERVANT.—If the charter of a city imposes upon its board of health the duty of keeping its streets clear of putrid and other substances offensive to the sense of smell, and which tend to imperil the public health, and a private citizen is injured by the negligence of its servants in and about such work, as in allowing a mule attached to a garbage cart to run away and collide with a person's buggy, the city is not liable, because, in discharging such duty, it is simply exercising a governmental function.

Action for damages.

Dorsey, Brewster & Howell, for the plaintiff.

J. A. Anderson and Fulton Colville, for the defendant.

¹²⁰ ATKINSON, J. Love brought against the city of Atlanta an action for damages, alleging, in substance, that while he was passing along the streets of the city, in the exercise of proper care, without fault upon his part, by, through, and because of the negligence of a servant of the defendant, an animal attached to one of the garbage carts of the city was permitted to run away, and, while so running, collided with the buggy of the plaintiff, causing serious injury; it was also alleged that the driver of the cart was a small negro boy wholly incompetent to the discharge of the duty, and that the mule employed was vicious, dangerous, and liable to run away. The evidence proved the plaintiff's cause of action as laid in the declaration; and, in reply, it was shown that the mule and cart causing the damage were in use by the city under the direction of the health board of the city, and that the servant of the city charged with driving said cart was then employed in cleaning the streets and removing therefrom such putrid and offensive substances as usually accumulate in the streets of densely populated cities, and which were necessary to be removed, because, remaining, they endangered the public health. At the conclusion of the evidence, the trial judge directed a verdict for the defendant, instructing the jury that, inasmuch as the uncontroverted testimony showed that the injury complained of was inflicted by servants of the city, employed by that department of the city ¹²¹ government whose duty it was to look after and preserve the public health, and inasmuch as it appeared that this injury was inflicted by the defendant's servants while engaged in the performance of work essential to the discharge of that particular duty, the city was not liable, and they should return a verdict for the defendant. Exception is taken to this instruction, and we are now to consider whether the court erred.

Distinctions do not appear to have been at all times accurately drawn between the classes of cases in which a municipal corporation would be liable, and those in which it would not be liable for the misfeasance or nonfeasance of a public servant employed, under municipal authority, in the discharge of duties relating to corporate affairs. One general proposition, however, seems to have received general recognition at the hands of courts of last resort wherever that class of cases has been considered; and that class of cases is, that where an injury sustained is inflicted because of the misfeasance of an agent of a corporation while engaged in a duty pertinent to the exercise of what are termed "governmental functions" of a corporation, the city is not liable. Where injuries under similar circumstances are inflicted by the agent of a

corporation acting for it in the discharge of a duty on behalf of a municipal corporation, where it is engaged in the exercise of some private franchise, or some franchise conferred upon it by law which it may exercise for the private profit or convenience of the corporation, or for the convenience of its citizens alone, in which the general public has no interest, for such injuries a right of recovery lies against the city. Some difficulty has arisen in the application of these general principles to the facts of particular cases which from time to time have arisen. Some difficulty has arisen in the proper classification of cases, in order to assign each to its appropriate position with reference to the liability ¹³³ or nonliability of a corporation, and the courts have not been altogether happy, nor entirely consistent at all times, in this regard. As an illustration of this, it is held that cities are liable for damages resulting from the nonrepair or from the dangerous condition of public streets, and this in the absence of strict statutory liability imposed by law. It has been held that they are not liable for damages occasioned by their fire departments for injuries to person or property in going to or from fires. The former case is one that might properly have been originally classified among the cases of nonliability. The duty of keeping its streets in repair is a public duty in which the general public is interested. The state commits to it the discharge of those governmental duties, incident to the sovereign power, by which it is required to maintain, for the use of the general public and for the public convenience, a system of roads throughout the state; and the assignment of this particular duty to municipal corporations within their limits may fairly be said to be a delegation of what appears to us to be one of the functions of government. The latter case, referring to the fire department, is a case of nonliability, and, if not the exercise of a private power for the benefit of the corporation itself and the inhabitants thereof, in which the general public in no way participates, it reaches the verge upon that line. We cite these as simple illustrations of our statement that the courts have not at all times been consistent, but with no purpose either to disturb the precedents established by repeated rulings of respectable courts of last resort in nearly all the states, or to intimate that there is such a doubt as to their soundness as would, in any sense, justify the adoption of other rules.

With respect to matters concerning the public health, however, there is no serious conflict of reason, opinion, or authority upon the correctness of the proposition ¹³³ that the preservation of the public health is one of the duties that devolves upon the

state as a sovereign power. It is such a duty as, upon proper occasion, justifies the exercise of the right of eminent domain and the demolition of structures which endanger or imperil the public health. In the discharge of such duties as pertain to the health department of the state, the state is acting strictly in the discharge of one of the functions of government. If the state delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare, not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the state, and, in the exercise of such powers, is entitled to the same immunity against suit as the state itself enjoys. Such a duty would stand upon the same footing as its duty to preserve the public peace, and its liability or nonliability would depend upon the same principle which relieves the city from liability for the misfeasance of a police officer in the discharge of his duty. It will be observed, however, that in order to exempt a city from liability, it is not sufficient to show that the particular work, from the negligent performance of which by the servants of the city a citizen was injured, was being performed under the direction of the health authorities; but it must be shown that the particular work so being done was connected with, or had reference to, the preservation of the public health. If the health department were engaged in clearing away or removing obstructions from the street which in no ¹³⁴ way endangered the public health, the responsibility of the city then would rest upon the rule of liability for work connected with repairing and keeping in order the public highways. It can make no difference in principle as to the character of the agents employed in the discharge of this duty with respect to the public health. The principle of nonliability rests upon the broad ground that, in the discharge of its purely governmental functions, a corporate body, to which has been delegated a portion of the sovereign power, is not liable for torts committed in the discharge of such duties and in the execution of such powers. It can be no more liable because of the failure to select competent drivers of garbage carts than a city could be held liable for failing to elect a wise, conservative, and discreet mayor.

Let us inquire, then, whether the particular service being per-

formed by this particular servant of the corporation had special reference to the preservation of the public health. The accumulation of garbage, of substances offensive to the sense of smell, of substances which, if permitted to remain, would poison the atmosphere and breed diseases infectious and contagious among the inhabitants of the city, may well be said to endanger the public health. The preservation of the public health involves the removal of those causes which are calculated to produce disease. According to the undisputed testimony of this case, the driver of this garbage cart and the alleged refractory mule were engaged actually in the removal from the streets of substances similar to those described above. However incongruous it may appear to be to say that this diminutive darkey and this refractory mule were engaged in the performance of some of the functions of government, it is nevertheless true, and illustrates how even the humblest of its citizens, under the operation of its laws, may become in Georgia an important public functionary.

Judgment affirmed.

MUNICIPAL CORPORATIONS—LIABILITY FOR TORTS.—A city while acting, not in the management of its private affairs, but in the interest of the public, as the guardian of the health and welfare of the public, is not liable for the negligent acts of its officers or agents in the execution of its ordinances: Note to *Oriando v. Pragg*, 34 Am. St. Rep. 25. To protect and preserve the public health is one of the duties of every sovereignty: See monographic notes to *State v. Goodwill*, 25 Am. St. Rep. 883, on the Fourteenth Amendment, and *People v. Wemple*, 27 Am. St. Rep. 566, on interstate commerce.

WESTERN UNION TELEGRAPH COMPANY v. HOWELL.

[95 GEORGIA, 194.]

CONSTITUTIONAL LAW—TELEGRAPH COMPANIES—INTERSTATE COMMERCE—PENALTY.—That provision of the federal constitution which confers upon Congress the power to regulate commerce among the several states, does not prohibit a state legislature from enacting a law subjecting telegraph companies to penalties for acts of negligence occurring entirely within the limits of that state, although such acts may be committed in dealing with messages to be transmitted to points in other states.

TELEGRAPH COMPANIES—NONDELIVERY OF MESSAGE—BURDEN OF PROOF.—If a telegraph company receives a prepaid message for transmission to a point in another state, which is not delivered, it is liable for the statutory penalty for negligence in not transmitting the message, unless it shows that the message was, in fact, transmitted from the receiving office with due diligence, and that its nondelivery to the sendee was due to some default, or other cause, arising beyond the limits of the state in which it was received for transmission.

Action to recover the statutory penalty and special damages for the defendant's failure to promptly deliver a telegraphic message. The plaintiff had been arrested in the state of Georgia. He addressed a message containing this information to his brother in Montgomery, Alabama, his object being to have the latter meet him at Decatur, Georgia, and sign an appearance bond for him. He prepaid the charges, but the company neglected to deliver the message. There was a verdict for the plaintiff, and the defendant appealed.

Bigby, Reed & Berry, and Dorsey, Brewster & Howell, for the appellant.

John S. Candler, for the appellee.

¹⁹⁶ LUMPKIN, J. The facts appear in the reporter's statement.

¹⁹⁷ 1. The case at bar, so far as relates to the proposition announced in the first headnote, is not distinguishable in principle from those of *Western Union Tel. Co. v. James*, 90 Ga. 254, and *Western Union Tel. Co. v. Michelson*, 94 Ga. 436. We have, therefore, felt constrained to follow those cases. As no opinion was written in either of them, the writer, but for a reason which will be presently stated, would feel it incumbent upon himself to endeavor to set forth with some care the views upon which these decisions rest. It is obvious that to do so would require the consumption of much time and the expenditure of a considerable amount of labor, as the subject is one which has but lately arisen, and is not free from doubt and difficulty. Inasmuch, however, as the general assembly of this state, four days before the present case was decided by this court, repealed the act imposing penalties upon telegraph companies (Acts 1894, p. 79, repealing both the statute of October 22, 1887, and the amendment thereto of December 20, 1892), and, in consequence, the question is no longer of practical importance in this state, it is not now deemed necessary to enter into an elaborate discussion of it. The time at our command can certainly be more profitably expended in preparing opinions, so far as we are able, devoted to the discussion of questions which are live issues, and are likely to arise in future litigation. We shall, therefore, content ourselves with citing the case of *Connell v. Western Union Tel. Co.*, 108 Mo. 459, which supports the view entertained by this court, although the subject is not dealt with at any great length, nor accorded the thorough and satisfactory discussion which its importance would seem to demand. It may, never-

theless, be very profitably examined, for, so far as we have been able to discover, it is the only decision outside of this state which has, as yet, directly dealt with ¹⁹⁸ the question. Reference may also be made to the American and English Encyclopaedia of Law, volume 25, page 768, where in a note *Connell v. Western Union Tel. Co.*, 108 Mo. 459, is cited; and also to page 770 of the same volume, where, at the conclusion of note 3 (which begins on the preceding page with the title, "Regulation of Interstate Messages"), comments and expressions in full harmony with the view of the question taken by this court will be found, together with references to cases more or less in point.

2. Counsel for the telegraph company, while not conceding its liability in any event, contended that as the plaintiff had failed to show that the omission of duty on the part of the company occurred within the limits of this state, he could not recover even under the rulings announced in *Western Union Tel. Co. v. James*, 90 Ga. 254, and *Western Union Tel. Co. v. Michelson*, 94 Ga. 436. We quite agree with counsel that our penalty statute could have no extraterritorial operation, but are compelled to express our dissent to the assertion that the plaintiff totally failed to make out a *prima facie* case of negligence on the part of the company occurring within the borders of the state. The matter simply resolves itself into a question of burden of proof, and appears to us to be free from serious difficulty.

The rule as to telegraph companies seems to be the same as that applicable to railroad carriers. Proof of the delivery to a telegraph company of a message, non (or incorrect) transmission of it, and consequent damage, is all that is required to make out a *prima facie* case of negligence: *Thompson on Election*, secs. 266, 275; 25 *Am. & Eng. Ency. of Law*, 831; *Wharton on Negligence*, sec. 766; 3 *Sutherland on Damages*, 295, 2d ed., 2140; *Gray on Communication by Telegraph*, secs. 26, 53, 54, 77. Breach of the contract is presumed to comprehend negligence. This, as stated by *Boynton, C. J.*, in *Telegraph Co. v. Griswold*, 37 Ohio St. 313, 41 *Am. Rep.* 500, for the reason that: "If the error or mistake is attributable to atmospheric causes or disturbances, or to any cause for which the company is not ¹⁹⁹ at fault, it is entirely within its power to show it. To require the sender of the message to establish the particular act of negligence, or ferret out the particular locality where the negligent act occurred, after showing the mistake itself, would be to require, in many cases, an impossibility, not infrequently enabling the company to evade a just liability."

In *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 *Am. Rep.*

605, the court dealt with the question of presumption, in a case where a message delivered by one telegraph company to another, which was sued for error in transmission, was not shown by the plaintiff to have been different from the one delivered to him. Beck, J., says: "Defendant's line of telegraph did not extend to Chicago, but at Grinnell it connected with another line reaching to that city, from which the market reports were obtained, and sent by defendant to different points on its line. It is insisted by defendant that plaintiff failed to show that a correct report was furnished, to be sent from Grinnell upon defendant's line. The evidence shows that the market reports were received at Grinnell on the day the incorrect one was delivered to plaintiff. Upon this evidence, we must presume that the reports received there and delivered to defendant were correct. The rules of evidence, in the absence of proof showing the report delivered to defendant at Grinnell to be either correct or incorrect, require us to presume it to have been correct. They are based upon the fact that men ordinarily, in the course of business, act correctly and speak truly. Errors and intentional misstatements are exceptions, and not the rule, in the affairs of business. Their application in this case is demanded by the fact that the evidence to establish error in the report furnished defendant was within its control and exclusive knowledge. Plaintiff was utterly unable to prove the correctness of the report furnished at Grinnell, while, if it had been ²⁰⁰ incorrect, defendant could have readily established the fact."

Again, in *Olympe de La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383, it was contended that the defendant was not the first carrier or contractor, and that it was not proved that the error in the transmission occurred on defendant's line, on whose printed blank there was an express provision for nonliability for the default of other companies. But it was held, "that whether first carrier or not, it was peculiarly within their power, and was their duty, to make the proof here suggested, if necessary."

Surely, the two cases last cited go farther than is requisite to support our ruling in the present case; for where a third party is also concerned, the further question is presented whether it was not in the power of the plaintiff to show that such third party, in dealing with the message, was free from negligence.

In the case at bar, the plaintiff showed a breach of contract—and prima facie negligence—which must have occurred on the defendant's line, either in this state or in Alabama. Undoubtedly, it was in the exclusive power of the telegraph company to

show the exact point where the failure of diligence occurred, and through the negligence of what particular servant it was occasioned. It will not do to say that the servants of the company are equally at the disposal of the plaintiff to prove the facts connected with the transaction. The truth of this assertion may be demonstrated by the peculiar facts here presented. The plaintiff, it is true, did know the company's agent at Lithonia, and, perhaps, could have secured him as a witness at the trial. But, suppose this had been done, and he had testified that he had promptly forwarded the message to the relay office at Atlanta, but had no further knowledge as to the transaction, how could the plaintiff pursue his ²⁰¹ investigation and proof? Would he have to sue out interrogatories—for he could not compel personal presence in another county—directed to each and every one of the numerous employes of the company stationed in the Atlanta office? Certainly, the company could not reasonably be expected to aid him by furnishing a list of all its servants, nor to keep him posted when any of them resigned or were transferred elsewhere. It might be, and doubtless is, often convenient to the company to change the location of its employes, and it could do so in the utmost good faith; but whatever the motive, the inconvenience to the plaintiff in reaching them as witnesses would be the same. Again, it cannot be known that the telegraph company keep such records in writing of its business as would enable the plaintiff to show the required facts by compelling the defendant to produce its records in court. Besides, how would it be known that such records, if kept at all, were correct? If the company itself did not see to it that evidence of negligence was not recorded against it, would it not be a temptation to its employes to omit making any record of their own shortcomings which might result in their discharge? And, at last, this would merely be a different way of compelling the company to supply evidence entirely within its own keeping. It follows from the foregoing, that the default should be treated as having occurred in Georgia, the burden being on the defendant to show the contrary, and it having failed to do so.

Finally, the plaintiff showed more than a mere failure to deliver. His brother, the addressee, who lived in Montgomery, testified: "I went directly to the telegraph office, as soon as I received my brother's letter, and there had been no message for me at all. The telegram was sent on Thursday. I received my brother's letter on Sunday morning at 9:30." Therefore, it was shown that three days after the message was handed to the agent

at 202 Lithonia, the office in Montgomery had still failed to receive it over the wire from Atlanta. This being so, it makes no difference whether the message was afterward sent or not. Three days delay in Georgia (unexplained) would render the company liable to the penalty, for this would be undoubtedly and per se an unreasonable and inexcusable delay; and even if the office in Montgomery had afterward received the message, and had made no attempt to deliver it to the addressee, these facts would be of no consequence whatever with reference to the question of the company's liability for the penalty.

Judgment affirmed.

TELEGRAPH COMPANIES—NONDELIVERY OF MESSAGE.—

The fact that a telephone company has extended its lines through different states, and is engaged in interstate commerce, has been held not to relieve it from the operation of state statutes, upon business conducted wholly within the state: *Central Union Tel. Co. v. Falley*, 118 Ind. 194; 10 Am. St. Rep. 114. On the other hand, it has been held that a state cannot regulate the transmission or delivery of interstate telegrams, even within its own borders. But, however it may be as to the regulation by a state of the transmission and delivery of such telegrams within its own boundaries, it seems certain that no power exists in a state to regulate the mode and order of transmission and delivery of interstate telegrams, starting from points within its own territory, after such telegrams have passed the state line, and are within the boundaries of other states: See monographic note to *People v. Wemple*, 27 Am. St. Rep. 559, on the constitutionality of state regulations of interstate commerce. The penalty prescribed by statute for a failure to transmit and deliver telegraph messages promptly applies in every case where the company is under an obligation to do these things: *Western Union Tel. Co. v. Jones*, 69 Miss. 658; 30 Am. St. Rep. 579. A statute making any telegraph company liable for the non-delivery of dispatches intrusted to its care applies to all telegraph companies doing business in the state, even when contracting to correctly send a message to another state: *Western Union Tel. Co. v. Kemp*, 44 Neb. 194; 48 Am. St. Rep. 723. A claim against a telegraph company for damages, and a claim against it for a statutory penalty, are separate and distinct; but it is also liable to the statutory penalty for default in the transmission or delivery of messages: *Mathis v. Western Union Tel. Co.*, 94 Ga. 338; 47 Am. St. Rep. 167. A statute imposing a penalty on a telegraph company for failure to transmit a message is not unconstitutional, even as to a message addressed to another state, and the sender may recover the penalty: *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; 48 Am. St. Rep. 692. The company is bound to transmit a message which has been paid for by the sender: *Western Union Tel. Co. v. Jones*, 69 Miss. 658; 30 Am. St. Rep. 579. A prima facie case is made out against a telegraph company when it is shown that the message which the company undertook to send was not delivered, and that damage has resulted, and the burden of proof is then thrown upon the company to show the exercise of ordinary care, and that its failure to transmit and deliver the message was not caused by its fault or negligence, or that of its employes: *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211. The burden is upon the company to explain delay in not delivering a message until three days after its agent receives the same; and, where no excuse is offered for the delay,

the court is justified in finding that the company was negligent: *Harbness v. Western Union Tel. Co.*, 73 Iowa, 190; 5 Am. St. Rep. 672.

BAILIE v. AUGUSTA SAVINGS BANK.

[95 GEORGIA, 277.]

BANKS—DEPOSIT OF CHECK—LIABILITY.—If a bank, in the ordinary course of business, receives from a depositor a check upon another bank, and credits it on his deposit-book, not as cash, but as a check, the bank is not liable for the value of the check as a purchaser thereof, especially where it appears that the bank merely undertook the collection of the check for the benefit of the depositor, and that it was not the intention of the parties that the title to the check should pass to the bank as absolute owner.

AGENCY—LIABILITY FOR SUBAGENT.—If an agent employs a subagent to perform a part of the work or service he has contracted to do, he is liable to his principal for any negligence or omission of duty on the part of such subagent in the course of his employment.

BANKS—COLLECTIONS BY SUBAGENT.—In the absence of any agreement to the contrary, a bank which receives a check from a customer is liable to him for any negligence whereby the collection of the check is defeated, whether such negligence is that of its own officers, or of a subagent or correspondent to whom he sends the check for collection. It makes no difference that the bank does not charge anything for the collection, and it is immaterial whether such subagent or correspondent is the bank upon which the check is drawn, or another.

Suit by Sarah R. Bailie against the defendant to recover one thousand dollars, with interest, claimed to be due on account of the nonpayment, by the bank, of the principal sum on demand. On November 21, 1891, a check for one thousand dollars upon the First National Bank of Wilmington, North Carolina, payable to the order of a person named, was, by his indorsement, made payable to the order of George A. Bailie, described as "trustee." The latter resided in Georgia, and, after indorsing the check in blank, delivered it to his cestui que trust, the plaintiff, who deposited it at the place of her residence, in the defendant bank, of which she was a regular customer, and with which she kept an account. The check was signed, "Carolina Interstate B. & L. Per C. E. Borden, Treasurer," and the plaintiff's account was credited with the check as such, and not as cash. The defendant indorsed the check as follows: "Pay to the order First National Bank, for account Augusta Savings Bank, Augusta, Ga. W. B. Young, Cashier," and on the same day forwarded it to the Wilmington bank with a letter stating that the check was inclosed "for collection and return," and directing the latter bank to protest all unpaid paper at once, unless otherwise in-

structed. On November 23, 1891, the Wilmington bank received the check and acknowledged its receipt. That bank charged the check to Borden's account, who had to his credit on that day one thousand five hundred and ninety-six dollars and seventy-one cents, leaving a balance to his credit of five hundred and ninety-six dollars and seventy-one cents. The Carolina Interstate Building and Loan Association had no account in its corporate name on the books, though Borden was its treasurer, and the money of the corporation was credited to his account as such. The Wilmington bank, on November 25, 1891, suspended payment. It had received deposits and paid checks on the 24th up to 2 o'clock P. M., the regular hour of closing. The name of the defendant bank did not appear upon the books of the Wilmington bank in any way, except upon the collection book. The receiver of the Wilmington bank found therein a letter addressed to the defendant inclosing a check on New York for the amount of the collection, one thousand dollars, less ten cents. The defendant requested the receiver to return the check which had been forwarded for collection, but he refused to surrender it, claiming that it was a voucher. The receiver afterward returned the check to the drawer of it, and admitted the latter's claim for the balance to his credit. Previous to the failure, neither the plaintiff nor her husband had heard a word affecting the solvency of the bank; and, neither did the defendant, at the time of the deposit and transmission of the check, have any notice or knowledge of its insolvent condition. After the suspension, the teller of the Augusta Savings Bank told Bailie that the bank had failed, and that the check had been drawn on. The defendant charged the amount of the credit on the plaintiff's deposit-book, that being the amount of the deposit; and the plaintiff notified the Carolina Interstate Building and Loan Association of the fact, but the association refused to recognize any liability on its part. The jury found for the defendant, and the plaintiff excepted to the refusal of a new trial.

Frank H. Miller and William K. Miller, for the appellant.

Joseph R. Lamar, for the appellee.

280 SIMMONS, C. J. 1. In the absence of anything indicating a different understanding, a bank which, in the ordinary course of business, receives from a depositor a check upon another bank and credits it on his deposit-book, not as cash, but as a check, will not be held to be an absolute purchaser of the check.

"If a bank does not wish to assume the relation of a debtor for the paper to the depositor, this intention may be manifested in a very explicit manner by crediting the paper as paper": *St. Louis etc. Ry. Co. v. Johnston*, 23 Blatchf. 492; *Thompson v. Giles*, 2 Barn. & C. 422; 2 *Morse on Banks and Banking*, sec. 583. This the bank did in the present instance, the entry on the depositor's pass-book being: "Check on First National Bank of Wilmington, \$1,000." Nor will the mere fact that the ²⁸¹ depositor is allowed to check against the credit change the import of the transaction, so as to preclude the bank from charging back the amount of the credit if the check is not paid: See, on this subject, 2 *Morse on Banks and Banking*, secs. 583-587, and authorities cited.

2. The court instructed the jury, that "if the Augusta Savings Bank, in the ordinary course of business, selected the First National Bank of Wilmington to collect the check, and the Bank of Wilmington negligently failed to collect the same, or if it collected the money and failed to remit, the savings bank is not liable to the plaintiff for such negligence or failure." Error was assigned upon this instruction and others to the same effect, and it was contended that, in the absence of any agreement to the contrary, a bank which receives a check from a customer for collection is liable to the customer for any negligence whereby the collection of the check is defeated, whether such negligence is that of its own officers, or that of an agent or correspondent to whom it sends the check for collection. In support of the holding of the court below, various decisions are relied on which hold that if the check is not payable in the place where the bank which receives it for collection is situated, but has to be sent to a distant place to be collected, the bank receiving the check from the customer is not liable for the default of the agent to whom it sends the check for collection, if it has exercised due care in the selection of such agent. These decisions are based upon the view that, in such case, the customer, knowing that the check cannot be collected by the ordinary officers or servants of the bank, but that this service must be performed by a subagent at the place where the check is payable, impliedly authorizes the selection of such subagent, and thereby assumes the risk of any failure of duty on the part of the latter; and that the benefit which may accrue to the bank, where no specific ²⁸² compensation is received for the service, is not a sufficient consideration from which to imply an undertaking on the part of the bank to assume that risk itself: *Dorchester etc. Bank v. New England*

Bank, 1 Cush. 177; Jackson v. Bank, 6 Harr. & J. 146; Stacy v. Dane County Bank, 12 Wis. 629; Aetna Ins. Co. v. Alton City Bank, 25 Ill. 243; 79 Am. Dec. 328; East Haddam Bank v. Scoville, 12 Conn. 303; Daly Brothers etc. v. Bank, 56 Mo. 94; 17 Am. Rep. 663; Bank of Louisville v. First Nat. Bank, 8 Bart. 101; 35 Am. Rep. 691; Guelich v. National etc. Bank, 56 Iowa, 434; 41 Am. Rep. 110; Third Nat. Bank v. Vicksburg Bank, 61 Miss. 112; 48 Am. Rep. 78; First Nat. Bank v. Sprague, 34 Neb. 318; 33 Am. St. Rep. 644. And see 1 Morse on Banks and Banking, sec. 268, et seq.

On the other hand, there are numerous decisions upholding the rule of liability contended for by the plaintiff in error. This is the rule laid down by the supreme court of the United States: See Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, in which the question is elaborately discussed. The decision in that case was unanimous, and the case of Bank of Washington v. Triplett, 1 Pet. 25, which was relied on, in some of the cases above cited, as authority for the contrary view, is there explained and distinguished. This is also the rule in England: See decision of the house of lords in Mackersy v. Ramsays, 9 Clarke & F. 818; 3 Eng. Rul. Cas. 762; also, Van Wart v. Wooley, 3 Barn. & C. 439; 5 Dowl. & R. 374. And the same rule has been adopted in the states of New York, New Jersey, Indiana, Ohio, Michigan, Minnesota, and Montana: Allen v. Merchants' Bank, 22 Wend. 215; 34 Am. Dec. 289; St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26; Titus v. Mechanics' Nat. Bank, 35 N. J. L. 588; Tyson v. State Bank, 6 Blackf. 225; 38 Am. Dec. 139; American Ex. Co. v. Haire, 21 Ind. 4; 83 Am. Dec. 334; Reeves v. State Bank, 8 Ohio St. 465; Simpson v. Waldby, 63 Mich. 439; Streissguth v. National etc. Bank, 43 Minn. 50; 19 Am. St. Rep. 213; Power v. First Nat. Bank, 6 Mont. 270. See, also, Kent v. Dawson Bank, 13 Blatchf. 233 237; Taber v. Perrot, 2 Gall. 565. The question has not been dealt with in any prior decision of this court.

In our opinion the sounder doctrine is that which holds the bank liable. The collection of checks, drafts, and other commercial paper constitutes an important feature of the business of banking as generally conducted, and for the transaction of this branch of their business banks have their regular correspondents in different parts of the country. In the selection of a correspondent, the customer for whom the collection is to be made is not consulted. As a rule, he does not know the name or the financial standing of the correspondent, and it is not contemplated that they shall have any communication with each other. Under

these circumstances, we think a customer from whom a bank receives paper for collection has a right to assume, in the absence of any agreement to the contrary, that the undertaking of the bank comprehends the whole service to be performed, and that the agent employed by the bank in this service is its own agent, and not the agent of the customer. So treating the undertaking, the case falls within the general rule of agency, that by the employment of underagents to perform a part of the work which he has contracted to do, the employer becomes responsible to those with whom he contracts or deals in his business, and will be held liable for the negligence or omission of any duty of his agent in the course of his employment. There seems to us to be no good reason why a different understanding should be inferred, and a different rule of liability applied, because the bank cannot make the collection itself, but must employ an agent for that purpose. "The general rule of law, that an agent is liable for a subagent employed by him, is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself without employing a subagent": Lord Campbell, in *Mackerray v. Ramsays*, 9 Clarke & F. 818.

²⁸⁴ This rule is applied to ordinary collecting agencies receiving claims for collection at distant places (*Wharton on Agency*, sec. 544, and cases cited; *Hoover v. Wise*, 91 U. S. 308; *Bradstreet v. Everson*, 72 Pa. St. 124; 13 Am. Rep. 665), and we do not see any substantial difference between the case of such an agency and that of a bank which receives such claims for collection.

It makes no difference that the bank does not charge anything for the collection. The benefits which the bank derives generally in the making of such collections, from the use of the funds while in its custody, the advantages which may arise from business associations, and the profits on exchange, are held to be, and we think may properly be, regarded as a valuable consideration for the undertaking, and as sufficient to uphold the liability incident thereto: See *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 288; *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588, and other cases cited *supra*. What was said in the case of *Merchants' Bank v. Guilmartin*, 88 Ga. 804, as to the insufficiency of casual or incidental benefits to constitute the bank a bailee for hire, has no application in a case like this. That was the case of a special deposit of bonds, and the bank, of course, had no right to make use of the deposit.

The doctrine that a bank is responsible for the acts of its sub-

agents, in cases of this kind, is not only, it seems to us, in accord with the principles governing the law of agency, but there are considerations affecting the general welfare of the commercial community which commend it to us as a wise rule of commercial law. "Any other rule," as is said by Mr. Daniel in his work on Negotiable Instruments, "opens the door to carelessness in the conduct of banking business, which should be conducted with every safeguard to the customer who intrusts his business to the keeping of such agents. If they are averse to dealing with distant and unknown ²⁸⁵ parties, they should decline undertaking the collection or handling of the paper; and if they assume it, they should do so for sufficient compensation, and be held responsible": 1 Daniel on Negotiable Instruments, sec. 342.

Under the agreed facts in this case, there can be no question as to the negligence of the Wilmington bank. It received the check on Monday, November 23d, with a letter stating that the paper was inclosed "for collection and return," and directing that all unpaid papers be protested at once, unless otherwise instructed. Up to the close of banking hours on the following day, it received deposits and paid checks, and on Wednesday, the 25th, suspended payment, having made no remittance for this check. It then had to the credit of the drawer an amount considerably in excess of the amount of the check. It was contended that the bank was not bound to pay the check, because it had no account upon its books in a name corresponding to the signature on the paper. There is no merit in this contention. Although the check was drawn by C. E. Borden as treasurer of the "Carolina Interstate B. & L.," and there was no account upon the books of the bank in the name of the "Carolina Interstate B. & L.," and none in which he was designated as treasurer of such a concern, the bank did have an account in the name of "C. E. Borden, treasurer," the money of the corporation referred to—the Carolina Building and Loan Association—was credited upon that account, and the bank recognized the check as drawn thereon by charging it accordingly.

There are decisions sustaining the contention of the plaintiff in error, that the defendant was negligent in sending the check directly to the bank upon which it was drawn, there being at that time in Wilmington another bank which was in good standing and credit: See *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422; 58 Am. Rep. 728; *Drovers' Nat. Bank v. Anglo-American etc. Co.*, ²⁸⁶ 117 Ill. 100; 57 Am. Rep. 855; *German Nat. Bank v. Burns*, 12 Col. 539; 13 Am. St. Rep. 247; *Anderson v. Rodgers*,

53 Kan. 542; First Nat. Bank v. Fourth Nat. Bank, 56 Fed. Rep. 967; Farwell v. Curtis, 7 Biss. 160. And see 1 Daniel on Negotiable Instruments, 4th ed., sec. 328 a; 1 Morse on Banks and Banking, 3d ed., sec. 236. The view we take of the liability of the defendant for the negligence of the Wilmington bank, however, renders it unnecessary to pass upon this question. It is not likely that this question or others presented by the record will arise again in this case.

Judgment reversed.

BANKS—DEPOSIT OF CHECK.—If checks on another bank are handed by a depositor to the receiving teller of a bank, and are, by the teller, credited on the depositor's pass-book, they are received only for collection, and, if not paid on presentation, may be returned and the credit in the pass-book canceled. The question as to whether such checks become the property of the bank is really one of agreement between the parties: See monographic note to Ditch v. Western Nat. Bank, 47 Am. St. Rep. 389, 391, on effect of check indorsed "for deposit": In re State Bank, 56 Minn. 119; 45 Am. St. Rep. 454, and note.

AGENCY—LIABILITY OF AGENT FOR ACTS OF SUBAGENT.—If an agent, having undertaken to do the business of his principal, employs a subagent on his own account to assist him, the agent is liable to his principal for the manner in which the business has been done, whether by himself or by the subagent: See monographic note to Davis v. King, 66 Conn. 465, 50 Am. St. Rep. 104, on subagents, and their relation to the principal and to the agent appointing them.

BANKS—NEGLIGENCE IN COLLECTIONS BY SUBAGENT—LIABILITY.—Many cases hold, with respect to collections by a bank through correspondents and other subagents, that the liability of the bank extends merely to the exercise of due care in selecting a competent agent and the transmission of the paper to the latter with proper instructions; that the agent thus selected is not the agent of the bank selecting him, but of the owner of the paper; and that, therefore, the bank cannot be held answerable for his defaults, in any respect, if it has used due care in his selection: See monographic note to Isham v. Post, 38 Am. St. Rep. 777, on care required of bankers acting as agents or bailees; Waterloo Milling Co. v. Kuenster, 158 Ill. 259; 49 Am. St. Rep. 153. But the cases on this question are divided, and the weight of authority seems to be against the banks, and does not require the owner of the paper to suffer from the negligence of agents selected by the bank, though in such selection there was not any want of care, and the person selected was apparently a suitable person to transact the business intrusted to him: Note to Isham v. Post, 38 Am. St. Rep. 777.

MORRIS v. MURPHY.

[95 GEORGIA, 397.]

AN ADMINISTRATOR is, in law, the personal representative, or substitute, of the deceased; and it is his duty to prosecute suits in favor of, and to defend suits against, the estate he represents.

EXECUTORS AND ADMINISTRATORS — CREDITORS — PRIVILEGE.—All creditors of an estate are so far in privity with the administrator thereof that a judgment against him in favor of one of such creditors is conclusive, upon all questions adjudicated thereby, as between himself and other creditors.

EXECUTORS AND ADMINISTRATORS — CONCLUSIVENESS OF JUDGMENT AGAINST.—Unless there is fraud or collusion between an administrator and a creditor of an estate, a judgment regularly rendered in a court of competent jurisdiction, in favor of the creditor and against the administrator, is conclusive as to all matters adjudicated thereby upon legatees, and all other creditors of the estate.

TRIAL — AFFIDAVIT OF ILLEGALITY.—If an issue is formed, in a justice's court, upon an affidavit of illegality, and the affiant fails to appear to prosecute it, the proper practice is for the court to dismiss the affidavit, and not to adjudicate upon its merits. Where, however, a judgment upon the merits is rendered, it is not void, but simply erroneous, and, if acquiesced in by the affiant, becomes conclusive upon him and his privies.

Petition for an injunction.

Simmons & Corrigan, for the appellants.

M. H. Sandwich and Hall & Hammond, for the appellee.

³⁹⁷ **ATKINSON, J.** 1. In 1878 a judgment was obtained, and in 1879 an execution issued thereon. In 1882 another judgment by ³⁹⁸ a different plaintiff was recovered against the same defendant. In 1893 the execution issued on the older judgment was levied on certain land as the property of the defendant in execution, and he, between the date of the rendition of the judgment and the date of the levy, having died, the administrator upon his estate filed an affidavit of illegality to the execution, on the ground that the judgment which was the basis of plaintiff's execution was dormant, and that the same had not been revived within the time allowed by law. Two other executions, in all respects similar to the one then proceeding, were issued in favor of the same plaintiff; but we do not deem it necessary to set out in detail all the entries thereon, nor proceedings thereunder, as the same questions are involved with reference to each, and may be fairly stated in our discussion of the questions arising upon a consideration of one of them. The illegality thus filed came on to be heard, and, the administrator neither appearing in person nor by counsel, the court, upon tender of issue by the plaintiff in execution, after hearing evidence, rendered a judgment overruling

the affidavit of illegality, the effect of which was an adjudication in favor of the validity of the judgment upon which said execution was issued. Afterward, the plaintiff seeking to enforce this judgment, the plaintiff in the junior execution above referred to, but whose judgment had in the mean time become dormant, though the time allowed by law in which it might be revived had not then elapsed, instituted equitable proceedings, and sought thereunder to enjoin the enforcement of the judgment and execution then proceeding against said estate, upon the same grounds that were made and set up in the affidavit of illegality as filed by the administrator. Upon the hearing of the application, the court granted an injunction. There were certain affidavits introduced upon the hearing, and, as well, certain documentary evidence; but as the questions ³⁰⁹ which control this case arise under the facts hereinbefore stated, the consideration of this additional evidence is not necessary to a correct determination of this case.

1. The grant of this injunction, and the exception to its allowance, present for the adjudication of this court the question as to whether all creditors of an estate, either by judgment or otherwise, are so far in privity with an administrator thereof as that a judgment in favor of one of such creditors against the administrator is conclusive upon all questions adjudicated thereby as between himself and other creditors. It is a well-recognized and universal rule of law, that judgments unexcepted to and unreversed are, upon all matters which were or ought to have been adjudicated thereby, conclusive as between the parties thereto and their privies in estate. "Privity is defined to be," says Black on Judgments, volume 2, section 549, "a mutual or successive relationship to the same rights of property, and the common-law writers classify privies as privies in law, in blood, or in estate, sometimes adding, as a fourth class, privies in representation. But, for the purposes of a discussion of the doctrine of res adjudicata, this classification is of no practical importance. And, if a person is bound by a judgment as a privy to one of the parties, it is because he has succeeded to some right, title, or interest of that party in the subject matter of the litigation, and not because there is privity of blood, law, or representation between them, although privity of the latter sort may also exist. . . . The person who is to be thus connected with the judgment must be one who claims an interest in the subject affected, through or under one of the parties. Every person is a privy to a judgment whose suc-

cession to the rights of property thereby affected, coming through one or other of the parties, occurred subsequent to the commencement of the suit." "All privies are in effect (with reference to the operation of judgments), if not in ^{§10} name, privies in estate. They are bound because they have succeeded to some estate or interest which was bound in the hands of its former owner, and the extent of the estoppel, so far as the privy is concerned, is limited to controversies affecting this estate or interest. The manner in which the estate was lawfully acquired neither limits or extends the operation of the estoppel by a former adjudication, and is, therefore, immaterial. It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit": 1 Freeman on Judgments, 4th ed., sec. 162. The administrator is, in law, the personal representative of the deceased. He is, for all practical purposes involving the administration of his affairs, a legal substitute for the deceased. Clothed as a trustee with the duty of administering all the assets which may come into his hands, and applying the same under the statute of distributions, it is his duty to represent the estate in any litigation in which it may become involved, to prosecute suits in favor of, and defend suits against, the estate he represents. He is the party chosen of the law to whom these interests are committed. No person other than he, for and on behalf of the estate, can, in his own name, as matter of right, prosecute or defend a suit in which his estate is interested as plaintiff on the one hand or defendant on the other. The administrator, with respect to such matters, stands upon the same footing as the deceased. It will not be seriously insisted that a judgment rendered against a person in his lifetime, with due notice of the pendency of the action, fairly rendered, and to which no exception was by him taken, could thereafter be called in question by a creditor of such a person. No more can it justly be said that his estate would not be equally bound where ^{§11} a judgment, under similar circumstances, has been rendered against his administrator. In contests which arise between the administrator and third persons who are indebted to the estate, the administrator represents all persons who may be interested therein, either as heirs or creditors. As against persons preferring claims against the estate, the administrator likewise stands as the representative of the estate and its interests, for and on account of heirs at law and all other creditors. Through him alone can they reduce to

present possession any of the credits or assets of the deceased, or make the same available for the purpose of distribution. If this were not true, and, on the contrary, each individual creditor and heir at law were authorized in his own name to bring suits and collect assets, no man could afford to submit to a judgment rendered against him at the suit of an administrator; because the acquiescence therein might subject him to further suit at the instance of any other person who might conceive that he had a claim against the estate. So persons indebted to the estate could never pay the administrator, for fear some outside creditor, upon his own account, might bring a suit against them. To hold that each individual creditor might, upon his own behalf, proceed with the collection of his debt from the debtors of the estate without the intervention of the administrator, would involve the whole affair in the most inextricable confusion; for, if one creditor could so assert his right outside of the administrator, another could do so, and a man who was so unfortunate as to find himself the debtor of an estate, would, in every individual instance, be compelled to file a bill of interpleader to determine whether he should pay the money, and who was entitled to receive it. The law avoids all this confusion by nominating the administrator in advance as the stakeholder, and compels creditors through him, as against the estate and its debtors, ^{§12} to enforce their demands. It is only through the administrator that a creditor can compel the payment of debts due the estate, for the reason that there is no direct privity between individual creditors and debtors of an estate. The only privity existing between the administrator and a debtor of the estate is such as results from the pre-existing relation between the intestate and the debtor, and privity of some sort is essential to the maintenance of an action. Inasmuch as it is the duty of the administrator to collect the assets of the intestate, and inasmuch as outside creditors are not authorized to interfere with the collection of such assets, it is the corresponding duty of the administrator to defend all suits that may be brought against the estate. It thus being his duty for and on account of the estate to prosecute and defend such suits as its interest might seem to require, and he being not only a proper, but an indispensable, party thereto, it were ill to say that the judgment would have no binding force as against the estate. If it be binding upon the estate, it must, of necessity, be binding upon creditors who could have no interest except such as was derived from their privity with the administrator. An outside

creditor, if he can do so at all, can only interfere as a party in such litigation when he shows that, because of some wrongful act of the administrator, his debt is likely to be imperiled. So that in this case it was the duty of this administrator, when a creditor of the estate sought to subject this land, under a pre-existing judgment, to the payment of his debt, and when he conceived that he had good cause for so doing, to have filed this affidavit of illegality. It was his duty to have prosecuted it to a successful termination, if that could have been accomplished. Failing in that, the judgment overruling the affidavit of illegality must be taken as binding upon the administrator upon the point made in that affidavit; and inasmuch as no ³¹³ person other than the administrator has any right to interfere, then this complainant cannot be heard to impeach the judgment with which the administrator was himself satisfied. Of course, this whole argument proceeds upon the idea that this judgment was fairly rendered. If the administrator and one creditor permit a collusive judgment to be taken which may operate as a fraud upon other creditors, they may, for that reason, impeach and set it aside. Such creditors may also have their election to proceed against the administrator and his bondsmen. But in this case there is no intimation that this judgment is void for any such reason. If, without collusion with the plaintiff in execution, who is a creditor, the administrator negligently permit a judgment to be rendered against him to the prejudice of other creditors, then the administrator and his bondsmen might be answerable to such creditors. So far, however, as this record discloses, the administrator filed this affidavit of illegality in good faith, intending to insist upon it, but simply, for some reason not disclosed by the record, failed to be present when it was tried, and did not except to the rendition of the judgment thereon. He is simply in the situation of a defendant in execution who has permitted a judgment to be rendered against him by default. For this reason alone, a judgment cannot be impeached or set aside. If void for any other reason, that reason must be alleged and proved. The effect of this disposition of the affidavit of illegality is to adjudicate that the judgment which was enjoined was, as against the attack made by the equitable petition, a valid subsisting judgment, and entitled according to its priority to participate in the distribution of this estate. Upon this question the administrator, in behalf of all concerned, had been fully heard, and we hold that both heirs and creditors are concluded.

2. Where an affidavit of illegality is filed to an execution ³¹⁴ and, when the case comes on to be heard, the affiant in the affidavit of illegality does not appear, the proper practice is for the court to dismiss the affidavit of illegality, and not adjudicate upon its merits. If the court, however, proceed to final judgment upon the merits, such a judgment is not void; it is, at most, only irregular, and, if not excepted to, becomes binding as though in all respects regular. The practical effect, however, of the dismissal and an adjudication upon the merits of an affidavit of illegality is the same, for no second affidavit of illegality to the same execution for the same reason assigned in the first can ever be received. Therefore, as to questions made in the affidavit of illegality, where the same go to the validity of the judgment, it would make little practical difference whether the affidavit be dismissed or be adjudged upon its merits adversely to the party filing the same.

Judgment reversed.

JUDGMENT AGAINST ADMINISTRATOR, CONCLUSIVENESS OF.—A judgment against an executor or administrator, to be paid in due course of administration, will, in the absence of fraud, bind the personal estate: *Gold v. Bailey*, 44 Ill. 491; 92 Am. Dec. 190, and note; *Guice v. Sellers*, 43 Miss. 52; 5 Am. Rep. 476; though it would not be a lien upon the land, as he has no title to that: See monographic note to *Filley v. Duncan*, 93 Am. Dec. 356, on estates and interests affected by judgment lien. A judgment against an administrator who fails to plead a want of assets in an action upon an alleged debt against his intestate is conclusive upon him of a sufficiency of assets to pay such debt: *Gibson v. Robinson*, 90 Ga. 756; 35 Am. St. Rep. 250.

JUDGMENT—RES JUDICATA.—ACQUIESCENCE in a judgment, however manifested, constitutes what is decided by that judgment, *res judicata*: *Slocumb v. De Lizardi*, 21 La. Ann. 355; 90 Am. Dec. 740.

MAYOR AND ALDERMEN OF SAVANNAH v. MULLIGAN.

[95 GEORGIA, 223.]

MUNICIPAL CORPORATIONS—DESTRUCTION OF PROPERTY AS A NUISANCE—BURDEN OF PROOF.—If property in a city constitutes a nuisance endangering the public health and safety, the city may, in cases of emergency, if authorized by its charter to abate nuisances, destroy such property without making compensation to the owner, and without first obtaining a judicial determination that the property is a nuisance; but, unless the property is first condemned as a nuisance by appropriate proceedings, its destruction will be at the peril of the municipal authorities, and, when sued for its value, the burden is upon them of showing that it was in fact a nuisance, and that its destruction was really necessary for the public health and safety.

MUNICIPAL CORPORATIONS—DESTRUCTION OF PROPERTY AS A NUISANCE.—If the sanitary inspector of a city, under orders of its health officer, destroys a feather bed, pillows, and a mattress as a nuisance, the owner of the property cannot recover its value from the city, where it is empowered by its charter to abate nuisances, and where the evidence shows that the bedding had been used by a person having scarlet fever, a highly contagious disease. Such property being, in fact, a nuisance endangering the public health, its destruction is lawful.

Samuel B. Adams, for the appellant.

Gignilliat & Stubbs, for the appellee.

323 **SIMMONS, C. J.** This was an action against the municipal corporation of the city of Savannah for the value of a feather bed, pillows, and mattress destroyed by a sanitary inspector of that city, under orders of its health officer. On certiorari, the superior court ruled that the city was liable to the plaintiff, under section 2226 of the code; and to this ruling the city excepted. The section referred to is as follows: "Analogous to the right of eminent domain is the power, from necessity vested in corporate authorities of cities, towns, and counties, to interfere with, **324** and sometimes destroy, the private property of the citizen for the public good, such as the destruction of houses to prevent the extension of conflagration, or the taking possession of buildings to prevent the spreading of contagious diseases. In all such cases, any damages accruing to the owner from such acts, and which would not otherwise have been sustained, must be paid by such corporation."

We do not think the section above quoted is applicable to this case. Under the ruling of this court in *Dunbar v. City Council of Augusta*, 90 Ga. 390, a city having the power, under its charter, to abate nuisances endangering the public health and safety, may destroy property without making compensation to the owner, where the property constitutes a nuisance of that kind; and we think the decision in that case controls the present case. There the city authorities destroyed grain which had become wet and damaged by a flood while stored in the plaintiffs' warehouse; the plaintiffs sued the city for the value of the grain, and it was held by this court that, "it not being alleged in the declaration that the damaged grain condemned and destroyed by the municipal authorities . . . was not a nuisance, or was not dangerous to the public health, that being the ground on which it was condemned and destroyed, no cause of action against the municipality was set out in the declaration." *Bleckley, C. J.*, in delivering the opinion of the court, said: "To destroy property because it is a dangerous nuisance is not to appropriate it to a

public use, but to prevent any use of it by the owner, and put an end to its existence, because it could not be used consistently with the maxim, *Sic utere tuo ut alienum non laedas*." Section 2226 of the code, though not referred to in the opinion, was cited and relied on by counsel for the plaintiff in error in that case, and was not overlooked by the court in the consideration of the ³²⁵ case. An illustration of the class of cases to which this section applies will be found in the case of *Dawson v. Kuttner*, 48 Ga. 133, the only case we know of in which the section referred to had been construed. In that case, the plaintiff was held entitled to recover from the municipal corporation for property destroyed by the authorities thereof in attempting to prevent the spread of a fire; but the fire did not originate in, and had not extended to, the property in question at the time of its destruction.

In cases of emergency, the municipal authorities, if authorized by their charter to abate nuisances, are not bound, before ordering the destruction of property as a nuisance, to wait until the fact that the property is a nuisance is judicially determined. In such cases, the destruction may be ordered without a preliminary condemnation: See *Mayor etc. of Americus v. Mitchell*, 79 Ga. 807; *Dunbar v. City Council*, 90 Ga. 390, and cases cited. Unless, however, the property is first condemned as a nuisance by appropriate proceedings, its destruction will be at the peril of the municipal authorities, and, when sued for its value, the burden is upon them of showing that it was in fact a nuisance, and that its destruction was really necessary to the public health and safety.

In the present case, the evidence showed conclusively and beyond question that the property destroyed was in fact a nuisance endangering the public health, having been used as bedding by a person who had scarlet fever, a highly contagious disease; and the mayor and aldermen of the city, under its charter, had ample authority to abate the nuisance: Code, sec. 4875. Consequently, the destruction of the property was lawful, and the owner was not entitled to recover its value from the city.

Judgment reversed.

MUNICIPAL CORPORATIONS—POWER TO DESTROY PROPERTY CONSTITUTING A NUISANCE.—When the use of property constitutes a nuisance, the legislature may destroy it: *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305; *Lawton v. Steele*, 119 N. Y. 226; 18 Am. St. Rep. 813; and so may a municipal corporation, even without statutory authority, if the nuisance cannot be otherwise abated: *First Nat. Bank v. Sarile*, 129 Ind. 201; 28 Am. St. Rep. 185. The abate-

ment of a nuisance, without first resorting to judicial proceedings, may be authorized by statute: *Lawton v. Steele*, 119 N. Y. 228; 16 Am. St. Rep. 813. A municipal corporation cannot declare that to be a nuisance which is not such in fact; and, if it, acting under a general power to abate and prevent nuisances, abates that as a nuisance which is not such in fact, it does so at its peril, but is not liable if a nuisance in fact exists: *Orlando v. Pragg*, 31 Fla. 111; 34 Am. St. Rep. 17, and note. The legislature may authorize the destruction of unhealthy houses as nuisances, without liability to the owner: *Theilan v. Porter*, 14 Lea, 622; 52 Am. Rep. 173. A city may, without liability, demolish a wooden dwelling-house, which, by reason of the combustible nature of its materials, and the disorderly character of its occupants, endangers the lives, health, and property of neighboring residents. So, a dwelling-house, cut up into small apartments, inhabited by a crowd of poor people, in a filthy condition, and calculated to breed disease, is a public nuisance, and may be abated, even by private individuals residing in the neighborhood, by tearing it down, especially during the prevalence of a disease like the Asiatic cholera: *Fields v. Stokley*, 99 Pa. St. 306; 44 Am. Rep. 109, and note. But, to justify such extreme measures, the act of destruction must be necessary to the abatement. If public authorities, such as municipal boards of health, abate that as a nuisance which is not such in fact, they are subject to the same liabilities as an individual guilty of a like wrong: Note to *Fields v. Stokley*, 44 Am. Rep. 111; *People v. Board of Health*, 140 N. Y. 1; 37 Am. St. Rep. 522; monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 546, on quarantine and health laws and regulations.

COMER v. DUFOUR.

[96 GEORGIA, 376.]

BANKS — FAILURE TO PRESENT CHECK WITHIN A REASONABLE TIME, EFFECT OF.—If the holder of a bank check neglects to present it for payment within a reasonable time, and the bank fails between the time of drawing and the presentation of the check, the drawer is discharged from liability to the extent of the injury he has sustained by such failure, and an indorser is discharged absolutely.

BANKS — PRESENTATION OF CHECKS — REASONABLE TIME.—What is a reasonable time in which to present a check to a bank for payment depends upon circumstances, and the relation of the parties between whom the question arises. When the facts are undisputed, the question is one of law, to be determined by the court.

BANKS—PRESENTATION OF CHECK RECEIVED AT DISTANT PLACE.—If a check is received at a place distant from the place where the bank upon which it is drawn is situated, and is forwarded by due course of mail to a person in the latter place for presentation, the person to whom it is thus forwarded has until the close of banking hours on the next secular day after he has received it to present it for payment, unless there are special circumstances which require him to act more promptly.

BANKS — PRESENTMENT OF CHECK — ALLOWING DRAWEE TO RETAIN FUNDS.—The holder of a check, after having once presented it, cannot derive any advantage from the fact that he could, without being chargeable with unreasonable delay, have held it longer before making presentment. The first presentment fixes the

rights of the parties. If the drawee is then ready and willing to pay, and the holder allows the fund to remain longer in the hands of the drawee, he does so at his peril.

BANKS — EFFECT OF TAKING SUBSTITUTED CHECK, AND OF DELAY IN ITS PRESENTMENT.—If the holder of a check accepts, in lieu of money, a check of the drawee, he does so at his peril. If such acceptance does not, of itself, discharge an indorser of the original check, the indorser should certainly be held discharged, if the substituted check is not presented promptly, and the collection is thereby defeated. Such presentment cannot be delayed, at the risk of the indorser, for any time beyond that within which, with reasonable diligence, the presentment can be made.

BANKS — DELAY IN PRESENTMENT OF SUBSTITUTED CHECK—DISCHARGE OF INDORSER—DIRECTION OF JUDGMENT.—If a bank cashes a check after its indorsement by an accommodation indorser, and sends it, for collection, to its correspondent in the city where the bank upon which the check was drawn is located, and it, with a number of other checks, is there presented to the drawee for payment, but the runner of the correspondent accepts in payment of all these checks a small sum of money and the drawee's check upon another bank in the same city, which, if promptly presented, would be paid, but which is held by the runner, or the bank he represents, for two hours or more, during which time the original drawee fails, and in consequence of which the substituted check is dishonored, the bank which cashed the original check cannot hold the indorser of that check liable for the amount thereof, though, after the substituted check was dishonored, the original check was reclaimed by replevin, duly protested for nonpayment, and returned to the bank which cashed it. Under such circumstances, the lower court will be directed to render a final judgment in favor of the defendant.

Lawton & Cunningham and H. W. Johnson, for the appellant.

Gignilliat & Stubbs, for the appellee.

377 SIMMONS, C. J. The receiver of the Central Railroad and Banking Company (of which the Central Railroad Bank is a part) brought suit in a justice's court against J. A. Dufour, upon a check for \$75, dated at Baltimore, January 9, 1892, upon J. J. Nicholson & Sons, bankers, by S. H. Brosius, payable to the order of A. M. Brosius, and indorsed by A. M. Brosius and by J. A. Dufour, which check had been protested for nonpayment. The case was submitted upon an agreement as to facts, and the justice rendered judgment in favor of the plaintiff. A writ of certiorari to this judgment was sustained by the superior court, and the case remanded to the justice's court for a new trial. To this ruling the plaintiff excepted. The facts agreed on were as follows: On January 11, 1892, defendant, accompanied by A. M. Brosius, went to the Central Railroad Bank and requested the assistant cashier, Ulmer, to cash the check in question. Brosius being a stranger to Ulmer, he told defendant he could not cash the check unless it was indorsed by him.

Defendant thereupon indorsed it, and it was cashed. On the same day it was forwarded by mail by the Central Railroad Bank to its correspondent in Baltimore, the Citizens National Bank, for collection. The Citizens National Bank received it, and acknowledged the receipt on January 14, 1892, and on the same day, about 11 o'clock, by its regular runner, presented this check, with other checks and drafts on J. J. Nicholson & Sons, to said firm for payment; the aggregate of all the checks and drafts so presented being \$1,748. The runner accepted \$48 in cash and the uncertified check of J. J. Nicholson & Sons on the Western National Bank for \$1,700 in payment for the checks and drafts presented; the custom of Nicholson & Sons being to give their check for the hundreds, and cash for the balance, unless, for any reason, cash or certified check for the ³⁷⁸ whole amount were demanded. The checks and drafts so presented to Nicholson & Sons, including the check in question, were canceled by them and charged up to the drawers thereof. The check-book of Nicholson & Sons showed that three or four checks (including one for about \$1,900 and another for about \$2,200), drawn by them on the Western National Bank after the check for \$1,700 was delivered to the runner of the Citizens National Bank, were paid by the Western National Bank before the \$1,700 check was presented to it, said check not having been so presented at any time before half-past one o'clock. Banking hours in Baltimore were from nine to three o'clock in the day. The Western National Bank was three squares from the bank of Nicholson & Sons, and nearly seven squares from the Citizens National Bank; it was not over five minutes' walk from the first place and ten minutes from the latter. Nicholson & Sons failed about 1:45 o'clock of said day, and the Western National Bank refused payment of the check drawn by them for \$1,700. The Citizens National Bank replevied the checks and drafts which its runner had delivered to Nicholson & Sons, after 2 o'clock, and during that afternoon protested all of them for nonpayment, and, on the next day, returned to the Central Railroad Bank the check sued on here.

1. If the holder of a bank check neglects to present it for payment within a reasonable time, and the bank fails between the time of drawing and presentation of the check, the drawer is discharged from liability to the extent of the injury he has sustained by such failure; an indorser is discharged absolutely: *Daniels v. Kyle*, 1 Ga. 304; 5 Ga. 245; 2 Morse on Banks and Banking, 3d ed., secs. 421, 422. What is a reasonable time will

depend upon circumstances, and the relation of the parties between whom the question arises. When the facts are undisputed, the question is one of law to be determined ³⁷⁹ by the court. If the check is received at a place distant from the place where the bank upon which it is drawn is situated, and is forwarded, by due course of mail, to a person in the latter place for presentment, the person to whom it is thus forwarded has until the close of banking hours on the next secular day after he has received it to present it for payment, unless there are special circumstances which require him to act more promptly: 2 Morse on Banks and Banking, 3d ed., sec. 421; Daniel on Negotiable Instruments, 4th ed., sec. 1591. The holder cannot, however, after having once presented the check, derive any advantage from the fact that he could, without being chargeable with unreasonable delay, have held it longer before making presentment. The first presentment fixes the rights of the parties. If the drawee is then ready and willing to pay, and the holder allows the fund to remain longer in the hands of the drawee, or if he accepts in lieu of money a check of the drawee, he does so at his peril: 2 Morse on Banks and Banking, 3d ed., sec. 426; 2 Daniel on Negotiable Instruments, 4th ed., sec. 1593; Simpson v. Pacific Mut. Life Ins. Co., 44 Cal. 139; Anderson v. Gill, 79 Md. 312; 47 Am. St. Rep. 402. If his acceptance of the drawee's check does not of itself discharge an indorser of the original check, the indorser should certainly be held discharged if the substituted check is not presented promptly and the collection is thereby defeated. Such presentment cannot be delayed at the risk of the indorser for any time beyond that within which, with reasonable diligence, the presentment can be made. In this case, it appears that presentment of the substituted check could have been made in about five minutes from the time it was received, the bank upon which it was drawn being only three squares distant from the bank of J. J. Nicholson & Sons, the drawees of the original check; but it was not presented for two hours and a half or more after it was received by the collecting bank, and, ³⁸⁰ by reason of this delay, the collection was defeated. Under these circumstances, we think the collecting bank failed to exercise due diligence, and its principal, the plaintiff in this case, was not entitled to recover against the defendant, the indorser of the original check. In the case of Gill v. Anderson, 79 Md. 312; 47 Am. St. Rep. 402, under circumstances almost identical with these, the drawer of the check sued upon was held discharged. In that case, as in the present case,

the original check was drawn upon J. J. Nicholson & Sons, and was presented to them on the day of their failure, about 11 o'clock A. M., and their check upon the Western National Bank received in lieu of it, and not presented until after the failure, though presented within banking hours of the same day. In that case, also, the original check was recovered from Nicholson & Sons, and protested on the same day, but it was held that this made no difference; that although the collecting bank was not bound to have made demand upon Nicholson & Sons when it was made, still, having made it, and by its own choice not having received the cash, it could not, if it had not used due diligence, claim the right to undo what it had done, and by a subsequent demand put itself in the position it would have occupied had it not made the first demand at the time it did make it, or done the act it then did. A full discussion of the subject, with numerous citations of authority, will be found in the opinion of the court in that case: See, also, *Smith v. Miller*, 43 N. Y. 171; 3 Am. Rep. 690; 52 N. Y. 545; *Merchants' Nat. Bank of New York v. Samuel*, 20 Fed. Rep. 664; *People v. Cromwell*, 102 N. Y. 477; also, cases cited in note to *Anderson v. Gill*, 47 Am. St. Rep. 402, and 25 Law. Rep. Ann. 200, 201.

2. The facts of this case, as above stated, having been agreed upon by the parties, direction is given that the superior court render a final judgment in favor of the defendant: See Code, sec. 218, par. 2, p. 4284; *Central R. R. Co. v. Kent*, 91 Ga. 693.

Judgment affirmed, with direction.

BANKS — PRESENTMENT OF CHECKS — SUBSTITUTED CHECKS.—A bank check should be presented for payment within a reasonable time. If not so presented, and the bank fails, the payee must suffer the loss, if the drawer has moneys on deposit sufficient to pay it. But laches in the presentment of a check does not discharge the drawer from liability thereon, except to the extent that he has suffered injury thereby: *Industrial Trust etc. Co. v. Weakley*, 103 Ala. 458; 49 Am. St. Rep. 46. What constitutes a reasonable time generally depends upon the circumstances of the case, and the relations which exist between the parties: Note to *Anderson v. Gill*, 47 Am. St. Rep. 413. If the holder of a check and the banker upon whom it is drawn reside in different places, the check must, in the absence of special circumstances, be forwarded by mail for presentment on the day, or on the next secular day after, it is received, and the agent or person to whom it is forwarded must, in like manner, present or forward it on the day, or on the next secular day after, he receives it in due course of mail; otherwise, the drawer or indorser will be released: *Gifford v. Hardell*, 88 Wis. 538; 43 Am. St. Rep. 925, and note. If the facts are undisputed, the question as to whether proper diligence has been exercised in presenting a check for payment is a question of law. The indorser of a check not presented for payment within a reasonable time

is released from liability: *Anderson v. Gill*, 79 Md. 312; 47 Am. St. Rep. 414, and note; *First Nat. Bank v. Miller*, 37 Neb. 500; 40 Am. St. Rep. 499; and, under some circumstances, the maker is released: *Scroggin v. McClelland*, 37 Neb. 644; 40 Am. St. Rep. 520; *Anderson v. Gill*, 79 Md. 312; 47 Am. St. Rep. 402, and note. The rule allowing the holder of a check until the close of banking hours on the next secular day in which to present it for payment does not apply to a substituted check given by the drawee to the payee of the original check, or his agent, upon its surrender. No time is fixed in which the holder of a substituted check taken upon the surrender of the original check to the drawee thereof must present it for payment, in order to hold the original drawer. Each case must depend on its own peculiar facts, and diligence will sometimes require presentment to be made within the period which would ordinarily limit the drawee's liability, but in no case can it be extended beyond that period. If the payee of a check drawn on a banker having funds of the drawer available to cash it presents it in due time, through his collecting agent, and the latter, instead of receiving money for it, surrenders it, and takes in lieu of the money the drawee's own check upon another bank having funds with which to pay the substituted check, and then fails to use the utmost diligence in presenting the substituted check for payment, which, when it is presented, is not paid, because of the supervening insolvency and suspension of the drawer of the substituted check, the loss must fall, as between the drawer and payee of the original check, upon the latter and not upon the former. So, the holder of a check need not hurry to make presentment for payment on the same day it is received, but if he does so, it fixes the rights of the parties. He cannot then change his mind and leave the funds at the drawee's risk until the next day. If he, on the first presentment, takes a substituted check on another bank in lieu of cash, it amounts to payment, and if the drawee fails on that day, the payee cannot, after neglect to use the utmost diligence in presenting the substituted check for payment, put himself, by a subsequent demand upon the original drawee, in the same position he would have occupied had he not made the first demand: *Anderson v. Gill*, 79 Md. 312; 47 Am. St. Rep. 402.

APPEAL—DIRECTING JUDGMENT.—If the supreme court is able, from an examination of the admitted facts, to direct judgment, it will do so without sending the case back for a new trial: *Taylor v. Bleakley*, 55 Kan. 1; 49 Am. St. Rep. 233.

MERCHANTS' NATIONAL BANK v. CARHART. CARHART v. MERCHANTS' NATIONAL BANK.

[96 GEORGIA, 204.]

BANKS—LOSS OF SPECIAL DEPOSIT THROUGH ACT OF EMPLOYEE.—It is incumbent upon a bank, where the loss of a special deposit occurs through the negligence or dishonesty of one of its employees, to show reasonable care and circumspection on its part, both as to the selection of such employee in the first instance, and as to his subsequent retention in a position of trust.

BANKS—LOSS OF SPECIAL DEPOSIT—BURDEN OF PROOF. If a special deposit of property for gratuitous safekeeping is made with a bank, which, through its cashier, issues a receipt therefor, specifying that the same is held subject to the order of the depositor, and which receipt the cashier is authorized to issue, the depositor, in an action against the bank for the value of the deposit, makes out a prima facie case by introducing the receipt in evidence and proving the bank's failure to deliver the property on demand; and this casts upon the defendant the burden of showing that it had exercised at least slight diligence in the care and keeping of the property.

BANKS—THEFT OF DEPOSIT BY CASHIER—CARE REQUIRED OF BANK.—If a special deposit of property for gratuitous safekeeping, made with a bank, is stolen by its cashier, it cannot exonerate itself from liability by showing that it exercised due diligence in selecting the cashier. To escape liability the bank must show affirmatively that, during the whole term of the bailment, it exercised, at least, a slight, continuing supervision over the cashier; that, in doing so, no indication of dishonesty, or other reason for distrusting him, appeared; and that it was not guilty of gross negligence in retaining him after it knew, or ought to have known, in the exercise of slight diligence, that he was, or had become, unworthy of trust. This is not shown by proof that, up to a given time, three or more years previous to the discovery of the theft, his reputation was good, and that "he stood in the community for honesty and integrity as high as any man."

BANKS—THEFT OF DEPOSIT BY CASHIER—DILIGENCE, HOW MEASURED.—If a special deposit in a bank is stolen by its cashier, the question as to whether or not the bank observed that degree of diligence which was due the plaintiff is not dependent upon the question whether or not, under similar circumstances, it trusted its cashier with its own property of like kind, and it is not error to refuse a charge making it so dependent. What the bank ought to have done, in order to come up to the measure of diligence required by law, cannot be arrived at by showing what it actually did in other matters relating to its own affairs.

Assumpsit. There was a verdict for the plaintiff, and the bank appealed.

Erwin, du Bignon & Chisolm and Barrow & Osborne, for the appellant.

C. N. West and J. R. Saussy, for the appellee.

LUMPKIN, J. The case now before us is quite similar to that of the Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 93 Ga. 503, 44 Am. St. Rep. 182, in which this court dealt at length with the duties and liabilities incurred by a bank in accepting

from one of its customers a special deposit under circumstances which, in law, would create a gratuitous bailment. In view of the elaborate discussion of the subject then entered into, it will not be necessary in this opinion to again cite the numerous authorities in support of the rule that it is incumbent upon a bank, in order to vindicate its diligence where the loss of a special deposit occurs through the negligence or dishonesty of one of its employes, to show reasonable care and circumspection on its part, both as regards the selection of such employe in the first instance, and as to his subsequent retention in a position of trust. Our present endeavor will therefore be simply to show the application of this rule to the facts of the case at bar.

1. The plaintiff having satisfactorily proved authority on the part of the defendant's cashier to receive and receipt for the special deposit in question, a *prima facie* case was made out by then introducing in evidence the receipt given by the cashier, and proving a failure to deliver the property on demand. Under section 2064 of the code, the burden would thus be cast upon the defendant of showing it had exercised at least slight diligence in the care and keeping of the property.

2. The defendant sought to escape liability, on the ground that the loss of plaintiff's property was sustained through no negligence on its part, but was due solely to ³⁹⁶ the wrongful conduct of its defaulting cashier, who had embezzled, not only the special deposit of the plaintiff, but also a considerable amount of valuable property belonging to the bank itself. In support of this defense, evidence was introduced to show that all requisite diligence had been observed in the selection of the cashier; that he had remained in the service of the bank many years, and had gained the implicit confidence of its managing officers; and that up to about three years previous to the discovery of the theft, his reputation was not merely good, but "he stood in the community for honesty and integrity as high as any man." No definite account, however, was given of the cashier, either as to his reputation or conduct, during the three years next preceding the discovery of his defalcation. It does not appear that during this period any effort was made on the part of the officials of the bank to inquire into, or even casually scrutinize, the conduct or habits of the cashier and determine for themselves his true character for honesty and integrity, or to exercise even a slight supervision over the important affairs with which he was intrusted. On the contrary, it would seem that they allowed themselves to be lulled into a state of tranquil inactivity by the sense of

fancied security they derived from the assumption, that as he had in the past proved faithful to his trust, he must surely remain equally trustworthy in the future.

In the argument before us, it was earnestly insisted by counsel for the plaintiff in error, that the officials of the bank had done all that could reasonably be expected of them in regard to informing themselves as to the real character of the cashier; for, as was argued, it having been once definitely ascertained by them that his reputation for honesty and integrity was above suspicion, they had a right to rely upon the presumption of law that he would remain honest and reliable. While this contention is ~~not~~ ingenious and was strongly stated, it cannot be accepted as sound. Presumptions of this kind are raised by law as mere rules of evidence, and have no application whatever to the conduct of men in the ordinary affairs of life, being designed merely to expedite and assist judicial investigation, and not being intended to influence or justify the acts, or omissions to act, of those upon whom is devolved the performance of legal duties, nor to set up a standard by which their diligence shall be measured and tested. The application of these rules of evidence in the conduct of every-day business affairs would often lead to absolute absurdities. For instance, how could it be said that a banker, implicitly relying upon the vague presumption of law that everyone is honest until the contrary is shown, would be justified in piling up money intrusted to his care in the middle of the street, and leaving it there to take care of itself?

We cannot reach the conclusion that the showing of diligence made by the defendant in the present case reasonably met the requirements of the law. The rule, as laid down by the supreme court of the United States in *Preston v. Prather*, 137 U. S. 604, and as universally recognized, is that: "Persons depositing valuable articles with banks for safekeeping, without reward, have a right to expect that such measures will be taken as will ordinarily secure them from burglars outside and from thieves within; that whenever ground for suspicion arises, an examination will be made to see that they have not been abstracted or tampered with; that competent men, both as to ability and integrity, for the discharge of these duties will be employed; and that they will be removed whenever found wanting in either of these particulars."

The requirement that not only must due diligence be observed in selecting a cashier in the first place, but that some degree of supervision over him, with a view to ascertaining whether he

should be retained, ought to be ³⁰⁸ exercised, is by no means a harsh one. Indeed, the rule of diligence applicable to banks is a very material modification in their favor of that governing ordinary bailees. Usually, where a bailee is intrusted with valuable property, he cannot shift his responsibility of accounting for it by showing that a wrongful conversion of the property was committed by another person, to whom he delegated the duty imposed upon himself alone; for, as a general rule, he would be held to have employed such other person at his own peril, and every act of his agent would, in law, be the act of himself.

It is only that the law looks to the intention of the parties, where property is deposited with a bank for safekeeping, that the strict rule as to bailments is relaxed, and a bank is allowed to discharge itself from liability by showing that, although loss occurred through the dishonesty of its agents, it had itself exercised due care and circumspection, both as to their selection in the first place, and as to their retention in office thereafter. A corporation can act only through its agents; and it is evident that when a person makes a special deposit with a bank, he understands that his property must, of necessity, be placed in the keeping of employes in the service of the corporation. Therefore, he is held to tacitly agree that he will not attempt to hold the bank responsible for loss, if it in good faith takes all reasonable precautions in having suitable and competent agents to discharge the trust delegated to it. However, it is not true that, in such case, the depositor consents that the duty raised by the bailment may be shifted upon the shoulders of persons other than the bailee; this duty remains owing by the bailee alone. The depositor simply assents to the employment by the bailee of agents to aid it in the performance of such duty; the effect of which is merely to change the test of liability resting upon the bailee in case of loss.

³⁰⁹ The court below fully, but concisely, charged the jury as to the manner in which the defendant could vindicate its diligence in regard to the employment and retention of its cashier. The only possible objection to the charge we have been able to discover is, that the judge instructed the jury, in effect, that it was incumbent on the bank to show that, during the whole term of the bailment, it had exercised at least a slight supervision over its cashier, and that in so doing no indications of dishonesty, or other reason for distrusting him, had appeared. After careful reflection, we feel safe in reaching the conclusion that this was not stating the rule too strongly against the defendant. The

duty imposed by law upon a bank to remove from its service an employé who has become wanting either in ability or integrity, necessarily comprehends the incidental requirement of maintaining a reasonable surveillance or supervision over such employé; else, how is the bank to know when such duty of removal arises? Certainly, where a bank is called upon to explain its nonobservance, it cannot be deemed a sufficient answer that the bank failed to comply with this duty simply because it was not aware that the time for its observance had arrived, when it was within the power of the bank, by the exercise of but slight diligence, to have fully informed itself that the necessity to act, and to act promptly, was at hand. The duty of a bailee to provide competent agents to care for the property of the bailor may be analogized to the similar obligation resting upon a master to provide suitable coemployés when a servant is expected to work in connection with others. This court recognized that a master's duty in this regard did not cease with simply providing in the first place competent fellow-servants, when in *McDonald v. Eagle etc. Mfg. Co.*, 68 Ga. 839, the rule was laid down that: "A principal is not liable for the negligence of a fellow-servant in the ⁴⁰⁰ same job, unless the principal himself was negligent in not using ordinary diligence in selecting the fellow-servant, or in retaining him after knowledge of incompetency or negligence." Such is the rule which likewise obtains in many other jurisdictions. Thus, where an agent, competent and skillful at the date of his hiring, subsequently acquires the habit of intoxication, the master is guilty of negligence if he retains such agent with knowledge of that fact: *Laning v. New York Cent. R. R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417; *Ochapman v. Erie Ry. Co.*, 55 N. Y. 579; *Huntington etc. R. R. Co. v. Decker*, 84 Pa. St. 419; *Ohio etc. Ry. Co. v. Collarn*, 73 Ind. 261; 38 Am. Rep. 134. And mere lack of actual knowledge of the servant's unfitness will not necessarily excuse the master; he cannot shut his eyes and claim exemption from liability, but must use the proper degree of diligence in keeping informed of the servant's habits and conduct. In *Gilman v. Eastern R. R. Corp.*, 10 Allen, 233, 87 Am. Dec. 635, it was held, "if the switchman was an habitual drunkard, and this fact was known, or ought to have been known, to the corporation, and the injury resulted from his intoxication, the corporation is responsible." The same rule was announced in *Chicago etc. R. R. Co. v. Sullivan*, 63 Ill. 293, *Scott, J.*, saying: "Whether O'Keefe was a careful and competent man when he was first employed by the company

is not now a material inquiry. The controlling question is, whether he was an unfit person for his position at the time of the injury to Sullivan, and whether the company knew of his incapacity, or could have known it by the exercise of reasonable diligence." Certainly, it is all important that a bank should keep a reasonable supervision over such of its employes as occupy positions offering the temptation and the means to do wrong; for, as already intimated, without the maintenance of some surveillance, the duty of removing such employes when they ⁴⁰¹ become deficient or unreliable could seldom be known or performed until too late to shield from loss the persons for whose protection the duty is imposed by law.

3. The fact that the defendant bank intrusted its own money and other property to the safekeeping of its defaulting cashier, and, in consequence, itself suffered a heavy loss through his speculations, is one which the jury might very properly consider in arriving at a conclusion concerning the good faith and diligence observed by the bank's officials. However, this solitary fact could not properly serve as the test upon which the liability of the bank should be made to depend. What the bank ought to have done in order to come up to the full measure of diligence required by the law, could not be arrived at by showing simply what it actually did in other matters relating to its own affairs. Indeed, the officials of the bank might have been grossly negligent concerning the care bestowed upon its own property; and it could not excuse its negligence in regard to the duty owing to its customers by showing it had been equally negligent in failing to properly look after its own affairs. The question is not a new one, but has been repeatedly passed upon by other courts of unquestionably high standing, as came to the notice of the writer when he made a thorough and laborious research of the authorities preparatory to writing an opinion in *Merchants' Nat. Bank v. Guilmartin*, when it made its first appearance before this court: See 88 Ga. 797. We confidently assume that our ruling upon this question will be readily accepted as correct without further citation of authority.

4. In none of the numerous grounds of the motion for a new trial filed by the plaintiff in error have we discovered error which would require or justify a reversal of the judgment of the court below denying another hearing. We cannot attempt the laborious task of dealing specifically with each of the alleged errors complained ⁴⁰² of, and have confined this discussion to such questions only as control the case upon its substantial merits.

As will have been seen by the foregoing brief but exhaustive statement of the evidence relied on by the defense to rebut the prima facie case of liability made out by the plaintiff, the defendant bank utterly failed in its attempt to prove due compliance with the requirements of the law as to diligence. Indeed, under the evidence submitted upon this issue, which was the main defense relied on by the bank, the jury would not have been warranted in finding other than they did. As to all other issues involved in the case, the verdict of the jury is amply sustained by the record before us, and could not properly be set aside.

Judgment on main bill of exceptions affirmed.

Cross-bill of exceptions dismissed.

BANKS—LOSS OR THEFT OF GRATUITOUS SPECIAL DEPOSITS.—The duty of a bank in protecting and keeping safely a gratuitous special deposit requires it to exercise only slight care and diligence. It is liable only for a want of that degree of care and diligence which is termed "gross negligence"; and the question, in case of loss, turns on the question as to whether there was, or was not, gross negligence in taking care of the property: *Merchants' Nat. Bank v. Guilmartin*, 93 Ga. 503; 44 Am. St. Rep. 182; *Gray v. Merriam*, 148 Ill. 179; 39 Am. St. Rep. 172. Where a gratuitous special deposit in a bank has been stolen by its cashier, the first inquiry is, in determining whether the bank exercised "slight care and diligence" in caring for and keeping the deposit, Was the cashier at the time of his original selection and employment a fit, proper, and trustworthy person for such position, so far as the bank, in the exercise of slight diligence, could ascertain and determine. If he was, the next inquiry would be, Did the bank, at any time before the theft, know, or have cause to suspect, that he had become, or was likely to become, untrustworthy? The bank is bound to exercise slight diligence all along during the time of his employment. The burden of proof, after proof of loss, is on the bailee to show that it exercised slight diligence, but this is not established by showing merely that the officers of the bank treated the bailor's property in the same manner that they treated the property of the bank: *Merchants' Nat. Bank v. Guilmartin*, 93 Ga. 503; 44 Am. St. Rep. 182, and note.

MARIL v. CONNECTICUT FIRE INSURANCE COMPANY.

[95 GEORGIA, 604.]

INSURANCE — PAROL EVIDENCE — “WATCHMAKER’S MATERIALS.”—If a policy of insurance, after covering “watches, diamonds, clocks,” etc., specifically, includes “watchmaker’s materials,” and there is nothing in the policy to indicate what that term means, it must be classed as an ambiguous expression, which may be explained by parol evidence, in order to apply the policy to the subject of the insurance.

INSURANCE—WRITTEN AND PRINTED CONDITIONS.—If, in a policy of insurance, there is a conflict between the written statement of the subject of insurance and the printed conditions of the policy, the former must prevail.

INSURANCE—CONDITIONS—INFLAMMABLE SUBSTANCES.—A recovery, in case of loss, may be had upon a policy of fire insurance which covers a stock of material used in a particular business, and which contains a printed condition that prohibited the keeping and use of certain inflammable substances upon the premises, although they were, in fact, there kept and used, if it appears that their use was a necessary, usual, and customarily incident to such business, and that they were kept only in such quantities, and used only in such a manner, as must necessarily have been in contemplation of the parties at the time the policy was issued.

INSURANCE—INFLAMMABLE SUBSTANCES.—In an action upon a policy of fire insurance, covering the materials of a certain business, where the policy contains a printed condition prohibiting the keeping and use of certain inflammable substances, a recovery may be had if the business insured was of such a character that some of such substances constituted component parts of the stock of materials used in such business, as the policy itself would then cover such inflammable substances, notwithstanding the condition.

Action on a fire insurance policy. The policy was written upon “watches, jewelry, diamonds, silver and plated ware, clocks, musical instruments, fancy goods, bric-a-brac, and other merchandise usual to a jewelry stock in and out of safes,” and “watchmaker’s material,” while it was all contained in a certain three-story brick, metal-roofed building. The policy, on its face, provided that it should be void if the risk was increased by any means within the control of the assured, or if benzine, gasoline, petroleum, or crude earth or coal oils were kept or used on the premises without written consent. It also contained this clause: “Kerosene oil, if of the legal standard, may be used for lights; lamps to be filled by daylight only; one barrel may be kept on the premises for this purpose; and may also be kept for sale in stores, in quantities not exceeding five barrels at any one time; if kept in greater quantities, without written consent, the policy shall be void.” A fire occurred on the premises, and a loss ensued. There was an amended official report, containing the evidence, sent up with the case. The material parts of this evidence are stated in the opinion. After the plaintiff had put in his testi-

mony, the defendant moved for a nonsuit. The plaintiff then offered to testify as stated in the opinion. The court refused to admit this testimony, and granted the nonsuit. The plaintiff excepted.

Garrard, Meldrim & Newman, for the appellant.

Denmark & Adams, for the appellee.

*** ATKINSON, J. With the addition that evidence was introduced showing that proofs of loss were submitted to the defendant company within the time prescribed, and a demand for payment made in writing; that the demand was never complied with; that suit was brought within the time limited by the policy, and proof made that from three hundred to three hundred and fifty dollars would be a proper allowance for counsel fees for the prosecution of this litigation, the facts as stated in the official report are sufficiently full for the determination of the questions made in this record. It will be seen from an examination of the official report, as amended supra, that the plaintiff proved his loss, the submission of proofs of loss, a demand for payment in accordance with the terms of the policy sued upon, and the value of counsel fees; and closed. A motion for nonsuit was made, upon what ^{¶10} special grounds does not appear in the record; but we may presume, from the line of argument pursued here and the fact that the plaintiff made such a case as would undoubtedly have authorized a finding for him, that the motion for nonsuit was predicated upon the ground that the plaintiff had rendered void his policy of insurance by keeping and using upon the premises occupied by him benzine and kerosene, contrary to the conditions of his policy of insurance, which prohibited the same. The evidence showed that in his store the assured kept a small quantity each of kerosene and benzine, of the former all told, including that in lamps, about one gallon, of the latter about one pint or a little more. None of either was destroyed by fire. After the court had signified its intention to grant a nonsuit, but before the order to that effect had been taken, the plaintiff offered to prove, in addition to the evidence already submitted, that at the time the insurance was effected, he was carrying on a jewelry business, selling and repairing watches and clocks; that he intended to continue such business, and this fact was known to the defendant; that in the conduct of this business, and as a part of a watchmaker's material, and as incidental, usual, customary, and naturally pertaining to the stock and business, kerosene and benzine were used in small and reasonable quantities in cleaning

the works of watches and clocks, the kerosene being used in part in a student's lamp (kept in the store); and that said benzine and kerosene did not cause the fire, nor contribute to it, and were not even consumed in whole or in part by the fire. This testimony was repelled by the court as being inconsistent with the contract as expressed in the policy; whereupon, the court granted a nonsuit, and to this judgment exception is taken.

We are not now to consider whether, in view of the very trifling and inconsiderable quantities in which the ⁶¹¹ prohibited inflammable substances were used and kept, and the fact that they were so kept as not materially to have affected the risk of the insurer, or in any manner to have contributed to the loss, the court would, in the first instance, have been authorized to grant a nonsuit; but whether, with the supplemental evidence offered, it should have done so. The first question to consider is, whether the testimony offered was competent. The contract of insurance was in writing, and the rule of law is, that parol evidence is inadmissible to add to, take from, or vary the terms of an unambiguous written contract; and the kindred rule to this is, that if the written agreement appears from its terms to be so ambiguous as not fully to express the contract between the parties, parol evidence is admissible to explain such ambiguity. If the written agreement is full, explicit, and unambiguous, it must be taken as conclusively representing the real contract between the parties, and neither will be permitted by parol to in any manner vary its terms. If, for want of fullness of statement, the contract be indefinite or uncertain, parol evidence is admissible, not to vary, add to, or take from the contract, but to explain and so illuminate it as to make the real intention of the parties apparent. It will be seen by an examination of its provisions that the policy of insurance covers a number of articles specifically, including watches, diamonds, clocks, etc., and finally, by the use of the words "watchmaker's materials," such articles as would be comprehended within that general descriptive term. In order to determine what was covered, or by the parties intended to be covered, by that general term, it is necessary to inquire somewhere what it means. No index to its meaning is afforded by any other expression contained in the policy; there is nothing in that instrument to indicate what the parties intended should be its meaning. It is, therefore, an expression which must be classed ⁶¹² as ambiguous, and, being ambiguous, parol evidence is admissible to explain its meaning. The plaintiff offered to prove that both kerosene and benzine in reasonable quantities

were used in his business as a part of a watchmaker's material, and that their use as such was necessary, customary, and usual in the conduct of such business; that he was engaged in the conduct of this business at the time this insurance was effected, and that the defendant knew such to be the fact. Had he proven these facts to the satisfaction of the jury, then he would have shown that the very articles, for the keeping and use of which he was nonsuited, were, in fact, themselves made by the terms of his policy the subject of the insurance, and the jury would have been authorized to find that the policy was written with reference to the continuance of such a business. If they were a part of a watchmaker's materials, they were as much covered by the policy of insurance as the springs, hands, dials, tools, glasses, or any other articles used by a watchmaker in the conduct of his business. If, then, by the stating clause of the policy itself, an article were insured, it surely could not be seriously insisted that the policy would be avoided because of the printed conditions thereafter appearing, to the effect that the keeping and use of the very article insured in the manner contemplated by the parties should render the policy void. One of the elementary rules for the construction of policies of insurance is, that if there be a conflict between the written statement of the subject of insurance and the printed conditions of the policy, the former must prevail. A contrary doctrine would present the strange anomaly of an insurance company issuing to another a policy of insurance containing such conditions as that under no circumstances could payment of the loss be thereunder legally demanded. A rule which permitted the printed conditions to control the written statement ⁶¹³ of the subject upon which the insurance was issued would place the insurance company in the peculiar position of saying, in effect: I issue you this policy; I accept your money in satisfaction of my demand for premiums; I insure your property to be used in your business, but if you use it, your policy is void. A parallel case, and one which alone adequately expresses the peculiar paradox in the case supposed, is to be found in the sage advice given to her youthful daughter, when an affectionate but over-cautious mother, in reply to the simple request:

"Mamma, may I go out to swim?"

said to her:

'Yes, my darling daughter;
Hang your clothes on a hickory limb,
But don't go near the water.'

Even if the inflammable substances, the keeping and use

of which it is claimed avoided the policy of insurance, were not of themselves a subject of the insurance, yet, if the articles were employed by the assured in the conduct of the particular business, and the use of such articles is a necessary incident to the conduct of such business, the parties will be presumed to have contracted with reference thereto, and, at the time the insurance policy was issued, the insurer will be presumed to have had in contemplation the use of such substances by the assured when he assumed the risk, and, under such circumstances, will be presumed to have waived the condition under which the use of such substance would render the policy void. For instance, if he insured a powder manufactory, he must have contracted with reference to the use of combustible materials necessary to be employed in its manufacture. Thus, where a policy covered property described as a stock such as is usually kept in a general retail store, and the keeping of gunpowder was prohibited by the printed portions of the policy, it was held that if gunpowder formed a ⁶¹⁴ part of the general stock usually kept in a retail store, then the keeping of the powder was not a violation of the conditions of the policy: *Peoria Fire etc. Ins. Co. v. Hall*, 12 Mich. 202. So, if the insurance be upon a printing establishment and the keeping or use of camphene was prohibited, as the policy covered a printer's stock and materials, and it was shown that camphene was necessary to clean the type and was usually employed by printers for that purpose, the prohibition was held not to apply: *Harper v. New York City Ins. Co.*, 22 N. Y. 441. So, also, the use of kerosene was prohibited, but as the policy covered a photographer's stock, materials, etc., and it being shown that kerosene was usually employed in the business for heating paper and other purposes, it was held that the prohibition did not apply, even though gas could have been used equally as effectually for that purpose: *Hall v. Insurance Co. of North America*, 58 N. Y. 292; 17 Am. Rep. 255. Those cited are a few of the many cases illustrating the principle which we here announce. We have seen that parol evidence was admissible to explain the meaning of the term "watch-maker's materials" as employed in the policy; and therefore the court erred in repelling the testimony offered by the plaintiff, to the effect that benzine and kerosene, in the quantities in which he kept and used them, were necessary to be used in the conduct of that business; and the testimony so excluded, coupled with such testimony as was already introduced, makes

such a case as that, whether we treat the kerosene and benzine in question as included among those articles insured under the general term "watchmaker's materials," or whether we treat them as simply inflammable substances used in connection with and as a part of the business in which the assured was engaged—the property employed by him in which business was covered by this insurance, in either event the jury would ⁶¹⁵ have been warranted in finding in his favor against the company.

We therefore conclude that the court erred in granting a non-suit, and the judgment is accordingly reversed.

INSURANCE—PAROL EVIDENCE—AMBIGUITIES.—While parol evidence is not admissible to vary the terms of a contract in writing, it is admissible for the purpose of applying the terms of the writing to the subject matter, and removing any ambiguity arising from such application: *Stoops v. Smith*, 100 Mass. 63; 97 Am. Dec. 76, and note. It is admissible to explain an ambiguity, whether latent or patent: *Shore v. Miller*, 80 Ga. 93; 12 Am. St. Rep. 239.

INSURANCE.—WRITTEN CONDITIONS PREVAIL OVER PRINTED ONES, in a policy of insurance, in cases of conflict between them: *Note to Lancaster Fire Ins. Co. v. Lenheim*, 33 Am. Rep. 783, 784.

INSURANCE—COMBUSTIBLES.—A clause in a policy of insurance, prohibiting the keeping or use of inflammable or combustible materials, is a part of the contract of insurance; and such keeping or use will avoid the policy, unless they were incidental to the business, adopted from necessity or custom, and recognized by the insurer, or the combustibles were kept in small quantities for a special and not dangerous purpose: *Wheeler v. Traders' Ins. Co.*, 62 N. H. 450; 13 Am. St. Rep. 582. The use of such materials as are ordinarily and necessarily used in the business, the stock and materials of which are covered by the policy, does not avoid the policy, although by its printed clauses the keeping or use of such materials is prohibited: *Note to Birmingham Fire Ins. Co. v. Kroegher*, 24 Am. Rep. 150. An insured business is supposed to be carried on in the customary mode: *Note to Lancaster Fire Ins. Co. v. Lenheim*, 33 Am. Rep. 781. A condition against keeping or using on the premises "petroleum, naphtha, benzine, benzole, gasoline," etc., or "camphene, spirit gas, or any burning fluid or chemical oils," does not prohibit the using of one or more of such substances temporarily for cleaning machinery: *Note to Wheeler v. Traders' Ins. Co.*, 13 Am. St. Rep. 585; or for the medicinal purposes of the insured: *Williams v. Fireman's Fund Ins. Co.*, 64 N. Y. 569; 13 Am. Rep. 620. Dangerous articles kept as part of a stock in trade are covered by the policy, where such stock is insured, and it is shown that such articles belonged to stock. Insurance companies must be deemed to be familiar with the materials necessary to the carrying on of any trade or business, the "stock in trade" of which they insure, and, in issuing the policy, they must be deemed to have intended to include all such materials in the risk: *Note to Lancaster Fire Ins. Co. v. Lenheim*, 33 Am. Rep. 781-784.

DAVIS v. DODSON. DODSON v. DAVIS.

[36 GEORGIA, 718.]

PARTNERSHIP—POWER OF PARTNER TO BIND FIRM IN A PRIVATE TRANSACTION.—It is not within the scope of the authority of one member of a partnership, in a private transaction between himself and another, and in consideration of a benefit bestowed upon himself alone, and not shared in by his partner, to undertake to bind his firm to any agreement whatsoever.

PARTNERSHIP—LAW FIRMS—POWER OF MEMBER TO BIND FIRM IN A PRIVATE TRANSACTION.—It is not within the scope of the business of a law partnership to collect choses in action without charging for services rendered in so doing. Hence, if one member of such a firm, being the owner of a promissory note, sells it to a third person, a part of the consideration being that the seller's firm will collect the note, if not paid, without charge, the contract is not binding upon the firm or another member of it, as the seller has no authority, by virtue of the partnership, to bind his partner by any such contract.

Complaint. There was a judgment for the defendants and the plaintiff appealed.

Copeland & Jackson, for the appellant.

Payne & Walker, for the appellees.

⁷¹⁸ LUMPKIN, J. The plaintiff below, Davis, as executor of Hall, sued out an attachment against Dodson & Moon, a nonresident ⁷¹⁹ firm of attorneys at law, which attachment was levied upon land in Walker county as the property of Moon, one of the defendants. The case made by the declaration in attachment, as amended, was, in substance, as follows: The defendants, as attorneys at law, received for collection from the plaintiff's testator a promissory note, at the same time giving him a receipt in the following words:

"Chattanooga, Tenn., Dec. 23d, 1886.

"Received of S. P. Hall a note on Larkin Payne, payable to E. M. Dodson and indorsed by him, for fifteen hundred dollars, dated the 7th day of March, 1886, and due 12 months after date, with interest at the rate of 7 per cent per annum from date, and secured by a deed of trust on 230 acres of land, the home place of said Payne, made to said Dodson as trustee, with power of sale. If said note is not paid at maturity, we agree to foreclose the deed of trust by the first Tuesday in May, 1887, free of cost to Mr. Hall, and not to charge him any fees, this being the agreement under which he purchased said note and deed of trust.

"DODSON & MOON,

"Attys. at Law."

The money due upon the note specified in the foregoing receipt

was collected by the defendants, who failed and refused to pay the same over to the plaintiff.

The defendant Moon pleaded, in substance, that he did not sign the receipt; that it was not signed by any one authorized by him; that neither he, nor the firm of Dodson & Moon, as such, ever had the possession, custody, or control, for collection or otherwise, of any such note or paper as was described in this receipt; nor did he or his firm, at any time or in any manner, collect or receive any money thereon, either as attorneys at law or otherwise; but that the giving of the receipt was the individual act of Dodson, for which neither Moon nor the firm was in any manner responsible.

At the trial, the plaintiff offered evidence to show that the receipt in question was signed by Dodson in ⁷²⁰ the name of his firm, and that he afterward collected the money due on the note, giving therefor receipts signed by him individually, and had failed to account for the money collected. No evidence whatever was introduced to show that Moon ever had any knowledge of the transaction, or had ever ratified the giving of the receipt to Hall. Nor was it shown that Moon ever had personal possession of the note, or recognized its possession by his firm, or that he took part in, or knew of, its collection by Dodson. On the contrary, as the receipt would seem to indicate, the truth of the matter probably was, that Dodson traded to Hall a note payable to himself and which he held in his individual capacity; and as an inducement to Hall to purchase the same, undertook by the receipt to bind the firm of Dodson & Moon to collect the note free of charge. If the effect of giving the receipt was to obligate that firm to perform the service indicated, it is obvious that it would make no difference that Moon never took any active part in, or even knew of, the collection and misapplication of the money due on the note; for he would be responsible and liable for every act of Dodson while acting within the scope of his authority as a member of the partnership. Therefore, the question presents itself, whether Dodson, by virtue of his general authority to represent his firm, could, in a transaction such as that disclosed by the record now before us, make a contract binding alike upon his partner and himself as composing the firm of Dodson & Moon.

We do not see how it can be seriously contended that it is within the scope of the authority of one member of a partnership, in a private transaction between himself and another, and in consideration of a benefit bestowed upon himself alone, and not

shared in by his partner, to undertake to bind his firm to any agreement whatsoever. In a transaction of this kind, he would ⁷²¹ be acting solely in his individual capacity, and not as a member of his firm. We had thought it a very universally recognized fact that lawyers are in the habit of charging their clients for services, and that the main object of forming law partnerships was the avowed purpose of reaping a goodly harvest of fees. In fact, complaint has frequently been made that lawyers are sometimes too diligent and over-zealous reapers. But, in all seriousness, it would defeat the very object for which a law partnership was formed, if one of its several members were allowed, without the express assent of the others, to undertake to bind the firm to perform legal services, without compensation, either for the actual time and labor necessary to be expended, or for the responsibility and liability the firm would incur by the undertaking. Certainly, it is the right of an attorney, acting for himself alone, as a matter of charity or friendship, to collect a paper for another without charging a fee for his services; but the present case sufficiently demonstrates how serious and unjust a matter it would be if an attorney were permitted to thus bind his partner, without his consent, and with no remuneration for the risk incurred. We have yet to see the rare spectacle of an attorney at law, or a firm of them, rendering professional services gratuitously as a recognized and customary incident of the business in which they engage. We have long ago departed from the honorarium from which our ancient ancestors in this noble profession either wholly or partially derived their means of subsistence.

Under the facts shown on the trial, therefore, we have no hesitancy in saying, the plaintiff failed utterly to make out a case. It was contended by counsel, however, that in the light of certain evidence shown to have been discovered since the trial, a different result would be inevitable if a new trial were granted. The evidence relied on was a certain contract purporting to have ⁷²² been entered into between Dodson and Payne, and explaining how the former came into possession of the note sold to Hall, as follows:

"This agreement, made the 1st day of March, 1886, witnesseth: That Larkin Payne has this day given E. M. Dodson his note for the sum of fifteen hundred dollars, which is to become due one year after date, and has made a deed of trust on his lands in Dade county, Ga., to secure the same. The agreement between us is, that said Dodson is to negotiate said note to the best ad-

vanlage possible, and for this purpose is to indorse the same if necessary, and is to apply the proceeds of the note as follows: A judgment of about the sum of \$350.00 in the superior court of Dade county, in favor of the estate of E. W. Forester deceased, now controlled by M. A. B. Tatum; whatever interest may be found in settlement to be due from me (Payne) to Wm. Glass on the mortgage heretofore given to him, if any; any balance of fees that I may be owing to said Dodson or to Dodson & Moon; and the balance he will pay over to said Payne. Nothing will be paid to William Glass until further order from said Payne.

"This 1st of March, 1886.

E. M. DODSON,

"LARKIN PAYNE."

Instead of being impressed that this paper would aid the plaintiff's case, we are the more strongly convinced that in no sense, either legally or morally, is Moon liable for the misapplication by Dodson of the money which the latter collected upon the note intrusted to him by the plaintiff's testator. Under this contract, it is plain that Dodson, in his individual capacity, became the trustee of Payne to raise money upon the note and apply it as directed. Certainly, it was not an undertaking on the part of the firm of Dodson & Moon, and Payne could not have held that firm liable in the event Dodson violated the trust. The mere fact that Dodson & Moon were named among the beneficiaries thereunder amounts to nothing; for it might as well be said that either of the other beneficiaries named in the instrument thereby became responsible for Dodson's execution of the trust, ⁷²³ simply because a benefit would be conferred upon him by its faithful performance on the part of Dodson.

The only effect of this paper upon the present case is to show that Dodson, instead of owning absolutely and in his own right the note he traded to Hall, at that time simply held it in trust for Payne for the purpose of negotiation, etc. With the performance of the personal and private obligations of Dodson, his firm had nothing to do; so we think the newly discovered evidence is favorable to the defendant, rather than to the plaintiff, for it clears up the last doubt as to whether Dodson & Moon owned the note at the time it was traded to Hall, or had any interest in that transaction.

Judgment affirmed.

Cross-bill dismissed.

PARTNERSHIP—USE OF FIRM NAME FOR INDIVIDUAL PURPOSES.—A partner's use of the firm name for a purpose entirely distinct from the partnership business, is *prima facie* evidence that the

act was unauthorized and a fraud upon the partnership, and such evidence must be rebutted by one seeking to hold the other partners bound by the contract, by showing their assent thereto: *Eastman v. Cooper*, 15 Pick. 276; 26 Am. Dec. 600, and note. A contract of a partner for his own benefit cannot bind the firm, unless the other members have assented to it: *Warder v. Newdigate*, 11 B. Mon. 174; 52 Am. Dec. 567; *Levi v. Latham*, 15 Neb. 509; 48 Am. Rep. 361.

LEAKE v. LACEY.

[95 GEORGIA, 747.]

MUNICIPAL CORPORATIONS — GARNISHMENT. — Public policy forbids that a municipal corporation should be subject to garnishment in any case where its indebtedness arose on account of the exercise by it of governmental functions. It cannot, therefore, be garnished for money due by it to a contractor for constructing a sewer or other public work, although such work is fully completed before the garnishment is served, and the debt is for a balance then due the contractor.

Mandamus.

Thompson & Ramsaur and W. F. Turner, for the appellants.

Sanders & Davis and Irwin & Bunn, for the defendant.

747 LUMPKIN, J. This case turns upon the question whether or not a municipal corporation is subject to the process of garnishment sued out for the purpose of reaching a sum of money due by the mayor and council to a contractor who had constructed a public sewer.

It could scarcely be doubted that if the public work was uncompleted, a creditor of the contractor could not, by garnishment, cut off payments which would otherwise be made by the municipal authorities to the contractor as the work progressed. It is obvious that if this were allowed, it might, and in most cases would, seriously interfere with the performance by the contractor of his undertaking, and thus the public would be subjected to inconvenience and delay at the instance, and for the benefit, of a party in whose affairs it had no interest or concern whatever. It very frequently happens that a contractor actually needs partial payments, in order to be able to carry on his work. We deem it unnecessary to consume further time in endeavoring to show that, in a case of this kind, it would never do to hold that municipal authorities could be subjected to the ⁷⁴⁸ process of garnishment. The protection of the contractor might be a matter of no great concern, and there is, perhaps, no special reason why the law would favor him; but the welfare of the pub-

he requires the prompt and speedy completion of works in which the community at large is interested, and forbids the delaying of the same for the sake of a mere individual.

In the present case, however, it was insisted that the reason for the rule above stated would not apply, because the sewer in question had been actually completed, the public were receiving the benefit of it, and nothing remained to be done except for the mayor and council to pay over a balance due the contractor. There is, of course, some distinction between cases of the class first above instanced and the case in hand; but still, we are decidedly of the opinion that public policy forbids that a municipal corporation should be subject to garnishment in any case where its indebtedness arose on account of the exercise by it of governmental functions, which include, of course, the prosecution of public works and improvements for the benefit of the body politic. It is not to the municipal authorities, after the work has been completed, a matter of the slightest concern to whom the money due for the work should be paid. The municipality has no interest in aiding a creditor to collect his debt, or in shielding the debtor from paying it, and, therefore, there is no reason why it should be drawn into litigation pending between these parties, but many good reasons why it should not. It necessarily requires time, labor, and oftentimes expense in the employment of counsel and otherwise, to answer and defend garnishment suits, attend courts, and otherwise give attention to litigation; and these burdens should not be imposed upon public servants, whose entire time and attention ought to be given to the discharge of their official duties. Even if the municipality should be compensated in ⁷⁴⁰ money for the loss of the time of its officials and the expenses of litigation, it by no means follows that all the evils would be relegated. The failure of a city or town official to answer a garnishment, the filing of an answer too late, the making therein, through inadvertence or otherwise, of an untrue statement, and many other conceivable things, might subject the corporation to great loss and damage, with no corresponding benefit for a complete and accurate performance of everything necessary in answering the garnishment and giving attention to the case. Again, while the officials were engaged in answering the garnishment or in looking after the litigation, they would be compelled to neglect the duties properly devolving upon them, and this very neglect, it is easy to perceive, might result in subjecting the municipality to loss, damage, and inconvenience in many different ways.

We deem it unnecessary to prolong this discussion, and will conclude it by referring to the case of *Connolly v. Thurber Whyland Co.*, 92 Ga. 651, to which this court gave thoughtful consideration. The decision in that case, in principle, controls the present one, and the authorities there cited amply support the proposition that public policy requires the exemption of municipal authorities from the process of garnishment.

Judgment affirmed.

Garnishment of Municipalities.*

Rule Applicable to State Government.—It is plainly shown in the monographic note to *Divine v. Harvie*, 18 Am. Dec. 200-203, that the United States and states are not subject to garnishment; and the later cases of *McMeekin v. State*, 9 Ark. 553, *Swepson v. Turner*, 76 N. C. 115, *Wilson v. Bank of Louisiana*, 55 Ga. 98, *Lodor v. Baker*, 39 N. J. L. 49, *Dewey v. Garvey*, 130 Mass. 86, further support the doctrine that a government or state is not subject to garnishment. In *Wilson v. Bank of Louisiana*, 55 Ga. 95, this doctrine was applied to the confederate government. The most frequent applications of the rule are where creditors seek to subject the salaries of state officers to the process of garnishment: *Swepson v. Turner*, 76 N. C. 115; *McMeekin v. State*, 9 Ark. 553; note to *Lathrop v. Clapp*, 100 Am. Dec. 510; but the rule will prevent a creditor from attaching money in the hands of a state treasurer, due to a nonresident debtor: *Lodor v. Baker*, 39 N. J. L. 49; and a state lunatic hospital, under the control and government of the commonwealth, cannot be charged as the trustee of a person to whom it is indebted for personal services: *Dewey v. Garvey*, 130 Mass. 86. The authorities are uniform in exempting the states and United States from the process of garnishment, but this uniformity is lacking with respect to the exemption of municipal corporations from such process; and it is the purpose of this note to show the existing condition of the law respecting the garnishment of such bodies.

Cases Denying the Power to Garnish Municipal Corporations.—In the monographic note to *Divine v. Harvie*, 18 Am. Dec. 204-207, the cases cited support the general rule that municipal corporations are not subject to the process of garnishment. This rule is further supported by the following later authorities showing that cities are not subject to garnishment: *Bartell v. Bauman*, 12 Ill. App. 450; *Smith v. Woolsey*, 22 Ill. App. 185; *Triebel v. Colburn*, 64 Ill. 376; *Clafin v. Iowa City*, 12 Iowa, 284; *Caldwell v. Stewart*, 30 Iowa, 379; *Jenks v. Osceola Tp.*, 45 Iowa, 554; *First Nat. Bank v. Ottawa*, 43 Kan. 294; *Switzer v. Wellington*, 40 Kan. 250; 10 Am. St. Rep. 196; *Hawthorn v. St. Louis*, 11 Mo. 59; 47 Am. Dec. 141; *Fortune v. St. Louis*, 23 Mo. 239; *Pendleton v. Perkins*, 49 Mo. 565; *Merwin v. Chicago*, 45 Ill. 133; 92 Am. Dec. 204; *Mayor v. Rowland*, 26 Ala. 498; *Smoot v. Hart*, 33 Ala. 69; *Underhill v. Calhoun*, 63 Ala. 216; *Holt v. Experience*, 26 Ga. 113; *Born v. Williams*, 81 Ga. 796; *Bank v. Mayor*, 92 Ga. 361; *People*

* REFERENCE TO MONOGRAPHIC NOTES.

Garnishment of United States, states, counties, cities and other municipal corporations: 18 Am. Dec. 200-207.

Proceedings supplemental to execution: 100 Am. Dec. 500-515.

v. Omaha, 2 Neb. 166; Marx v. Parker, 9 Wash. 473; 43 Am. St. Rep. 849; Hadley v. Peabody, 13 Gray, 200; Erie v. Knapp, 29 Pa. St. 173; Burnham v. Fond du Lac, 15 Wis. 193; 82 Am. Dec. 668; Roeller v. Ames, 33 Minn. 132; Memphis v. Laski, 9 Heisk. 511; 24 Am. Rep. 327; Merrell v. Campbell, 49 Wis. 535; 35 Am. Rep. 785; Mayor v. Root, 8 Md. 95; 63 Am. Dec. 692; and that towns are not liable to garnishment or trustee process: Sauer v. Nevadaville, 14 Col. 54; Bradley v. Richmond, 6 Vt. 121; Shepard v. Turner, 13 Allen, 92; Brown v. Heath, 45 N. H. 168; Manchester v. Burns, 45 N. H. 482; Walker v. Cook, 129 Mass. 577. The fact, however, that a city is not liable to the statutory garnishment does not protect it from a bill in equity to reach money in its treasury belonging to a debtor: Pendleton v. Perkins, 49 Mo. 565; Speed v. Brown, 10 B. Mon. 108, 111.

It makes no difference whether the city or town is sued in foreign or execution attachment. It cannot be made a garnishee in either case: Erie v. Knapp, 29 Pa. St. 173; Hadley v. Peabody, 13 Gray, 200; Brown v. Heath, 45 N. H. 168. The treasurer of a municipal corporation, being a mere agent thereof, is not liable to the process of garnishment to reach moneys held by him for the city: Smith v. Woolsey, 22 Ill. App. 185; Triebel v. Colburn, 64 Ill. 376. Nor will such process reach funds of the corporation accruing to it by taxation either while in the course of collection by suit, or after they have been paid into its treasury: Underhill v. Calhoun, 63 Ala. 216, overruling Smoot v. Hart, 38 Ala. 69. It has even been held, where a public officer deposits funds in a bank in his individual name, but such funds belong, in equity, to the municipal corporation of which he is an officer, that such funds cannot be garnished at the suit of his individual creditors: Marx v. Parker, 9 Wash. 473; 43 Am. St. Rep. 849. Most of the cases above cited in support of the proposition that a municipal corporation cannot be garnished are those in which some creditor of an officer or employé of the city has invoked the process; but the rule is not limited to such cases. It cannot be garnished for a debt due from it to a citizen, as shown by county orders for money: Merrell v. Campbell, 49 Wis. 535; 35 Am. Rep. 785. So, where it is invested by statute with power to establish and maintain public schools, it is not subject to garnishment in respect to a debt which it owes for work done on a municipal school-house: Born v. Williams, 81 Ga. 796; Bank v. Mayor, 92 Ga. 361. A code provision that "a municipal corporation shall not be garnished" does not limit the exemption from such process to cases in which it would interfere with the discharge of corporate duties. The exemption applies to all cases: Jenks v. Osceola Tp., 45 Iowa, 554. Money due a policeman cannot be garnished in the city treasurer's hands, though nothing remains to be done but to pay it over: Triebel v. Colburn, 64 Ill. 376; and funds voluntarily placed in a city treasury by an applicant for a license cannot be garnished, although the license has not been issued, nor the conditions necessary to its issue fully complied with by the applicant: Smith v. Woolsey, 22 Ill. App. 185. A municipal corporation must necessarily act through its officers or agents, and a garnishment proceeding against them is, in substance and legal effect, one against the corporation itself; but the rule is, that a public officer who, in his official capacity, holds money to be paid out to individuals, is not subject to garnishment proceedings or trustee process: Wendell

v. Pierce, 13 N. H. 502; Chealy v. Brewer, 7 Mass. 259; Stillman v. Isham, 11 Conn. 124; Bulkley v. Eckert, 3 Pa. St. 368; 45 Am. Dec. 650; note to Lathrop v. Clapp, 100 Am. Dec. 510.

In garnishment proceedings against a city, it is sometimes conceded that money due municipal officers, agents, or contractors is not liable to the process, but insisted that, if the city is required to answer, the alleged indebtedness may not fall in any of these classes. "But, in our opinion," says the court, in *Merwin v. Chicago*, 45 Ill. 133, 92 Am. Dec. 204, "the city should not be subjected to this species of litigation, no matter what may be the character of the indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation. A municipal corporation cannot properly be turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers, or the money in its treasury, in defending suits in order that one private individual may the better collect a demand due from another. A private corporation must assume the same duties and liabilities as private individuals, since it is created for private purposes. But a municipal corporation is a part of the government. Its powers are held as a trust for the common good. It should be permitted to act only with reference to that object, and should not be subjected to duties, liabilities, or expenditures merely to promote private interest or private convenience." To the same effect are *Switzer v. Wellington*, 40 Kan. 250; 10 Am. St. Rep. 196; *Underhill v. Calhoun*, 63 Ala. 216; *Memphis v. Laski*, 9 Heisk. 511; 24 Am. Rep. 327; *Mayor v. Root*, 8 Md. 95; 63 Am. Dec. 692. These well-considered cases all show that cities are exempted from garnishment solely upon the ground of public policy.

Among the reasons given for holding that the salary of a public officer due him from a municipal corporation cannot be reached or intercepted by his creditors under legal process are, in substance, "that municipal corporations are auxiliary to the state government; that their officers are public servants, employed to perform public duties; that the public have a right to fill these offices by the selection of the most suitable men; that these officers are usually dependent on their salaries for the support of themselves and families; that the efficiency of their services, or even their remaining in the public service, may depend upon the prompt payment of their salaries, and the certainty that they will receive them when due. Hence, if creditors can step in by any legal proceedings and prevent the payment of salaries directly to the officers in person, and divert the money to the satisfaction of their claims, the public service would suffer by impairing its efficiency, and perhaps depriving the public of the service of men whom it would be desired to retain. This is not an exemption in favor of the officer, but a rule for the protection of the public." From these considerations of public policy, it is held that the unpaid salary of a public officer cannot be reached, by his creditors, either by garnishment, attachment, or supplementary proceedings: *Roeller v. Ames*, 33 Minn. 132; note to

Lathrop v. Clapp, 100 Am. Dec. 510; *Mayor v. Root*, 8 Md. 95; 63 Am. Dec. 692; *Bank v. Dibrell*, 3 Sneed, 378. The salary of a public school-teacher cannot be attached by trustee process while in the hands of the city officials whose duty it is to pay it: *Hightower v. Slaton*, 54 Ga. 108; 21 Am. Rep. 273. So, for reasons of public policy, neither the chief of police of a city or town, nor any other member of the municipal police force, is subject to garnishment for effects which come to his hands by color of his official authority, and without the consent of the owner, whether he obtains them lawfully or unlawfully: *Connolly v. Thurber Whyland Co.*, 92 Ga. 651. A garnishment, in such a case, is, in legal effect, one upon the corporation, and the same reasons which exempt a municipal corporation from garnishment apply.

In reaching the conclusion that public policy forbids the garnishment of municipal corporations, the courts have necessarily had to construe attachment laws to reach that result; and it has been held that a statute authorizing an attachment to be levied upon property of the defendant in the hands of any "person or persons whatever, corporate or sole," excludes municipal corporations from its operation: *Mayor v. Root*, 8 Md. 95; 63 Am. Dec. 692; that the word "corporation," in a garnishment law, does not include municipal corporations: *Switzer v. Wellington*, 40 Kan. 250; 10 Am. St. Rep. 196; *Chamberlain v. Waters*, 10 Utah, 298; and that a section of a code declaring that the word "person," when used therein, "includes a corporation as well as a natural person," does not so control subsequent sections giving the process of garnishment against "any person indebted to the defendant in attachment," etc., as to authorize a garnishment against a public municipal corporation, to whom those sections, as shown by their provisions, are inapplicable: *Mayor v. Rowland*, 26 Ala. 498.

If a municipal corporation is summoned as a garnishee, it may properly be discharged on motion, without first making an answer: *Merwin v. Chicago*, 45 Ill. 133; 92 Am. Dec. 204. It may, under a statute exempting it from garnishment proceedings, claim its exemption at any time before answer is filed, without waiving its rights: *Jenks v. Osceola Tp.*, 45 Iowa, 554. So, where an incorporated town is summoned as garnishee on account of salary due one of its officers, it may show in discharge of its liability that the officer is a collector of its taxes, and, as such, has received money of the town, which he insists upon returning, equal to the amount of salary due him: *Sauer v. Nevadaville*, 14 Col. 55.

As to whether a municipal corporation can waive its right to claim exemption from garnishment, the authorities are divided. In *Board of Commrs. v. Bond*, 8 Col. 411, it is held that the exemption may be waived by appearance and submission to liability; but in *Van Cott v. Pratt*, 11 Utah, 209, it is held that a city cannot waive its exemption from the process of garnishment in an action between private parties; and that an ordinance consenting that moneys in its hands due as wages and salaries to its employes may be "attached under garnishee process" in suits between private parties is void. Such exemption is not a mere privilege, but a legal right which inures to the benefit of the public: *Van Cott v. Pratt*, 11 Utah, 209, 212.

Cases Sustaining Garnishment.—Having shown the exemption of municipal corporations from the process of garnishment, a proposition supported by the great weight of authority, and adopted in contemplation

of the great and paramount interests of public order which it is supposed to subserve, it remains to look at what is on the other side. A town or city is as subject to suit for what it owes as is a private individual, and some courts hold that any fund due from it to a debtor is as subject to attachment or garnishment while in its hands as if it were a private individual; and that the coercive appropriation of the salary of an officer of a city or town to the payment of his debts does not conflict with public policy. Hence, cities and towns have, in some few cases, been held subject to garnishment: *Whidden v. Drake*, 5 N. H. 13; *Newark v. Funk*, 15 Ohio St. 462; *Bray v. Wallingford*, 20 Conn. 416; *Wilson v. Lewis*, 10 R. I. 285; *Rodman v. Musselman*, 12 Bush, 354; 23 Am. Rep. 724; *Smoot v. Hart*, 33 Ala. 69; all cited in the monographic note to *Divine v. Harvie*, 18 Am. Dec. 204-207; *Mayor v. Horton*, 38 N. J. L. 88; *Denver v. Brown*, 11 Col. 337; *Laredo v. Nalle*, 65 Tex. 359; *Speed v. Brown*, 10 B. Mon. 108, 111. The case of *Whidden v. Drake*, 5 N. H. 13, is not, however, now the law in that state: Note to *Divine v. Harvie*, 18 Am. Dec. 207; and *Smoot v. Hart*, 33 Ala. 69, was overruled in *Underhill v. Calhoun*, 63 Ala. 216. The pivotal point of the other cases cited is, that in the absence of any statute exempting municipal corporations from garnishment, they are, like individuals or private corporations, subject to the process of garnishment for ordinary debts due from them to third persons: *Laredo v. Nalle*, 65 Tex. 359; *Wilson v. Lewis*, 10 R. I. 285; *Denver v. Brown*, 11 Col. 337. In *Mayor v. Horton*, 38 N. J. L. 88, 91, in deciding that a municipal corporation was subject to garnishment, the court said: "These public corporations have, with legislative sanction, a very liberal power of contracting debts, and, in many instances, are large borrowers of money. A public policy which would place these large sums wholly beyond the reach of creditors is not so clear as to justify this court in denying to suitors the beneficial remedy by attachment against this class of debtors." "No one," says *Willie, C. J.*, in *Laredo v. Nalle*, 65 Tex. 359, should be allowed to place his property beyond the reach of his creditors by keeping it in the possession of a municipal corporation." "The argument, drawn from the impolicy and inconvenience of calling off municipal officers from their duties to answer writs of garnishment, can be used," said the chief justice, "with equal force to show that no suit whatever should be allowed against such corporations. The officers of a city are drawn from their duties to make answer as much in the one case as in the other. Yet, we find them constantly called upon to answer suits for debt or for damages caused by the alleged neglect of the city's agent, or to writs of mandamus issued to compel them to perform their duties. To answer to these proceedings and properly defend them, the officers are frequently forced to leave their posts of duty, and to continue in attendance upon court for days, or weeks, if necessary, no matter how inconvenient it may be to the city government to dispense with their services. The policy of keeping the operations of municipal government free from the interference of law suits must yield to the more important policy of securing to the creditors and injured parties payment of their debts and redress for their wrongs, to be enforced by the appropriate process of the law. It is not the policy of the law that the citizen should be wronged, rather than that the city government should suffer inconvenience. Little difference, if any, exists between the inconvenience of answering to an

ordinary suit and that of answering to a writ of garnishment. The latter is nothing more than a suit by the plaintiff in the writ against the city, the matter in dispute, if there be any dispute at all, being the alleged indebtedness of the city to the debtor of the plaintiff. It is not required to take part in the controversy between the plaintiff and the party for whose debt it is garnished. It cannot, therefore, be said, that in requiring a city to answer to a writ of garnishment, it is necessarily drawn into a controversy, with which it has no concern. Neither is the public money thereby diverted from the channel in which it should flow. A payment to the plaintiff in garnishment is, in effect, a payment to the original creditor of the city. Public policy may demand that a fund set apart for erecting a public building should not be taken for the debt of the person contracting to do the work during the progress of its construction, for this may prevent its completion. But, when the work is finished, and the money earned, and standing to the credit of the contractor with the city, it should be subject, like any other property, to the payment of his debts": *Laredo v. Nalle*, 65 Tex. 359, 361.

Counties are political divisions of the state, and are organized as a part of the machinery of the government for the performance of functions of a public nature. They are merely parts of the state government, and partake of the state's immunity from liability: See monographic note to *Gilman v. County of Contra Costa*, 68 Am. Dec. 290, on the liability of counties, mode of its enforcement, and power of the legislature to modify or impair. Counties are generally classed as quasi corporations: *Price v. County of Sacramento*, 6 Cal. 254; monographic note to *Todd v. Birdsall*, 13 Am. Dec. 523-525, on what are quasi corporations. In some states, counties are held not to be municipal corporations: *People v. McFadden*, 81 Cal. 489; 15 Am. St. Rep. 66. In other states, they have been declared to be municipal corporations, within the meaning of statutes affecting such corporations: *Iowa R. R. Land Co. v. Carroll County*, 39 Iowa, 151, 166; *Dowlan v. County of Sibley*, 36 Minn. 430. But, whatever may be the exact legal status of a county, it is as much beyond judicial control, so far as garnishment proceedings are concerned, as municipal corporations proper: *Stevens v. St. Mary's Training School*, 144 Ill. 336; 36 Am. St. Rep. 438; *Merrell v. Campbell*, 49 Wis. 535; 35 Am. Rep. 785; and they have been held, almost uniformly, to be exempt from the process of garnishment: See monographic note to *Divine v. Harvie*, 18 Am. Dec. 203; *Merrell v. Campbell*, 49 Wis. 535; 35 Am. Rep. 785; *Ward v. County of Hartford*, 12 Conn. 404; *Dotterer v. Bowe*, 84 Ga. 769; *Riggin v. Hilliard*, 56 Ark. 476; 35 Am. St. Rep. 113; *Boone County v. Keck*, 31 Ark. 387; *Eureka Sandstone Co. v. Pierce County*, 8 Wash. 236; *McDougal v. Board of Supervisors*, 4 Minn. 184; *State v. Eberly*, 12 Neb. 616; *Geer v. Chapel*, 11 Gray, 18; *Stermer v. Board of County Commrs.*, 5 Col. App. 379; *Board of County Commrs. v. Brown*, 6 Col. App. 43. They are not liable to the process of foreign attachment: *Ward v. County of Hartford*, 12 Conn. 404. A county cannot be held as trustee in foreign attachment of a juror whose fees have not been allowed and ordered paid by the court: *Geer v. Chapel*, 11 Gray. 18. In *Stermer v. Board of County Commrs.*, 5 Col. App. 379, counties were said to be "quasi corporations," and not municipal corporations. They were, nevertheless, held not liable to garnishment. This distinction between "quasi

corporations" and municipal corporations was probably made to keep clear of the case of *Denver v. Brown*, 11 Col. 337, holding that a municipal corporation is liable to garnishment. To have held a county not liable to garnishment, in view of this case, it was evidently necessary to decide first that it was not a municipal corporation.

The rule that public corporations, such as cities and incorporated towns, are not subject to garnishment, applies to counties, and the reasons why such corporations should be exempt from that process apply with equal force to counties: *State v. Eberly*, 12 Neb. 616, 622; *McDougal v. Board of Supervisors*, 4 Minn. 184. In *Dotterer v. Bowe*, 84 Ga. 769, it is held that a county, without express authority of statute, is not subject to garnishment, and that to imply such authority is contrary to public policy. Even if a statute as to garnishment is broad enough to make it applicable to counties, a county cannot be garnished where the principal defendant cannot maintain an action against the county, as where his claim against the county has not been presented to the county commissioners and rejected in whole or in part by them, and which must be done before the county can be sued: *Eureka Sandstone Co. v. Pierce*, 8 Wash. 236.

A county is not subject to garnishment for a debt to a citizen: *Merrill v. Campbell*, 49 Wis. 535; 35 Am. Rep. 785. The salary or wages of an officer or servant of a county cannot be subjected, in the hands of the county, to garnishment or proceedings supplementary to execution: *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661. A garnishment does not lie against a county treasurer, holding funds in his official capacity, to subject such funds to the satisfaction of a judgment against the county: *Edmondson v. De Kalb County*, 51 Ala. 103. Neither is a county clerk liable as garnishee in respect to money received by him in redemption of land from a tax sale: *Smith v. Finlen*, 23 Ill. App. 156.

A county is, however, liable to garnishment for a debt due by it to its officer, under a statute declaring that all persons are subject to garnishment, that the word "person" may be applied to "bodies politic and corporate," and that counties are such bodies: *Waterbury v. Board of Commrs.*, 10 Mont. 515; 24 Am. St. Rep. 67. In this case, it was considered that public policy does not require that counties should be exempted from garnishment when, instead of being exempted by statute, their liability to the process is within the letter of the law.

School Districts—Townships—District of Columbia.—A school district is but an instrumentality of the state. It is, therefore, a public quasi corporation: See monographic note to *Todd v. Birdsall*, 13 Am. Dec. 523, on what are quasi corporations; and, like a municipal corporation, is not subject to the process of garnishment: *Kein v. School Dist.*, 42 Mo. App. 460; *Skelly v. Westminster School Dist.*, 103 Cal. 652; *School Dist. v. Gage*, 39 Mich. 484; 33 Am. Rep. 421. The word "persons," in a garnishment statute, cannot be construed to include school districts: *Kein v. School Dist.*, 42 Mo. App. 460. A school district is a municipal corporation; and cannot be garnished for teachers' wages, where the statute prohibits the garnishment of municipal corporations: *School Dist. v. Gage*, 39 Mich. 484; 33 Am. Rep. 421. A municipal corporation, such as a school district, or its board of trustees, is not a "person," within the meaning of a garnishment law: *Dollman v. Moore*, 70 Miss. 267. The trustees of a school district, being but special agents, without general authority, to represent the district, cannot be gar-

nished in an attachment suit by a third party against its creditor: *Skelly v. School Dist.*, 103 Cal. 652. A board of education, incorporated under territorial law, is a public or municipal corporation, and is not liable to the process of garnishment for salary due a teacher, where the territorial laws authorizing the garnishment of corporations apply only to private corporations: *Chamberlain v. Watters*, 10 Utah, 298. If a town has been divided into school districts, neither the town nor its treasurer is liable to garnishment for a teacher's wages, at least until an order therefor has been given by the school committee in favor of the teacher: *Spencer v. School Dist.*, 11 R. I. 537.

In Montana, however, a public municipal corporation, as a school district, is not exempt from the process of garnishment, as all persons, under the statute of that state, are subject to garnishment, and the word "person" includes "bodies politic and corporate": *Whalen v. Harrison*, 11 Mont. 63; *Waterbury v. Board of Commrs.*, 10 Mont. 515; 24 Am. St. Rep. 67.

If a township is garnished, and both parties treat it as, and thereby practically concede it to be, a municipal corporation, the attachment will, on motion, be discharged, on the ground that the defendant is a municipal corporation, and, therefore, not subject to garnishment, where the statute provides that "a municipal corporation shall not be garnished": *Jenks v. Osceola Tp.*, 45 Iowa, 554.

Upon grounds of public policy, the District of Columbia is not subject to garnishment or attachment, in respect to money due its contractors or officers; and its commissioners are exempt from such process on the same grounds: *Pottier etc. Mfg. Co. v. Taylor*, 3 McAr. 4; *Brown v. Finley*, 3 McAr. 77.

GILLIS v. GILLIS.

[36 GEORGIA, 1.]

WILLS, PROOF OF—COMPETENCY OF WITNESS.—A statute providing that an illiterate or infirm witness is competent to attest a will by his mark, "provided he can swear to the same," means, that, to be so competent, he must be competent as a witness to testify in a court of law at the time of attesting the will, and not that he must be competent to swear to or identify his mark at the time the will is offered for probate. His competency at the latter time is immaterial.

WILLS.—THE COMPETENCY OF ATTESTING WITNESSES to a will is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation.

WILLS—ATTESTING WITNESSES.—If a sufficient number of witnesses attest a will, and are at that time competent, it remains valid, although death or supervening disability may render any or all of them incapable, in fact, of testifying when the will is offered for probate.

WILLS—ATTESTING WITNESSES.—If, at the time of the probate of a will, a subscribing witness is incompetent, from any cause, or unwilling to testify to its attestation by himself or the other subscribing witnesses, or to the due execution of the will by the testator while mentally capable, or if the witness denies any of these facts, they may be proved by competent witnesses having knowledge thereof, although not subscribing witnesses to the will.

Williams & Smith, Hines & Hale, and Felder & Davis, for the plaintiffs in error.

Cain & Polhill, Evans & Evans, A. Herrington, F. H. Saffold, H. R. Daniel, and H. D. D. Twiggs, for the defendants in error.

² LUMPKIN, J. The nominated executors of the alleged last will of Sarah Gillis propounded the same for probate, and a caveat was filed by some of her heirs at law. On the trial in the superior court, to which court the case had been carried by appeal, there was a verdict for the propounders; and the caveators bring up for review a judgment overruling their motion for a new trial. Besides the general grounds that the verdict was contrary to law and the evidence, and that the court erred in refusing to grant a nonsuit, the motion contained special grounds raising certain questions, the nature of which is disclosed by the headnotes and this opinion.

The paper purporting to be the will was executed by the testatrix on the twelfth day of March, 1873. It bears the names of four witnesses, but it was conceded that the last of them signed his name some time after the execution of the paper by the testatrix and its attestation by the other witnesses, and it does not appear that he signed in her presence. The appearance, therefore, of the name of this witness upon the paper counts for nothing in determining the question of the legality of its execution. Accordingly, the fact that he signed will be ignored altogether, and it will be understood that, in speaking of the subscribing witnesses to the paper, reference to the other three only is intended. One of these signed by making her mark. Another died before the testatrix. The usual and formal attestation clause was used. The paper was offered for probate soon after the death of the testatrix, and about twenty years after its execution and attestation. At the time of probate, the two subscribing witnesses then in life were produced. The one who wrote his own name proved the due execution of the paper as a will. The signature of the deceased ³ witness was shown to be in his handwriting. The illiterate witness testified that she had no recollection of attesting the will, and could not swear to the making of her mark. At the same time, however, she did not expressly swear that she did not attest by her mark the paper propounded.

1. The first and leading question is: Was the paper legally attested as a will? The execution and attestation of written wills in this state, as to both real and personal property, is provided for in sections 2414 and 2415 of the code. Section 2414 reads

as follows: "All wills (except nuncupative wills) disposing of realty or personalty must be in writing, signed by the party making the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the testator by three or more competent witnesses." Section 2415 declares that: "A witness may attest by his mark, provided he can swear to the same; but one witness cannot subscribe the name of another, even in his presence and by his direction." Section 2414 was codified from section 5 of 29 Charles II, chapter 3, known as the "statute of frauds," in reference to devises of real property (Cobb's Digest, 1128; Huff v. Huff, 41 Ga. 701), and from an act of January 21, 1852 (Acts 1851-52, p. 104), which prescribes that wills bequeathing personal property shall be executed as are wills devising real property. The statute of frauds and our own act of 1852 each uses the word "credible," and section 2414 of the code uses the word "competent," as to the three or more witnesses required to attest a will. These two words are, as here used, synonymous: Hall v. Hall, 18 Ga. 40. They mean, in this connection, witnesses who are competent at the time of attestation to testify in a court of justice.

Thus, in one of the earlier English decisions, it was said: "The true time for his credibility is the time of ⁴ attestation; otherwise, a subsequent infamy, which the testator knows nothing of, would avoid his will": Holdfast on Demise of Anstey v. Dowsing, 2 Strange, 1253. In Sears v. Dillingham, 12 Mass. 358, the court, after stating that an executor was not a competent witness to prove the execution of a will, said: "But a will to which such an executor is a subscribing witness may be proved by the testimony of the other witnesses, he having been a credible witness within the statute at the time of his attestation, and having become incompetent only by accepting a trust." In Patten v. Tallman, 27 Me. 17, it was said: "The competency of an attesting witness to a will is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation." So very pertinent, in this connection, is the text of Schouler on Wills, that we make an extended extract: "Upon common-law principle the qualification or disqualification of a witness is usually raised with reference to the time when he is called upon to testify. Nor is competency at that date to be left unconsidered; as where, for instance, a witness who subscribed while in sound mind has become insane by the time the probate of the will is at

issue, in which case, of course, his testimony cannot be taken. But his incompetency at this latter date does not defeat the will, whose attestation and subscription was a sort of testifying, such as the peculiar transaction called for. To surround himself with a specified number of witnesses at that time competent was all that any testator could do in compliance with the statute requirements; and what was then a proper execution in all respects taking place, a will was produced whose validity could never be impeached for informality. Hence the rule, which reason should now pronounce the universal one, so far as the question remains a material one at all, that the competency of witnesses, "like that of the testator, is tested by one's status at the time when the will was executed. If, therefore, a sufficient number of witnesses attest and subscribe properly, who at that date are competent, the will remains valid, although death or supervening disability may render any or all of them incapable in fact of testifying by the time the will is offered for probate. In other words, the inconvenience of this last situation is purely casual and incidental, and without direct prejudice to the will itself, which might, indeed, be established on mere proof of handwriting, where the instrument appeared on its face genuine and formal": Schouler on Wills, secs. 350, 351; Jarman on Wills, Randolph and Talcott's ed., 225; Higgins v. Carlton, 28 Md. 115; 92 Am. Dec. 666, and note on 680; Hawes v. Humphrey, 9 Pick. 350; 20 Am. Dec. 481, and note on 488; Amory v. Fellowes, 5 Mass. 219; Carlton v. Carlton, 40 N. H. 14; Holt's Will, 56 Minn. 33; 45 Am. St. Rep. 434.

A witness who signs by his mark, if so capable of testifying, is just as competent a witness under the statute of frauds, our act of 1852 and section 2414 of the code, as one likewise capable of testifying who writes his own name. This is settled by an unbroken line of authorities: Harrison v. Harrison, 8 Ves. 185; Addy v. Grix, 8 Ves. 504; Doe ex dem. Davies v. Davies, 9 Ad. & E. 648; Bailey v. Bailey, 35 Ala. 687; Garrett v. Heflin, 98 Ala. 615; 39 Am. St. Rep. 89; Horton v. Johnson, 18 Ga. 397; Montgomery v. Perkins, 2 Met. 448; 74 Am. Dec. 419; Lord v. Lord, 58 N. H. 7; 42 Am. Rep. 565; Compton v. Mitton, 12 N. J. L. 70; Morris v. Kniffin, 37 Barb. 336; Pridgen v. Pridgen, 13 Ired. 260; Simmons v. Leonard, 91 Tenn. 183; 30 Am. St. Rep. 875; Jesse v. Parker, 6 Gratt. 57; 52 Am. Dec. 102; 4 Kent's Commentaries, 575; 10 Bacon's Abridgment, 491; Williams on Executors, 3d Am. ed., 79; Beach on Wills, sec. 41; 1 Jarman on Wills, Randolph and Talcott's ed., 213, 214; Schouler on Wills, sec. 331;

§ 1 Am. & Eng. Ency. of Law, 941. And, indeed, our code expressly declares that, "signature" or "subscription" includes the mark of an illiterate or infirm person": Code, sec. 5. The mark is the signature of the witness: Century Dictionary, word "Signature"; 14 Am. & Eng. Ency. of Law, 457, word "Mark"; Anderson's Law Dictionary, words "Mark" and "Signature." The subscription of a witness, whether in his own handwriting or by his mark, does not, of course, ipso facto, make such witness competent, because at the time of attestation he may be disqualified by law from testifying in a court of justice, on account of infancy, imbecility, crime, or for other causes.

But for the proviso in section 2415 of our code, it cannot be reasonably doubted that the true test for determining the competency of any witness to the execution of a will in this state would certainly be whether or not the witness, at the time of attestation, would be disqualified from testifying in a court of justice. The rule as to witnesses generally, unless changed by that proviso, is beyond question applicable to "markmen." Did the words, "provided he can swear to the same," referring to a witness unable to write his name and who attests by his mark, change the rule? Omitting from the section the words just quoted, the mark of the witness, he being legally capable of testifying when he made it, would be good without any further condition. Suppose he should die, or become blind or insane; corruptly refuse to testify to what he knew; forget, or be inaccessible; and, for any of these reasons, did not, at the time of probate, in fact swear to the mark, but the other two witnesses did swear that he made it, and proved all other essential facts; must the will fail?

The proviso is new. After very diligent search and inquiry, we have been unable to discover even a trace of it in any book other than our code, where it appears for the first and only time. Can it be possible that it ⁷ was intended to revolutionize the law on the subject and make the validity of a will depend upon the life, the eyesight, the continued sanity, the integrity, the memory, or the accessibility of witnesses? No court should so hold, unless constrained by the plainest language to do so. We do not feel so constrained in the present instance. To construe section 2415 as contended for would be to open the door for endangering or destroying all wills. It would be contrary to the old law, and not in harmony with the spirit of the code. Such an unwise and dangerous innovation should come in language able to withstand the severest verbal criticism. If it be expressed in doubtful phrase, construction may turn aside the danger: See

Walker v. Hunter, 17 Ga. 409; Deupree v. Deupree, 45 Ga. 441-443. If the test of the legal competency of the witnesses is to be applied only at the time of probate, a will might be defeated in many ways. If the witness had died before that time, he could not possibly swear to his mark. If he had become blind, he could not see the mark, and therefore could not swear to it. He might remember all the circumstances, and know that he did make his mark to a will which was properly executed, but without the aid of his lost vision he could not swear to it. If he had lost his mind, he could swear to nothing. If he falsely testified that he could not swear to the mark, he would thus defeat the will, and with small risk, for it is always difficult to convict any person of perjury, and hardly possible to do so when the alleged false evidence relates to a mental state of the witness himself. If he had honestly forgotten, or could not really identify the mark as his own, the same result would follow. If he was inaccessible, or his whereabouts unknown, the mark would remain unsworn to by him.

Surely neither the original codifiers nor the general assembly can be supposed ever to have contemplated the ^o defeat of a will in any of these ways. If the time for applying the test of competency as to an illiterate witness is when the will is offered for probate, it necessarily follows that, in order to make the subscription of such a witness valid, he must then swear to his mark, or else he does not count at all as a witness to the will. Accordingly, counsel for the plaintiffs in error contended that as the illiterate witness in this case, on account of her failure of memory, could not and did not swear to her mark, her attestation amounted to nothing, and consequently there were but two legal witnesses to the will, and it was therefore void.

We cannot think this contention is sound. It goes beyond even the letter of the section under construction. It assumes that the compilers of our code made a new law, and did not codify an old law. It "builds, like the martlet, on the outward wall." It leads to patent absurdities. It ignores the fact that sections 2414 and 2415 are in *pari materia*, and must be construed together. It adopts, from two constructions, the one that defeats, rather than the one that upholds, the real purpose of the law. It overlooks the rule that if the language of any part of section 2415 is devoid of sense, it may be eliminated by the court altogether. It makes the competency of the witness at the time of attestation dependent on his memory or will, or other contingency, at the time of probate. It departs from established authorities, which are laws themselves, the overturning of which would un-

settle property rights. It would enable a contestant to defeat a will by successfully tampering with a witness before the trial. And it does not include or suppose the possibility of an illiterate or infirm witness, if in existence, being voluntarily beyond the process of the court, or his whereabouts being unknown at the time of probate, nor of the death or insanity of such witness before that time. "The ^o presumption against absurdity in the provision of a legislative enactment is probably a more powerful guide to its construction than even the presumption against unreason, inconvenience, or injustice. The legislature may be supposed to intend all of these; but it can scarcely be supposed to intend its own stultification. Accordingly, it has been said that, when to follow the words of an enactment would lead to an absurdity as its consequences, that constitutes sufficient authority to the interpreter to depart from them": Endlich on Interpretation of Statutes, sec. 264; and see, also, sec. 295. Moreover, "in making it requisite to the validity of a will that there should be attesting witnesses who shall subscribe their names to the writing, the law has a threefold purpose: the identification of the paper, the protection of the testator from deception and fraud, and the ascertainment of his testamentary capacity": Beach on Wills, sec. 39. The three reasons here specified are fulfilled by having three competent witnesses who are not disqualified at the time of attestation from testifying in a court of justice. Therefore, if an illiterate or infirm person, who is requested by a testator to attest his will, is not so disqualified, he is a competent witness to the will, because he is then competent to testify on the three points mentioned, as well as on any others relating to the factum or validity of the will.

Whatever evils may exist in having illiterate or infirm persons, who are otherwise competent, to attest wills by their marks, it is shown by a uniform current of decisions, and by the opinion of all text-writers, that the sages of the law, from the earliest times to the present, have upheld the attestation of wills by such witnesses making marks for their signatures; and they have never set forth a reason for any change in the law. In the well-considered case of *Pridgen v. Pridgen*, 13 Ired. 263, Nash, J., delivering the opinion of the court, says: "To ^{1o} subscribe is to set one's hand to a writing. If, then, the statute is, on the part of the testator, in this particular, complied with by making his mark, why is it not satisfied by the witnesses making their mark? The inconvenience and danger of defeating wills by allowing witnesses to attest them who cannot write, have been strongly urged in the argument. On the other hand, many evils might grow out of a

rule confining the attestation to those only who can write." A fortiori, how many evils would exist, as already shown, if the contention of the caveators in this case should be upheld.

There is no act of our legislature or decision of our supreme court, before the adoption of our code, that ever changed, or attempted to change, the old law as to witnesses attesting wills by their marks; and there is at least one case decided by this court, before the code went into effect, which is in harmony with and upholds that law: See *Horton v. Johnson*, 18 Ga. 397. How, then, can it be said that the compilers of our code intended to incorporate into it any other than the prevailing rule of law? It is not to be presumed that they, learned in the law, would, except in rare instances, themselves make a rule of law, when they were only empowered to codify existing laws of force in this state: See act of December 9, 1858; *Mechanics' Bank v. Heard*, 37 Ga. 412; *Phillips v. Solomon*, 42 Ga. 195, 196; *Gardner v. Moore*, 51 Ga. 269; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106, 119, 120; *McDaniel v. Campbell*, 78 Ga. 188. At any rate, "the code is not to be construed as changing the old law, unless the change be very apparent": *Gardner v. Moore*, 51 Ga. 269; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106; or "unless the intent to change be clear," as stated in *Phillips v. Solomon*, 42 Ga. 195. It is, therefore, reasonable to conclude that the codifiers did not intend to create a new rule in Georgia as to the attestation of wills by illiterate or infirm persons,¹¹ which would, in the manner above pointed out, so seriously affect the validity of wills so attested. It is hardly probable that they would have inserted the words, "provided he can swear to the same," if they had supposed they would receive the construction now contended for by the plaintiffs in error.

In our opinion, the true interpretation of section 2415 is found by construing it with section 2414. They are in *pari materia*. Indeed, they cannot be separated, because they relate to the same subject matter. The rule of law applying to statutes that are in *pari materia* is, that "where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs": *Endlich on Interpretation of Statutes*, sec. 43, and note thereto, where many authorities are collated. This rule applies with peculiar force to sections of our code relating to the same subject matter, and which were codified at the same time, because they must be construed, if possible, to harmonize

with each other: *Bealle v. Southern Bank of Georgia*, 57 Ga. 274; *Thomason v. Fannin*, 54 Ga. 363. As was said in the latter case: "If a fair construction can be adopted to prevent such a contradiction by one section or the other, it should be done."

Section 2415, read with section 2414, shows that an illiterate or infirm person may attest a will by his mark. Standing by itself, it does not show what the witness is to attest. The whole section is evidently codified from the case of *Horton v. Johnson*, 18 Ga. 396, which holds that if another witness signs the name of an illiterate witness, it is an illegal subscription, unless the illiterate witness affixes his mark; and from the case of *Hall v. Hall*, 18 Ga. 40, in which it was decided that any witness ¹² to a will is competent, provided, at the time of attestation, he is not disqualified from testifying in a court of justice. This is made plain when section 2415 is construed with section 2414, which, as already stated, is codified from section 5 of the statute of frauds and our act of 1852, which place all witnesses, learned and unlearned, vigorous or infirm, upon the same footing, and render them competent witnesses to a will if, by law, they are not, at the time of attestation, disqualified from testifying in a court of justice.

It was argued that as section 2414 of the code distinctly declared, in effect, that all the witnesses to a will must be "competent," i. e., capable of testifying, and by its terms necessarily embraced witnesses who could not write their names, the words, "provided he can swear to the same," used in the next section with reference to a witness attesting by his mark, would be merely tautological, if regarded simply as repeating the necessity for competency already plainly and unequivocally required. The force of this position cannot fairly be ignored. In it lies the main strength of the argument on the other side of the question; for it gives much plausibility to the contention that the purpose of the words last quoted was to limit, to some extent, the competency of infirm or illiterate witnesses, by requiring that they should possess at least one other qualification than mere legal capacity to testify, viz., the ability to swear to their marks.

It would be unreasonable, if not absurd, to construe the words "can swear" as meaning that the witness must have the requisite memory and the keen physical perception which would enable him, after the lapse of weeks, months, or years, to distinguish and identify a mere cross-mark or other ordinary device representing his signature. This would certainly be very difficult, if not altogether impossible, if the mark had no peculiarities. ¹³ It is much more reasonable to refer the question of ability to

swear to the mark, not to recollection or accuracy of vision, but to legal capacity to testify. Synonymous with the word "can," in the connection in which it is used in the proviso under consideration, are the expressions, "is able to"; "has the power to"; "has the ability"; "is competent to"; "has the capacity to"; or, negatively speaking, "is not unable to"; "has not the lack of power to"; "has not the inability to"; "is not incompetent to"; "lacks not the capacity to." Surely, something must be supplied to this proviso by inference in order to give it sense or meaning. We must thus supply the means from which the witness "can" swear, etc. Is it by reason of his retentive memory, or any other inherent power? Or, by reason of a power which does not spring from his own physical or mental capacities as a person in a natural state, but is conferred upon him by law as a member of society? It would not be straining to substitute the synonymous phrase, "is competent to," for the word "can," so that the proviso would read: "provided he is competent to swear to the same." Had the codifiers used this language, certainly it could not be said that the competency they had in view was his ability by reason of memory, rather than his ability to stand the tests which the law applies to all persons alike in passing upon their fitness to testify as witnesses. It is because of the overwhelming and destructive force of natural laws, that the only requirement which human law can exact is that the witness must, at the time of attesting, be able to stand the test of competency prescribed in all cases; and it matters not whether he afterward loses that competency or not. Illiterate or infirm witnesses simply stand upon the same footing as all others; illiteracy or infirmity will not count against them, but they must, in other respects, come up to the legal standard of competency by which those who wield the pen are measured.

¹⁴ We do not mean to insist that the suggestions just made eliminate the tautology. They cannot, for it is there, if the words, "provided he can swear to the same," mean what we think they do. But granting they are tautological, or even meaningless and utterly useless, if the foregoing argument is worth anything at all, it establishes the conclusion that it is safer and better to thus treat them than to give them a meaning not only out of harmony with all the law, but leading to consequences which the codifiers, we may almost say with certainty, did not anticipate.

In the argument here, our attention was called to the case of *Thompson v. Davitte*, 59 Ga. 472, as somewhat in point, because it there appeared that an attesting witness, when called upon to

prove the execution of a will, stated his unwillingness to swear positively to a mark purporting to be made by him, although he said he thought he made it. That case has, however, afforded us no aid in reaching our present decision; for the only point there was, whether a mere statement by a witness of his belief could be regarded as affirmative evidence, and no construction of section 2415 of the code was then attempted. Indeed, so far as we have been able to ascertain, this court has never before been called upon to construe that section.

The correctness of the views upon this question we have above expressed are, we think, confirmed by other considerations which belong more properly to the next division of this opinion.

2. Error was assigned upon the admission in evidence of the paper propounded, over the objection that there was no sufficient evidence from the subscribing witnesses as to its execution; and also upon admitting the testimony of Mary Gillis as to the execution of the paper by the testatrix and its attestation by the subscribing witnesses, over the objection that she, not being ¹⁵ herself a subscribing witness, was incompetent to testify as to these matters.

It is well settled that the subscribing witnesses to a will must, if practicable, be called and examined; but the fate of a will does not depend entirely upon their testimony. Upon the trial of an application to prove a will in solemn form, they are, all of them, unless accounted for, indispensably necessary witnesses; but the testimony, even as to the factum of execution, is not confined to them: The fact to be established is the proper execution of the will. If that is proved by competent testimony, it is sufficient, no matter from what quarter the testimony comes, provided the attesting witnesses are among those who bear testimony, or their absence is explained. The inquiry, as in other cases, is whether, taking all the testimony together, the fact is duly established. It is not required that any one or more of the essential facts should be proved by all, or any number, of the attesting witnesses. The right is simply to have the attesting witnesses examined, no matter what their testimony may be. The law does not allow proof of the valid execution and attestation of a will to be defeated at the time of probate by the failure of the memory on the part of any of the subscribing witnesses: *Deupree v. Deupree*, 45 Ga. 442, 443; *Jackson v. Le Grange*, 19 Johns. 386; 10 Am. Dec. 237; *Dewey v. Dewey*, 1 Met. 349; 35 Am. Dec. 367; *Remsen v. Brickerhoff*, 37 Am. Dec. 260, note; *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424, and note; *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 568; *Lawyer v. Smith*,

8 Mich. 411; 77 Am. Dec. 460; *Brown v. Clark*, 77 N. Y. 369; *Beach on Wills*, sec. 39, and cases cited in note 19. Or, by their even denying their signatures to the will altogether, when such denial is overcome by other competent evidence: *Pearson v. Wightman*, 1 Mill, 336; 12 Am. Dec. 636; *Matter of Higgins*, 94 N. Y. 554; *Hall v. Hall*, 18 Ga. 45; ¹⁶ *Gardner v. Granniss*, 57 Ga. 555. In *Deupree v. Deupree*, 45 Ga. 441, decided in the year 1872, *McCay, J.*, delivering the opinion of the court, said: "There is no question as to the general rule that, on the death of the witnesses, or on the failure of their memory, the proof of the fact of execution begets a presumption that all the details of the fact were such as the law requires." And on page 443, he says: "How many wills do not come up for probate until many years after the execution of them! Sometimes the witnesses can only recognize their own handwriting; sometimes they only remember the fact that the testator signed, and perhaps only that they signed. Who was present and all other details have passed from memory. To say that, under such circumstances, the will is not to be probated, would be a death-blow to wills." And in *Pearson v. Wightman*, 1 Mill, 336, 12 Am. Dec. 636, *Cheves, J.*, said: "Where subscribing witnesses cannot be produced, or [if found] they deny their signatures, or otherwise fail to prove the due execution of the will, circumstantial evidence may be adduced to supply this deficiency. . . . It would be of terrible consequence if such evidence were not admissible, for how often and how easily might witnesses be tampered with to deny their own attestation?"

The facts in the case of *Pate v. Joe*, 3 J. J. Marsh. 113, which are sufficiently stated in the case of *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424, and note, are very similar to the facts in the case at bar. In that case, one of the witnesses, a woman, did not write her own name. As the decision says: "She was examined as a witness, several years after the occurrence, but could recollect nothing of the circumstances except that Pate was sick, and rode in their [her and her husband's] wagon, and was left on the road." But her negative evidence was overcome by the affirmative testimony of the other subscribing witnesses, and the court held that the will was duly executed ¹⁷ and attested. "The most liberal presumptions in favor of the due execution of wills are sanctioned by courts of justice, where, from lapse of time or otherwise, it might be impossible to give any positive evidence on the subject": *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424. And see *Peck v. Cary*, 27 N. Y. 9; 84

Am. Dec. 220, and note; *Higgins v. Carlton*, 28 Md. 115; 92 Am. Dec. 666.

There is nothing in section 2424 of the code, upon the probate of wills in solemn form, which, rightly construed, conflicts with the law as declared in this opinion. This section does not require that the subscribing witnesses "in existence and within the jurisdiction of the court" shall each swear, at the time of probate, to their own subscriptions, and to the signature and testamentary capacity of the testator, in order to make a will valid; for thus construing the section would lead to obvious and glaring wrongs and absurdities. It simply means that they must be produced for the purpose of testifying to these facts, if competent. This section of the code must be taken, not literally, but in accordance with common sense and the usual rules of construction, as was done in this court in *Kitchens v. Kitchens*, 39 Ga. 171-173, 99 Am. Dec. 453, in construing section 2396 of the code then in force, which was the same as section 2431 of the present code. There it is plainly declared that, in the case of a lost will, the copy must be clearly proved by the subscribing witness; yet the court held that, while the subscribing witness must prove the execution of the lost will, other witnesses might prove its contents. The main reason of the rule for calling all the witnesses in a proceeding for probate in solemn form is, to give the other party an opportunity of cross-examining them; and while the law requires a will to be attested by three witnesses, it does not necessarily mean that all three must concur in their testimony to prove it on probate. To do this would make the validity of the will depend upon ¹⁸ the memory and good faith of the witnesses, and not upon that reasonable proof the law demands in other cases: *Nelson v. McGiffert*, 3 Barb. Ch. 158; 49 Am. Dec. 170, 174, note; *Jesse v. Parker*, 6 Gratt. 57; 52 Am. Dec. 102; *Montgomery v. Perkins*, 2 Met. 448; 74 Am. Dec. 419.

Section 2424 does not, when considered in connection with the well-established law on the subject of the attestation and proof of wills, as already shown, prevent the probate of a will on account of defect of memory, or even perjury, of a subscribing witness, when the deficiency is supplied by other evidence, because the general rules of evidence, and the force and effect of legal evidence were not intended to be disregarded in probating wills even in solemn form. This is shown by construing together the act of December 13, 1859 (Acts 1859, pp. 33-35), and the cases of *Brown v. Anderson*, 13 Ga. 177, and *Hall v. Hall*, 18 Ga. 40, from which section 2424 is evidently codified; and by considering the fact that when a will is pro-

pounded for proof in solemn form, "the issue, and the only issue, is devisavit vel non"—did he devise or not? *Wetter v. Habersham*, 60 Ga. 194. If each subscribing witness were compelled to testify alike, there might be no issue to pass upon.

3. The only remaining question to be disposed of requires very brief notice. The motion for a new trial complains that the court erred "in not charging the jury the law in regard to mutual wills," and alleges that the verdict is "contrary to the law and evidence in this, to wit, the evidence showed that the will offered for probate was one of several mutual wills, and there was no evidence to show that the other mutual wills were not revoked or destroyed."

Although there was some evidence of an agreement between the testatrix and others to make mutual wills, it does not appear that it was ever insisted upon or carried ¹⁹ out, or that the caveators had any concern in it. Moreover, it was incumbent on them to show affirmatively the revocation of the dependent wills, if any there were: Code, sec. 2397. So the law of mutual wills was not involved in this case.

Judgment affirmed.

WILLS—ATTESTING WITNESSES—COMPETENCY.—An attesting witness to a will must be competent at the time of the attestation. If then competent, his subsequent incompetency from any cause will not prevent the probate of the will, if it can be satisfactorily proved: *In re Holt's Will*, 56 Minn. 33; 45 Am. St. Rep. 434, and note.

LEONARD v. MIXON.

[96 GEORGIA, 229.]

EVIDENCE OF HABIT.—Although a witness may have no distinct independent recollection of the details of a fact occurring in the course of the routine of his business, he may testify to his fixed and uniform habit in such cases, and state that he knows that what he did in a given transaction was in accordance with that habit. The probative value of such evidence is for the jury, and it is error for the court to charge the jury to disregard it altogether, especially when such evidence is admitted without objection.

W. L. Grice, for the plaintiff.

H. Lawson and Cutts & Hixon, for the defendants.

²⁴⁰ **SIMMONS, C. J.** This was an action upon a promissory note dated November 29, 1884, payable to Lewis, Leonard & Co., and signed by James M. Mixon, T. L. Griffin, and J. R. Lacy. Mixon pleaded, not indebted, and payment, by giving a new note on February 11, 1885, with other sureties. There was a verdict

in his favor, and the plaintiff made a motion for a new trial, which was overruled, and he excepted.

W. L. Grice, the plaintiff's attorney, testified at the trial, that subsequently to the giving of the note of February 11, 1885, referred to in the plea, the note sued upon, with other notes of Mixon, was placed in his hands for collection, and that on January 27, 1891, he wrote to Mixon that he had the notes for collection, giving a full statement for each note; that he stated who signed each note, giving the date, time of maturity, rate of interest, etc; that he received in reply certain letters, introduced in evidence, one dated January 28, 1891, and another August 28, 1891, in which Mixon acknowledged the receipt of his (Grice's) letters, and stated that he would pay the notes. The witness further testified, that he had served Mixon with notice to produce the letters which he (the witness) had written him in regard to the notes. He knew the date of the letters from a memorandum made by him at the time upon the back of the note sued upon. On cross-examination he testified: "I do not now have a distinct and independent recollection of the entire contents of my letters to Mixon, but my uniform habit in such cases was to give a full description of the claims I had against a man, and I know from this fixed habit that I did it in my letter to Mixon of January 27, 1891, which I remember writing." The trial judge, in his charge to the ²⁴¹ jury, instructed them that "when a witness swears to a thing which he knows to be true only from his habit of doing business, such statement is not to be taken as evidence. What the jury wants is facts, not conclusions." To this portion of the charge the plaintiff excepted in his motion for a new trial, and now assigns error thereon.

We think the court erred in so charging. Although a witness may have no distinct or independent recollection of the details of a fact occurring in the course of the routine of his business, he may testify, as this witness did, to his fixed and uniform habit in such cases, and state that he knows that what he did in a given transaction was in accordance with that habit: See 7 Am. & Eng. Ency. of Law, 63; Abbott's Trial Brief on Facts, sec. 142, and cases cited. The probative value of such evidence is for the jury, and it is error for the court to exclude it altogether from their consideration. More especially is it error to do this when the evidence is admitted without objection, as was the case here: See Woddail v. Austin, 44 Ga. 19, where it is said that if irrelevant evidence be introduced without objection, the court may not charge the jury to disregard it. The party wishing to have it disregarded should move to rule out such evidence.

On account of the error referred to, we think a new trial should be granted.

Judgment reversed.

EVIDENCE OF HABIT.—Evidence that deceased was in the habit of carrying deadly weapons, and that this was known to his slayer, is admissible in behalf of the latter, on the same principle which justifies the admission of evidence of the threats or character of the deceased: *King v. State*, 65 Miss. 576; 7 Am. St. Rep. 681.

PALMER v. YOUNG.

[96 GEORGIA, 246.]

MORTGAGES—SALES UNDER POWERS.—Under a mortgage conferring a power upon the mortgagee to sell the property in satisfaction of the debt secured thereby, a sale thereunder need not be conducted by the mortgagee in person. It may be made through the instrumentality of an auctioneer or any similar agent with the sanction and approval of the mortgagee.

MORTGAGES—RIGHT OF MORTGAGEE TO PURCHASE.—An unauthorized purchase by a mortgagee of the mortgaged property, at a sale thereof under a power contained in the mortgage, if made, fairly and without fraud, is not void, but merely voidable at the election of the mortgagor or his successor to redeem at any time before final judgment of eviction. Such a purchase is good for all purposes, except that it does not bar the mortgagor's equity of redemption.

E. A. Smith, for the plaintiff in error.

J. E. Wooten and J. H. Martin, for the defendant in error.

²⁴⁶ **ATKINSON, J.** To secure the payment of a debt to them, Palmer executed a mortgage to Ellis, Young & Co., by means of which he created a lien upon the premises in dispute in their favor for the amount of the debt. In the mortgage ²⁴⁷ was a power of sale conferred upon the mortgagees, but there was no express provision authorizing them to become purchasers at the sale of the mortgaged property. Upon maturity of the debt, it remaining unpaid, they advertised and exposed the property for sale in accordance with the terms and stipulations of the power contained in the mortgage deed. At the sale neither of the mortgagees were present, but it was conducted by the sheriff of the county, who acted in the capacity of auctioneer, and at the sale the property was bid off by a third person, for the benefit of the mortgagees, and not on his own behalf; and he subsequently, at the request of the mortgagees, conveyed to John R. Young, who was himself an individual member of the partnership of Ellis, Young & Co. The mortgagees, by virtue of the power, conveyed to the purchaser who bought for them at the sale, and he

in turn conveyed to John R. Young. Young brought an action of ejectment against the mortgagor, introduced in evidence the deeds executed in pursuance of the sale under the power contained in the mortgage, and upon the trial recovered a verdict against the mortgagor. A motion for a new trial was made, and two questions arise for consideration in this case.

1. The first question is, whether Ellis, Young & Co., being empowered to sell this property, could delegate that authority to some person other than themselves. We think that their actual physical presence at the sale was not essential to its validity. While the partnership, who were the mortgagees, occupied in a certain sense the position of a trustee with respect to this property, we do not think that, with respect to the mere conduct of the sale, the trust imposed was of such a special, personal character as that the sale could only be conducted by the mortgagees in person. The mere conduct of the sale is, at best, a purely ministerial act. It involves the exercise of none of those elements of discretion and ²⁴⁹ personal confidence which ordinarily make imperative the personal execution of a special trust, and if the sale be conducted by such ministerial officer, and the mortgagee thereafter ratify the sale, there being no omission to give due notice of the time and place of sale as required by the terms of the mortgage, we know of no reason why this should not be a good execution of this power; indeed, it has been so held in courts of last resort in many of the states of the Union. In the case of *Dunton v. Sharp*, 70 Miss. 850, it was held that the personal attendance of the trustee at the sale under the deed of trust was not necessary, and that he could act through others in advertising and auctioneering the land, it being sufficient if this was done with his approval and sanction. In *Mann v. Burges*, 70 Ill. 604, it was decided that where a sale was conducted by an attorney for the mortgagee in his absence, and the mortgagee subsequently ratified the sale by making the deed, the sale was not void. To the proposition that it is not necessary that the sale be conducted personally by the mortgagee, or that he be present thereat, see *Boone on Mortgages*, sec. 219, citing *Fogarty v. Sawyer*, 23 Cal. 570; *Parker v. Banks*, 79 N. C. 480; *Hubbard v. Jarrell*, 23 Md. 66; *Watson v. Sherman*, 84 Ill. 263. See, also, *Jones on Mortgages*, sec. 1861. Even if this be an irregularity, it is not matter of such vital consequence as would avoid the sale. If voidable by reason thereof, the remedy was for the mortgagor to avail himself of his equity of redemption.

2. The next question which we come to consider is, whether or not the mortgagees, at their own sale, could legally purchase the

mortgaged property, and, if not, to what extent a want of power in the mortgagees to purchase would affect the validity of the sale. There is considerable conflict of authority upon this question, ²⁴⁹ some of the courts holding that a mortgagee under such a power can legally purchase the mortgaged property, and one of the best considered cases, viz., *Howard v. Davis*, 6 Tex. 174, assigns as a reason why a mortgagee should have the power to purchase at such a sale, the following: "A mortgagee is a trustee, but in a qualified sense. He does not hold for the benefit of others, but for himself. He is a cestui que trust, as well as trustee. He has an interest in the property. It is pledged expressly to secure his claim, and were he deprived of the power to purchase, he might suffer a great loss by its sale at a low price. He has an interest that the bid shall amount to his encumbrance, and that the property be not sacrificed, to the injury as well of the mortgagor as the defeat of his own claim, as this may be the only fund for the discharge of his debt. Sales at foreclosures, whether under a power or by decree, are open and public, and are made after long notice, and it is to the interest of the mortgagor that the mortgagee shall enter into the competition at the sale." While in other of the states the doctrine prevails that a purchase by a mortgagee of the mortgaged property under such a power is ipso facto voidable, in some states such a sale may be avoided by a disaffirmance thereof by the mortgagor within a reasonable time. The rule may be stated to be, in such cases, that an unauthorized purchase by the mortgagee arms a mortgagor, or his successors in title, with an option to have the sale declared invalid and the right of redemption established. It would seem that such a purchase is good for all purposes, except that it does not bar the mortgagor's equity of redemption. The mortgagor may elect to abide the sale, or at his election he may redeem; and while in the execution of the power there might be such fraud as would of itself avoid the sale, and which would authorize a court of equity to set it aside without reference to the equity of ²⁵⁰ redemption still remaining in the mortgagor, yet, if the sale be fairly made and free from fraud, it cannot be attacked and set aside as a void sale simply because the mortgagee was himself the purchaser thereat. Besides, according to the authorities, there is less strictness in applying the rule to cases of a mortgagee purchasing at his own sale under the power, than there is in the case of a trustee purchasing. A mortgagee in such a case is not merely a trustee, but he is also a cestui que trust, and as such has an interest to protect: See 2 Jones on Mortgages, sec. 1881. The question as to

whether this sale was fairly conducted was found favorably to the plaintiff in this case, who holds under the mortgagees. The legal title passed to him, subject to be divested by the mortgagor paying to him the amount of the debt to secure which the mortgaged premises were pledged. When he brought the action in ejectment, he had an unimpeached legal title derived from the mortgagor under a sale of his property, which, up to that time, had been acquiesced in by the latter. The mortgagor had the right at any time to disaffirm this sale, and avail himself of his equity of redemption. This he might have done by filing an equitable plea, tendering the debt due, at any time before final judgment of eviction against him; but not then disaffirming the sale by the mortgagee, he is concluded by this verdict; and the sale being, as we have before said, in all respects fair and regular, and in accordance with the power confirmed by the terms of the mortgage deed, the court properly declined to set aside the verdict and award a new trial.

Let the judgment of the court below be affirmed.

MORTGAGES—SALES UNDER POWERS IN—RIGHT OF MORTGAGEES TO PURCHASE AT.—A mortgagee who purchases at his own sale, under a power in the mortgage not authorizing him to purchase, gives the mortgagor an option to affirm or disaffirm the sale within two years thereafter, and, if he disaffirms, to redeem; but the mortgagee may, by bill filed against the person having such option, compel an election and foreclosure if the sale is disaffirmed: *Alexander v. Hill*, 88 Ala. 487; 16 Am. St. Rep. 55, and note. Where a mortgagee has purchased at a sale under a power contained in the mortgage, without the consent of the mortgagor, the latter has a right, within a reasonable time, to disaffirm the sale, and ask for redemption and an account of the rents and profits: *McCall v. Mask*, 89 Ala. 487; 18 Am. St. Rep. 145. See, also, the note to *Wygol v. Bigelow*, 16 Am. St. Rep. 500.

ATLANTA NATIONAL BANK v. DAVIS.

[36 GEORGIA, 324.]

BANKING—REFUSAL TO PAY CHECK—DAMAGES.—If an indorsed check is sent for collection by due course of mail to the bank on which it is drawn and in which the drawer has on deposit at the time sufficient funds to pay it, the return of the check unpaid, due solely to the negligent mistake of an employé of the bank, is, in effect, a refusal to pay, and renders the bank liable to the drawer for substantial, temperate, compensatory damages, without proof of special or actual damages.

B. F. & C. A. Abbott, for the plaintiff in error.

W. C. Glenn and C. D. Maddox, for the defendant in error.

³³⁵ LUMPKIN, J. 1. The plaintiff's check came by due course of mail to the defendant bank, upon which it was drawn, and in which he had on deposit at the time sufficient funds with which to pay it. The check was returned unpaid. It seems clear from the evidence that this was done, not deliberately or maliciously, but in consequence of a mistake made by one of the employés of the bank. The paper was not protested, nor willfully dishonored. Still, ³³⁶ so far as the plaintiff is concerned, we think what occurred amounted to a refusal to pay his check. The consequences to him resulting from the inadvertence of the bank official were exactly the same as if there had been an express refusal to pay. We do not think a bank should be allowed to send out a paper with a badge of dishonor upon it, and then protect itself by saying, in effect, this was caused simply by its own carelessness.

2. It was not denied that if the conduct of the bank amounted to a refusal to pay, it was liable in damages to the plaintiff; but the serious question was, as to what should be the measure of such damages. There was no proof of any actual or special damage, and the defendant therefore insisted that, at most, the damages awarded should be only nominal. We have given the subject some investigation, and, as a result, we find ourselves unable to accept this as a correct proposition of law. The following authorities are pertinent, and throw some light upon the question:

In 2 Addison on Contracts, section 820, the author, after stating the general rule that a banker is bound to honor the checks of his customers, if presented within banking hours, and provided he has in hand sufficient funds for the purpose belonging to the customers, adds: "And if he refuses he is liable to an action by the customer for substantial damages, without proof of actual damages; for it is a discredit to the customer to have his check refused payment." Again, in 2 Morse on Banks and Banking, section 458, after a statement of the general rule relating to the bank's duty in the premises, we find the following: "This duty and this right are so far substantial, that if the bank refuses, without sufficient justification, to pay the check of the customer, the customer has his action for damages against the bank. It has been said that if, in such action, the customer does not show that he has suffered a tangible or measureable loss or injury from the refusal, ³³⁷ he shall recover only nominal damages. But the better authority seems to be, that even if such actual loss or injury is not shown, yet more than nominal damages shall be given. It can hardly be possible that a customer's check can be wrongfully refused payment without some

impeachment of his credit, which must in fact be an actual injury, though he cannot, from the nature of the case, furnish independent distinct proof thereof."

Accordingly, it would seem that the plaintiff's recovery is not to be limited to merely nominal damages. We find authority for saying that in such a case he should be awarded "temperate" damages. Thus, in *Birchall v. Third Nat. Bank*, 19 Cent. L. J. 390, it was ruled that a bank was liable in temperate damages to a customer for a wrongful dishonor of his check, without proof of special damages. In the notes appended to an article on "Damages for Wrongful Dishonor of Checks," following the report of the above cited case, will be found a large collection of authorities which may be of help to anyone desiring to further pursue an investigation into this question. Another authority for the allowance of "temperate" damages to a customer for wrongful dishonor of his check, although special damage is not shown, is Newmark on Special Bank Deposits, sec. 215; and the same rule is stated in 3 Am. & Eng. Ency. of Law, 226, under the title "Checks." In a note to the text, *Birchall v. Third Nat. Bank*, 19 Cent. L. J. 390, is cited.

3. In view of all the evidence disclosed by the record, we think the verdict for two hundred dollars rendered in the present case was "temperate," and therefore sustainable.

Judgment affirmed.

BANKS — REFUSAL TO PAY CHECK — LIABILITY.—When a banker refuses to pay the check of a person engaged in trade, who has sufficient funds on deposit for that purpose, he is entitled to substantial damages, without proof of malice or special injury to the depositor: *Schaffner v. Ehrman*, 139 Ill. 109; 32 Am. St. Rep. 192, and note; extended note to *Matter of Franklin Bank*, 19 Am. Dec. 422.

WHITE v. EAST LAKE LAND COMPANY.

[96 GEORGIA, 415.]

WATERCOURSES—RIPARIAN RIGHTS.—If the natural channel of a watercourse lies along the lands of different proprietors, the water therein is the common and indivisible property of all. Their privileges therein are in all respects equal, and, except in so far as the right may be qualified by grant, prescription, or otherwise, each has, equally with the others, a right to the use of it for domestic or business purposes. Each has a right to have the water come to his land in its natural and usual flow, subject only to such detention or diminution as may be caused by a reasonable use of it by other proprietors.

WATERCOURSES—UNREASONABLE USE—DAMAGES.—If, by an unreasonable use of the water of a natural stream on the part of an upper proprietor, a lower proprietor is deprived entirely of his enjoy-

ment of the water, he is entitled to recover full compensation in damages for the loss; if the diversion is merely partial, the damages should be proportioned.

WATERCOURSES—REASONABLE USE.—Each riparian proprietor is entitled to a reasonable use of a natural stream. Whether such use is reasonable or not must depend upon the character and size of the stream, the uses to which it is subservient, and the other circumstances of each particular case. The question is always one of fact for the jury.

WATERCOURSES—UNREASONABLE USE.—If an upper proprietor, by placing a dam across a natural stream running through his land, obstructs it so that the water accumulates in an artificial lake or pond, and by means of percolation or evaporation is diminished in quantity to such an extent as to deprive the lower proprietor of the reasonable use of the water, such obstruction is an unreasonable diversion of the water for which the lower owner is entitled to recover damages.

WATERCOURSES—RIPARIAN RIGHTS—EVIDENCE.—In an action to recover for an unreasonable diversion of the water of a natural stream, if one of the questions at issue is whether the plaintiff's mill lost custom because it stopped grinding on account of an insufficient supply of water, statements of customers that they had withdrawn their custom for this reason are admissible in evidence.

Lewis & Green and H. C. Jones, for the plaintiff.

F. A. Quillian and J. S. Candler, for the defendant.

410 **SIMMONS, C. J.** 1-3. Where the natural channel of a watercourse lies along the lands of different proprietors, the water is the common and indivisible property of all of them; their privileges therein are in all respects equal, and, except in so far as the right may be qualified by grant, prescription, or otherwise, each has equally with the others a right to the use of it for domestic or business purposes. Each has a right to have the water come to his land in its natural and usual flow, subject only to such detention or diminution as may be caused by a reasonable use of it by other proprietors. The property in the water being indivisible, there can be no diversion ⁴¹⁷ or severance of a proportionate part of it. Each may divert so much, and so much only, as will not unreasonably impair the rights of other proprietors. "An unreasonable use of it, whereby others are deprived, in whole or in part, of the common benefit, is an actionable injury, even though there is no present actual damage, and without regard to the question whether the act which causes the injury is willful or malicious": Gould on Waters, sec. 207. If the diversion is complete, that is to say, if, by such unreasonable use on the part of another, a proprietor is deprived entirely of his enjoyment of the water, he is entitled to recover full compensation in damages for the loss thus occasioned; if the diversion is merely partial, the jury should apportion the damages accordingly. He is in any event entitled to nominal damages for the invasion of his rights: 28 Am. & Eng. Ency. of Law, tit. "Water-

courses," 983. The measure of each owner's rights in the use of the water is the reasonableness of the use. For the ascertainment of what is a reasonable use, no definite rule is or can be laid down. Whether the use is reasonable or not must depend upon the character and size of the stream, the uses to which it is subservient, and other circumstances of the particular case, and in an action of this kind the question is therefore one of fact to be determined by the jury, and not one of law for the court: *Pool v. Lewis*, 41 Ga. 162; 5 Am. Rep. 526; Washburn on Easements and Servitudes, 266, 277, 4th ed., 379, 380. Construing together the provisions of our code on this subject, as contained in sections 2227, 2231, and 3018, they do not change the common law above stated.

In the first of the cases now under review, that of *J. M. White v. East Lake Land Company*, the petition alleges, that the plaintiff is proprietor and owner, and has been since 1877, of a gristmill, sawmill, and cotton gin on lot of land 118 in DeKalb county; that he has ⁴¹⁸ no other means of propelling the mill and gin than by water power obtained from Doolittle creek, upon which said mills are situated, said creek being formed by the confluence of two smaller streams, the larger one of which, the main tributary of Doolittle creek, has its source in what is known as East Lake in said county; that during the spring and summer of 1891, defendant built a long and high dam across said main tributary, and thereby did wrongfully divert, cut off, and stop, during the period commencing about the last of July or first of August, 1891, and ending about the first of January, 1892, five-sixths of the natural volume of water flowing through Doolittle creek to plaintiff's mills, which was necessary to the operation of the mill and gin in its accustomed manner, as it had flowed, ought to have flowed, ought now to flow, and would have continued to flow without interruption, had not defendant so cut off and stopped the flow of the water by the building of the dam, which supply of water plaintiff had rightfully enjoyed until it was so cut off and stopped; and, by the act so complained of, defendant has damaged plaintiff twelve hundred and fifty dollars, by loss of grinding, sawing, and ginning. The declaration was demurred to on the grounds: 1. That it fails to show any act of negligence committed by defendant; 2. That it shows that the defendant simply exercised a legal right, and fails to show that such right was exercised in an illegal or improper manner; 3. That it fails to show in what manner the plaintiff was damaged, or any damages he would be entitled to recover; and 4. That it

sets forth no cause of action. The court overruled the demurrer, but, after hearing the evidence, granted a nonsuit. The plaintiff excepted to the grant of a nonsuit, and the defendant, by cross-bill, excepted to the overruling of the demurrer. Tested by what we have said as to the law on this subject, it is clear that the court was right in overruling the demurrer. We ⁴¹⁹ think the court erred, however, in granting a nonsuit. The evidence tended to show, that by reason of the erection of the defendant's dam, there was some detention and diminution of the natural volume of water which would otherwise have flowed to the plaintiff's mill, and that he thereby sustained pecuniary loss. As we have already shown, it was for the jury, and not for the court, to say whether the detention was unreasonable or not; and although, under the evidence, the extent of the loss is somewhat uncertain, yet if there was an unreasonable detention which interfered with the plaintiff's enjoyment of the water, he was entitled to at least nominal damages.

The declaration in the other case, that of J. M. White and Susan A. White v. East Lake Land Company, alleges that the plaintiffs are tenants in common, and have been since 1877, in a certain millsite, with a gristmill, sawmill, and cotton gin thereon; and allegations similar to those in the other declaration are made as to the dependence of the mill upon the water supply from Doolittle creek, and the erection of the dam; and it is further alleged, that by said erection defendant wrongfully changed the entire character of the main tributary of Doolittle creek from a narrow stream to a broad lake, known as East Lake, containing about thirty-five acres of land, and thereby diverted the water from flowing through said main tributary of Doolittle creek to plaintiffs' mills in its accustomed manner, which was absolutely necessary to their successful operation, as it had flowed, and would have continued to flow, had not defendant so diverted the flow by the erection of the dam and the making of the lake, by which the water that ought naturally to flow through Doolittle creek to plaintiffs' mills and gin was carried off by evaporation into the atmosphere and by percolation into the earth; which supply of water plaintiffs had enjoyed in its natural and accustomed flow ⁴²⁰ through Doolittle creek until wrongfully diverted by defendant, by which act defendant has rendered the millsite of plaintiffs practically worthless, to their damage three thousand dollars. This declaration was demurred to on the same grounds as the declaration in the other case, and the demurrer was sustained. We think the court erred in sustaining the demurrer.

The only substantial difference in the two declarations is in the allegation contained in the latter, as to the manner in which the water was diverted, it being alleged therein that the water which ought naturally to have flowed to the plaintiffs' mill, etc., was by reason of its being spread over a large surface in consequence of the erection of the dam, carried off by evaporation into the atmosphere and by percolation into the earth. It was argued, that the water thus lost having been carried off by natural causes, there could be no recovery for such damage as may have resulted therefrom. This loss, however, would not have occurred but for the building of the defendant's dam; and we see no reason why a diversion of this kind is not equally wrongful with a diversion accomplished by other means. That such a diversion is unlawful, see Gould on Waters, secs. 205, 208; Washburn on Easements and Servitudes, 224, 4th ed., 332; Ferrea v. Knipe, 28 Cal. 341; 87 Am. Dec. 128.

4. One of the questions at issue being whether the plaintiffs' mill lost custom because the mill had stopped grinding on account of the lack of a sufficient supply of water to run the same, it was, according to the decision of this court in *Stewart v. Lanier House Co.*, 75 Ga. 582, error to exclude the testimony of J. M. White as to the statements of customers that they had withdrawn their custom for this reason.

Judgment in each case, on the main bill of exceptions, reversed; on the cross-bill affirmed.

WATERS—RIPARIAN RIGHTS.—Water is the equal and common property of everyone through whose land it flows, and the right of each to its use and consumption while passing over his possession is the same: *Tennessee Coal etc. R. R. Co. v. Hamilton*, 100 Ala. 252; 46 Am. St. Rep. 48, and note; *Clark v. Pennsylvania R. R. Co.*, 145 Pa. St. 438; 27 Am. St. Rep. 710, and note.

WATERS—UNREASONABLE USE BY UPPER PROPRIETOR—DAMAGES.—A lower proprietor is entitled to recover nominal damages for the excessive diversion of the water of a stream by an upper owner without proof of actual injury: *Clark v. Pennsylvania R. R. Co.*, 145 Pa. St. 438; 27 Am. St. Rep. 710, and note; *New York Rubber Co. v. Rothery*, 132 N. Y. 293; 28 Am. St. Rep. 575, and note. Unless affected by license, grant, prescription, public right, or the like, any proprietor of lands on the bank of a stream of water has a right to use the water as it is wont to flow, without material alteration or diminution, and no riparian owner has the right to use the water to the prejudice of other proprietors above or below him: *Green Bay etc. Canal Co. v. Kaukauna Water Power Co.*, 90 Wis. 370; 48 Am. St. Rep. 937, and note.

WATERS—OWNER'S RIGHT TO ERECT DAM.—An upper and prior owner of a dam in a natural stream cannot be enjoined by a lower dam-owner from penning back the water and raising a sufficient

pond to supply his mill with water to run the machinery therein, although such use at times holds back the water so as to deprive the lower owner of a sufficient supply thereof: *Mumpower v. Bristol*, 90 Va. 151; 44 Am. St. Rep. 902, and note.

CITY COUNCIL v. SCHRAMECK.

[96 GEORGIA, 428.]

MUNICIPAL CORPORATIONS — STREETS — CHANGING GRADE OF.—The measure of damages to abutting property arising from a change in the grade of a street is the actual diminution in the market value of the land resulting from such change.

MUNICIPAL CORPORATIONS—DAMAGES FOR CHANGE OF GRADE OF STREET—EVIDENCE.—In ascertaining whether there has been an actual diminution in the market value of abutting property, arising from a change in the grade of a street, facts which may show that such value has actually decreased, such as that certain expenditures are necessary to bring the property to its former conditions, or the necessity of filling the lot and raising the buildings thereon, with the probable cost of such work, although they do not authorize a recovery of the cost of such changes as independent items of special damage, are admissible as throwing light upon the general question of diminution of market value.

W. T. Davidson and M. P. Carroll, for the plaintiff in error.

P. J. Sullivan, for the defendant in error.

⁴²⁶ **SIMMONS, C. J.** 1. The city council of Augusta built a new bridge upon the first level of the Augusta canal, and the plaintiff claimed that his property was damaged by reason of the approaches raised to the bridge. Arbitrators were appointed under the act of August 24, 1872, as amended by the act of February 26, 1887, in reference to authorizing the city council to open, change, and widen streets. The arbitrators awarded to the plaintiff five hundred and fifty dollars as damages, and he appealed to the superior court. The jury found nine hundred and thirty-seven dollars and fifty cents in his favor, and the defendant made a motion for a new trial, which was overruled, and it excepted. ⁴²⁷ On the trial of the case, the plaintiff introduced evidence as to the quantity of dirt which it would require to fill the lot to a grade with the street, and as to what it would cost to do so; also, as to the cost of raising the building on the lot to a level with the new grade of the street. The testimony was objected to, on the ground that it was irrelevant and misleading; but the trial judge stated that he would allow it as a means of arriving at the depreciation of the market value, and on this subject instructed the jury as follows: "Evidence was admitted to

show what it would cost the plaintiff to repair the damages he alleges to have sustained by defendant, by filling up his lot and raising the buildings to the grade level of the street. This evidence was not allowed as a correct rule for determining plaintiff's damages, because such a method is not a correct guide, and was only allowed to be considered, along with other evidence, to show the actual damage, if any, to plaintiff by raising the grade of the street. The raising of the grade of a street may not endamage property left below the grade, but may actually benefit it. Therefore, the cost of filling and raising property to the grade level is not a rule by which damages should be assessed, but may be considered to illustrate the amount of damages, along with other evidence." The admission of this evidence and the instruction above quoted are complained of as error. That the evidence in question was properly admitted, and the instruction of the court thereon proper and legal, see 3 Sedgwick on Damages, 8th ed., sec. 1163, et seq; Lewis on Eminent Domain, secs. 478, 494, and cases cited; Dawson v. Pittsburg, 159 Pa. St. 317; Stewart v. Council Bluffs, 84 Iowa, 61. The measure of damages in such cases is the actual diminution in the market value of the land resulting from the change of grade. In ascertaining whether there has been a diminution in the market value, however, facts which ⁴²⁸ may show that the value has actually decreased, such as that certain changes and expenditures are necessary to bring it to its former condition, although they would not authorize a recovery of the cost of such changes as independent items of special damage, are admissible as throwing light upon the general question of diminution in market value, and are always admitted for this purpose. The fact that a change in the grade of a street has left a lot considerably below the level of the street, and that the expenditure of a certain amount would be necessary to restore it to a level with the street, would not authorize a recovery of that amount as specific damages, but might very properly be considered as showing that the lot was thereby rendered less salable than before, and that its market value had decreased.

2. The next ground of the motion for a new trial complains of the admission of certain testimony, but does not state that it was objected to when offered. We have repeatedly held that such a ground will not be considered. The evidence, though conflicting, is sufficient to sustain the verdict, and the trial judge being satisfied therewith, this court will not control his discretion in refusing to grant a new trial.

Judgment affirmed.

MUNICIPAL CORPORATIONS—CHANGE OF STREET GRADE—DAMAGES.—The damages which a lotowner may recover for grading a street includes all the damages which his lot has sustained by the act of the defendant, and such damage is complete when the grade is changed, and does not depend upon any subsequent use of the lot: *Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614; 42 Am. St. Rep. 149, and note. See, also, the monographic notes to *O'Brien v. Philadelphia*, 80 Am. St. Rep. 835, and *Sheehy v. Kansas City etc. Ry. Co.*, 4 Am. St. Rep. 399.

MUNICIPAL CORPORATIONS—ELEMENTS OF DAMAGE FOR CHANGING GRADE OF STREET.—Under a statute authorizing a recovery of the damages sustained by a change in the grade of a street, the damages recoverable by the owner of an adjoining lot include all necessary expenses in changing the grade of the lot to conform it properly to the new grade of the street, and also the expense of repaving the street charged upon the lot, and rendered necessary by the change in the street grade: Extended note to *O'Brien v. Philadelphia*, 80 Am. St. Rep. 849.

HOWELL v. SHEWELL.

[98 GEORGIA, 454.]

AUCTION SALES—MEMORANDUM, WHO MAY MAKE.—An agent of the owner of land, engaging an auctioneer to make sale thereof cannot, as the latter's clerk, make an entry of the sale, so as to bind the bidder to whom the property is finally knocked off by the auctioneer. A memorandum so made does not satisfy the statute of frauds.

Petition for specific performance. An owner of certain land employed a specified person to act as his agent in the sale of the land at public auction. This agent employed an auctioneer, who made the sale. The agent acted as clerk for the auctioneer, and as such made a memorandum and entry thereof for his own purposes and as such clerk. The defendant, being the highest bidder, became the purchaser of three lots at such sale at a price written on a memorandum and entry made by such agent, as clerk for the auctioneer conducting the sale. After tender of deed conveying said three lots to defendant, and his refusal to take and pay for them, this action was brought, and the memorandum made by such agent, as clerk, was offered in evidence and excluded by the trial court. Plaintiff suffered a nonsuit and then appealed.

S. Morris, for the plaintiff.

Erwin & Cobb, for the defendant.

⁴⁵⁵ **LUMPKIN, J.** Under the statute of frauds, any contract for the sale of lands, or any interest in or concerning them, must be in writing: Code, sec. 1950, par. 4. An exception to this

rule, is, however, stated in section 2630, which declares that, in case of sales by auction, the auctioneer shall be considered the agent of both parties, so as to dispense with any further memorandum in writing than his own entries.

After much conflict of decision, the doctrine has become settled that entries of such sales made by the auctioneer's clerk, if he is a disinterested person, will be sufficient to bind a bidder to whom the property offered for sale is finally knocked off. We think this is going quite far enough in the direction indicated and, after careful and laborious search, have been unable to find any authority whatever for the proposition, that the owner of the property sold may act as the auctioneer's clerk for the purpose of making an entry to bind a bidder at the sale. Where the owner employs an agent to sell property, and this agent, in turn, engages the services of an auctioneer to conduct the sale at public outcry, the agent should no more be permitted to act as clerk for the auctioneer than the owner himself. Such agent represents the owner, and no one else; and is, in perhaps a modified degree, under the same kind of temptation which might induce the owner himself to make a false entry. At any rate, the agent is certainly not, as to the matter in hand, disinterested; and no one who is not entirely so should be permitted to act as the auctioneer's clerk.

Judgment affirmed.

AUCTIONS—MEMORANDUM MADE BY AGENT OF OWNER OF PROPERTY.—The agent of the vendor of real estate sold at auction cannot bind the purchaser by a memorandum thereof made and signed by him for the vendor alone, after the sale by the auctioneer, and not in any way assented to by the purchaser: *Bamber v. Savage*, 52 Wis. 110; 38 Am. Rep. 723. An auctioneer's clerk is not authorized to make the memorandum to take the case out of the statute of frauds: *Meadows v. Meadows*, 3 McCord, 453; 15 Am. Dec. 645. A memorandum signed by an auctioneer or his clerk, stating the terms of sales is a sufficient compliance with the statute of frauds: *Smith v. Jones*, 7 Leigh, 165; 30 Am. Dec. 498.

GUARANTEE COMPANY OF NORTH AMERICA v. EAST ROME TOWN COMPANY.

[96 GEORGIA, 511.]

CORPORATIONS—PLEDGE OF STOCK—DIVIDENDS.—If stock of a corporation is pledged as collateral security, the pledgee has a right to collect the dividends on the stock, and apply them to the debt for which it is pledged, or to hold them as trustee for the pledgor, unless, by special contract, the pledgor reserves the right to collect the dividends himself.

CORPORATIONS—PLEDGE OF STOCK—DIVIDENDS.—A corporation, having notice that a pledge of its stock has been made, is liable to the pledgee for dividends paid by it to the pledgor, although the transfer of the stock has not been entered on the books of the corporation.

CORPORATIONS—PLEDGE OF STOCK—NOTICE—DIVIDENDS.—If the proper officers of a corporation know that certain shares of stock therein have been pledged by the party in whose name the stock stands on the corporate books, such knowledge is notice to the corporation, and it is bound thereby as to the payment of dividends on such stock.

CORPORATIONS—PLEDGE OF STOCK—DIVIDENDS.—The pledgee of corporate stock as collateral security has a right to recover from the corporation all unpaid dividends thereon accruing prior to the satisfaction of his debt by a sale of the stock; and he holds such dividends as trustee for the pledgor.

CORPORATIONS—PLEDGE OF STOCK—DIVIDENDS.—In an action by the pledgor of corporate stock against the corporation to recover unpaid dividends thereon accruing prior to the satisfaction of his debt, the corporation is liable, unless, in addition to showing that the debt has been satisfied, it also shows that it has paid such dividends to the pledgor.

Reece & Denny and T. W. Alexander, for the plaintiff.

Fouché & Fouché, for the defendants.

512 SIMMONS, C. J. It appears from the record that Cothran & Co., a firm composed of Charles H. and James E. Cothran, became the agents of Armour & Co., and gave them a bond, with the Guarantee Company of North America as surety, for the payment of all amounts belonging to Armour & Co. that came into their (Cothran & Co's) hands as such agents. They subsequently became indebted to Armour & Co. a large amount which they were unable to pay, and the Guarantee Company having paid it in their behalf, they gave their promissory notes to the Guarantee Company for the amount thus paid, and, as security therefor, deposited with that company certain collateral, consisting in part of seventy-seven shares of the stock of the East Rome Town Company, sixty-two of which belonged to H. D. Cothran, the father of Charles H. and James E. Cothran, and were indorsed by him in blank. The notes not being paid at maturity, the collateral was sold, and the pledgee itself became the purchaser.

This sale was admitted to be regular and legal in every respect. While the stock was held as collateral ⁵¹³ certain dividends were declared upon it, but it seems that the pledgee had no notice of this. Upon learning that the dividends had been declared, it made a demand therefor upon the East Rome Town Company, which was refused; whereupon it brought this action to recover the same. There was a verdict in favor of the defendant, and the plaintiff made a motion for a new trial, which was overruled, and it excepted.

1. The law seems to be well settled, that where stock of an incorporated company is pledged by the owner as collateral security for a debt, the pledgee has a right, and is in duty bound, to collect the dividends on the stock, and apply them to the debt for which the stock is pledged, or to hold them as trustee for the pledgor. The dividends follow the stock into the hands of the person who is the legal holder of the stock. While the general property in the stock remains in the pledgor (Code, sec. 2142), the pledgee has such a title therein as would authorize and require him to collect the dividends: *Colebrook on Collateral Securities*, secs. 100, 270; *Jones on Pledges*, sec. 398; 18 *Am. & Eng. Ency. of Law*, 703. Of course, where, by a special contract, the pledgor reserves the right to collect the dividends himself, this rule does not apply.

2, 3. If, in the absence of an agreement reserving to the pledgor the right to collect the dividends, the corporation, with notice of the fact that the pledge has been made, pays the dividends to the pledgor, it is liable to the pledgee for such dividends; and this is so, although the transfer of the stock has not been entered on the books of the corporation: 2 *Thompson on Corporations*, secs. 2180, 2621; *Gemmell v. Davis*, 75 Md. 546; 32 *Am. St. Rep.* 412. The main reason for entering such transfers on the books is to afford notice as to the ownership of the stock; and where the proper officers of the corporation have notice independently of the ⁵¹⁴ books, their knowledge is notice to the corporation. In this case, although there was no transfer on the books of the corporation, it appears that, when the pledge was made and when the dividends were declared, the president and treasurer and the secretary of the corporation knew the stock had been pledged. The knowledge of these officers was notice to the corporation, and the corporation is bound thereby: *Mechem on Agency*, sec. 729; 2 *Cook on Stocks and Stockholders*, sec. 727; *Wade on Notice*, sec. 683 b.

4. The court instructed the jury in substance, that upon the satisfaction of the debt by the sale of the stock, the interest of

the pledgee in the dividends ceased, and it could not recover for dividends that accrued before that time. We think, if the company had not already paid the dividends, the pledgee would still have the right to recover them notwithstanding the debt had been satisfied. As to these dividends, the pledgee, as we have shown, was the trustee of the pledgor, it was its right and duty to collect them, and if they were not paid to the pledgor, he would have the right to demand of the pledgee an accounting for them.

Unless, therefore, the corporation had paid the dividends, the pledgee still had such an interest therein as would entitle it to sue for them. If the corporation, in addition to showing that the debt had been satisfied, could show also that it had paid the dividends to the pledgor, this, of course, would be a good defense to the action.

5. The evidence fails to show that the dividends were paid to the pledgor, or to anybody else. It follows, from what we have said, that the verdict was not supported by the evidence, and a new trial should be granted.

Judgment reversed.

CORPORATIONS—DIVIDENDS—RIGHT OF PLEDGEE OF STOCK TO.—As between the vendor and vendee, or pledgor and pledgee, of shares of corporate stock, all dividends declared after the sale or pledge of the stock belong to the vendee or pledgee, even though the transfer has not been recorded on the books of the corporation: *Gemmell v. Davis*, 75 Md. 546; 33 Am. St. Rep. 412.

CORPORATIONS—DIVIDENDS—PAYMENT TO PLEDGOR.—While dividends declared during the pledge of corporate stock belong to the pledgee, although he is not registered as owner on the corporate books, yet, if not so registered, and the corporation pays the dividend in good faith and without notice of the transfer to the pledgor, the payment is a good one as against the corporation: *Gemmell v. Davis*, 75 Md. 546; 33 Am. St. Rep. 412.

SPENCER v. LOVEJOY.

[96 GEORGIA, 657.]

RAILROADS—AGENCY OF CONNECTING LINE.—If through coupon passenger tickets of a particular class are issued by a railway company over its own lines and those of connecting railways, including a system of railroads in the hands of a receiver, and operated by him in separate divisions, the fact that, with his knowledge, conductors in his employ have been recognizing and honoring as valid the coupons of such tickets for his lines, in connection with the fact that a coupon from the particular ticket in question has been so recognized and accepted for passage, is sufficient to establish on behalf of the holder of such ticket the agency of the initial company for the receiver in issuing the ticket.

RAILROADS—STOPOVER PRIVILEGES.—If a through railroad passenger ticket has attached to it separate and distinct coupons for each of several lines of railway owned by the same or different companies, or for separate divisions of the same line, the person entitled to use the ticket has, in the absence of any specific contract or restriction, the right to break his journey and stop over at the end of each of these lines or divisions, and then resume his journey again upon the next coupon of the same ticket, provided this is done within the limit of time during which the ticket is good for transportation.

RAILROADS—TRANSFER OF TICKET.—In the absence of terms rendering a railroad ticket nonassignable, it passes from one person to another by delivery without affecting its validity or the right to use it for transportation.

Action to recover for unlawful ejection from a passenger train. Plaintiff purchased from a ticket broker a through coupon railroad passenger ticket, issued by the Kansas City, Memphis & Birmingham Railroad, and good for one passage from Atlanta, Georgia, to Washington, D. C., and return, over that road and connecting lines. The ticket and each of the coupons attached thereto were dated September 14, 1892, on the back, and appeared from their face to be good for any of the remaining part of 1892, with no date punched or any other indication of time limit. The original ticket stipulated for stopover privileges on the road issuing it, but from the coupons, good over the several specified connecting lines, this stipulation was omitted. Plaintiff took the train of the Richmond & Danville Railroad Company at Atlanta, Georgia, on September 24, 1892, and presented his coupon designated to be used over that road to the conductor upon call. The conductor rejected it on the ground that it had expired by limit of time, and, in default of payment of cash fare, compelled the plaintiff to leave the train. Plaintiff recovered a verdict and judgment, and the receiver for the said railroad appealed.

Jackson & Leftwich, for the plaintiff in error.

Hall & Hammond and L. P. Skeen, for the defendant in error.

604 **LUMPKIN, J.** 1. Under the facts recited in the first head-note, and which were duly and legally proved, it is quite certain that the plaintiff made out at least a prima facie case establishing the agency of the initial company for the receiver in issuing the ticket upon which the plaintiff was riding when he was expelled from the defendant's train.

2. The authorities settle beyond question, that where a through railroad ticket has attached to it separate and distinct coupons for each of several lines of railway owned by different companies, the person entitled to use the ticket has, in the absence of any specific contract or express restriction to the contrary, the right

to break his journey and "stop over" at the end of each of these lines of railway, and then resume his journey again upon the next coupon of the same ticket, provided this is done within the limit of time during which the ticket is good for transportation. If any doubt upon this question is entertained, it will surely be removed by examining the following text-books and the cases therein cited: Hutchinson on Carriers, sec. 578; 4 Lawson's Rights, Remedies, and Practice, sec. 1889; Redfield on Carriers, sec. 444; 2 Wood's Railway Law, 1398; Wheeler on Carriers, 147; 25 Am. & Eng. Ency. of Law, 1112. An examination of these authorities will also show that, in principle, they are applicable to coupon tickets over a line of railways owned by the same company, but divided into separate divisions, for each of which there is a coupon upon the ticket. Each coupon, in the absence of a special "stopover" privilege, requires the traveler to make a continuous journey over the division for which it was issued. It is a sort of separate and independent contract for carriage over that division; but when the end of the division is reached, the passenger may leave the train and resume his journey over the next division upon the coupon issued for it. We see no reason why a company which chooses to issue separate coupons for different divisions of its own line should not be required to perform its contract of carriage by installments. Indeed, this would seem to be at least one of the purposes of issuing the tickets in this form. At any rate, the law has attached to this class of tickets a peculiar significance, and a railway company issuing them will be presumed to have intended that they should bear the construction which the law places upon them. Certainly, a traveler, in the absence of any special understanding or agreement with the carrier, will be protected in attaching to a ticket of this class its ordinary and legal significance.

3. There is nothing in the record even remotely suggesting why the ticket which the plaintiff was using was not transferable, or that, merely because he purchased it from another, he had not a perfect right to use it. In the absence of terms rendering a railroad ticket nonassignable, it passes from hand to hand by delivery: Bishop on Noncontract Law, sec. 1077.

4. A number of small points were raised at the trial and brought here for review. We shall not undertake to discuss them.

Judgment affirmed.

RAILROADS—COUPON TICKETS—STOPOVER PRIVILEGES.
The purchaser or holder of a coupon railroad ticket over connecting lines is not bound to make a continuous trip from the starting point to

destination, unless there is a stipulation upon the ticket to that effect. He is entitled to stopover privileges at the end of each line, but, when he has started over any of the connecting lines, he is bound to continue to the point named in his coupon: *Nichols v. Southern Pac. Co.*, 23 Or. 123; 37 Am. St. Rep. 664.

RAILROADS — COUPON TICKETS — TRANSFERABILITY. — A coupon railroad ticket over several connecting lines of railroad, issued without limitations or restrictions as to ownership, is transferable after being partly used, though issued and sold at a reduced rate, and entitles the holder to ride thereon and to recover damages for expulsion from the train when he presents such ticket in payment of his fare: *Nichols v. Southern Pac. Co.*, 23 Or. 123; 37 Am. St. Rep. 664.

RAILROADS — COUPON TICKETS. — A ticket over connecting lines does not evidence a joint contract by them, when it consists of coupons each entitling the passenger to transportation over the line of the carriers designated therein, and the whole is sold by one of them, acting as the agent of the others so far as their lines are concerned: *Gulf etc. Ry. Co. v. Looney*, 85 Tex. 158; 34 Am. St. Rep. 787.

AMERICAN NATIONAL BANK v. GEORGIA RAILROAD COMPANY.

[96 GEORGIA, 665.]

RAILROADS — RIGHT TO HOLD GOODS FOR FREIGHT — NOTICE OF THROUGH BILL OF LADING. — If a connecting carrier receives from its preceding carrier goods shipped on a through contract, and pays the freight charges which have accrued up to that time, with notice that the initial carrier has issued to the consignor a through bill of lading reciting that the entire freight charges have been prepaid, although the notice is also to the effect that this recital is erroneous, such notice is sufficient to put the receiving carrier on inquiry, and it ought to have ascertained before paying the freight charges and accepting the goods for shipment whether the bill of lading had been negotiated or not, and, failing to make any inquiry, it cannot hold the goods, either for its own charges, or those paid by it, as against an innocent purchaser under the indorsed bill of lading, who, believing that the freight has been actually prepaid, has accepted as cash a draft drawn by the consignor upon the consignee, to which draft the bill of lading is attached, as is usual in such transactions.

J. R. Lamar, for the plaintiff.

J. B. & Bryan Cumming, for the defendant.

006 **SIMMONS, C. J.** Nathan, a grain merchant, shipped from Kansas City, Missouri, two carloads of grain to Wallace & Co., of Augusta, Georgia, over the Missouri Pacific railway, taking a through bill of lading to Augusta, signed by the proper officer of the Missouri Pacific Railway Company. Nathan gave his check upon a bank for the amount of the freight; the check was accepted as cash by the agent of the railway company, and the bill of lading was marked by the agent, "freight prepaid." Nathan took the bill of lading, drew a draft on Wallace & Co., the consignees, attached the bill of lading to the draft, and negotiated

it to the American National Bank of Kansas City, the bank taking it for absolute credit in the usual course of business. The waybills and manifests issued by the Missouri Pacific Railway Company for the grain contained ⁶⁶⁷ the entry: "Delivering line will please collect all freight charges. Through error, bill of lading has been issued reading prepaid. This bill of lading must not be protected." When the grain arrived in Atlanta it was delivered to the Georgia Railroad Company, which received the waybills with these indorsements upon them. The Georgia Railroad Company paid the freight from Kansas City to Atlanta, and carried the grain over its line to Augusta, and, upon the arrival of the grain at Augusta, demanded the freight it had paid to the other companies which had transported the goods from Kansas City to Atlanta, and the freight which it had earned upon its own road. This demand was refused. The goods were demanded of the Georgia Railroad Company by the agent of the American National Bank; the demand was refused; and the bank thereupon brought its action of trover against the railroad company to recover the grain. The judge, to whom the case was submitted without the intervention of a jury, decided that the plaintiff could not recover.

If the case were between the American National Bank and the Missouri Pacific Railroad Company, it would, under many decisions, be free from difficulty. The law seems to be, that where an agent has authority to issue bills of lading, and does issue one with certain representations contained therein, and the bill of lading is negotiated to an innocent third person, the railroad company, as between itself and such third person, is estopped to deny the representations made in the bill of lading. Under these decisions, it is immaterial that the bill of lading is not negotiable in the strict sense of the term. A representation in a non-negotiable chose in action, when acted upon, is, according to the usual rule applied in cases of estoppel, held to be equivalent in all respects to one made in the case of a negotiable paper. Some of the decisions referred to are also put upon the ground, ⁶⁶⁸ that where one of two innocent parties must suffer from the wrongful act of a third party, the law casts the burden of loss upon him by whose act, omission, or negligence such third party was enabled to commit the wrong which occasioned the loss. The superior equity is with the bona fide assignee who has parted with his money upon the faith of the recitals contained in the bill of lading: 2 Am. & Eng. Ency. of Law, tit. "Bill of Lading," 227, and cases cited; *Bank of Batavia v. New York etc. R. R. Co.*, 106 N. Y. 195; 60 Am. Rep.

440; *Howard v. Tucker*, 1 Barn. & Adol. 713; *Armour v. Michigan Cent. R. R. Co.*, 65 N. Y. 114; 22 Am. Rep. 603; *St. Louis Ry. Co. v. Larned*, 103 Ill. 293; *Brooke v. New York etc. R. R. Co.*, 108 Pa. St. 529; 56 Am. Rep. 235; *Wichita Savings Bank v. Atchison etc. R. R. Co.*, 20 Kan. 519; *Sioux City etc. Ry. Co. v. First Nat. Bank*, 10 Neb. 556; 35 Am. Rep. 488; *Coventry v. Great Eastern Ry. Co.*, 11 Q. B. Div. 776; *Abbott's Law of Merchant Shipping*, 13th London ed., 565, and cases cited. A very large proportion of the business of the country is founded upon transfers of bills of lading; and if the transferee were required, at his peril, to ascertain from the carrier whether the representations made in the bill of lading are true or not, it would practically put an end to this class of transactions. The better and safer rule is, to hold that the carrier who issues the bill of lading is bound by the representations of his agents. Mr. Justice Miller, in discussing this subject in the case of *McNeil v. Hill*, Woolw. 96, says: "As civilization has advanced and commerce extended, new and artificial modes of doing business have superseded the exchanges, by barter and otherwise, which prevail while society is in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent, invention of like character, for the transfer, without the cumbersome and often impossible operations of actual delivery ⁶⁶⁹ of articles of personal property, is the indorsement or assignment of bills of lading and warehouse receipts. Instruments of this kind are sui generis. From long use and trade, they have come to have, among commercial men, a well-understood meaning, and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale. . . . If the warehouseman gives to the party who holds such receipt a false credit, he will not be suffered to contradict his statement which he has made in the receipt, so as to injure a party who has been misled by it." Horton, C. J., in the case of *Wichita Savings Bank v. Atchison etc. R. R. Co.*, 20 Kan. 519, says: "Where one advances money on a bill of lading, or buys the property therein set forth, by taking a transfer of such instrument absolutely, the only evidence which he has of the quantity of goods which he has bought or advanced money on may be the statement contained in the bill of lading. Indeed, one of the main uses of bills of lading of grain, at this day, is to afford shippers opportunity to obtain advances upon their shipments. When issued, the parties issuing them have the knowledge that they may, and probably will, be used with commission merchants, or at some bank, to obtain

advances of money. In the most of cases this result is almost certain to follow." Under the facts of the present case, we think what has been said as to the liability of the initial carrier upon the representations contained in the bill of lading applies also as between the Georgia Railroad Company and the assignee of the bill of lading. When the Georgia Railroad Company received the shipment at Atlanta, and paid the freight charges which had accrued up to that time, it did so with notice that the initial carrier had issued to the consignor a through bill of lading, reciting that the entire freight charges had been prepaid; and its agents ought to have known that, in all ⁶⁷⁰ probability, the bill of lading had passed into the hands of third parties who had acted upon the faith of this representation. Having such notice as was sufficient to put it on inquiry, it ought to have ascertained, before it paid the charges and accepted the shipment, whether the bill of lading had been negotiated or not; and, having failed to make any inquiry, we do not think it can hold the goods, either for its own charges or those paid by it, as against an innocent purchaser under the bill of lading. Its acceptance of the shipment upon this bill of lading was an adoption of the bill of lading as issued, and it became responsible to innocent third parties for such statements as were contained in that instrument, just as if it had issued the same in the first instance.

Judgment reversed.

RAILROADS—FREIGHT.—A carrier acts as forwarding agent of a consignor in receiving goods to be carried over his own line, and thence over successive lines connected therewith, in the absence of special instructions from the consignor to the succeeding carriers; and the last carrier has a lien upon the goods, not only for the freight on his part of the route, but also for any freight paid by him from the commencement of the transportation: *Briggs v. Boston etc. R. R. Co.*, 6 Allen, 246; 83 Am. Dec. 626, and note. A second carrier, who receives goods for transportation from a prior carrier under a bill of lading which provides for a reshipment, has a lien on the goods for his freight: *Walker v. Cassaway*, 4 La. Ann. 19; 50 Am. Dec. 551. Where several independent carriers receive goods in succession, each is entitled to payment in advance, or to a lien thereto, including back charges paid; but not after notice not to receive such goods: *Knight v. Providence etc. R. R. Co.*, 13 R. I. 572; 43 Am. Rep. 46. A lien is the right of detaining property on which it operates until the claim which is the basis of the lien is satisfied: *Ames v. Palmer*, 42 Me. 197; 66 Am. Dec. 271.

WESTERN UNION TELEGRAPH COMPANY v. HINES.

[96 GEORGIA, 688.]

EVIDENCE—ATTACK ON PAPER AFTER IT IS ADMITTED.

If a party, calling for a paper, inspects and puts it in evidence after he has announced that he contends that it is not the original of the paper called for, he does not lose his right to subsequently attack it on the ground stated, although he has given no formal notice of an intention to do so.

EVIDENCE—ATTACK ON PAPER AFTER IT IS ADMITTED.

If a party, calling for and inspecting a paper produced in response to notice, does not, at or before the time of introducing it, mention any objection to it, or give any notice of an intention to attack it, he cannot afterward impeach it, unless he has been in some way misled, imposed upon, or deceived, after the exercise on his own part of proper diligence.

TELEGRAPH COMPANIES—WAIVER OF NOTICE OF CLAIM FOR DAMAGES.—If the sendee of a telegraphic message promptly notifies the agents of the telegraph company of a claim against it for damages caused by failure to promptly deliver the message, and of his intention to sue, a promise by the company's agent to look into the matter, and report to him, and to "arrange" it, if followed by a failure to keep such promise, constitutes a waiver by the company of the sixty days' written notice of the sendee's claim for damages, stipulated for upon the blank on which the message was written.

TELEGRAPH COMPANIES—NOTICE FROM MESSAGE.—

A telegraphic message reading "Have work, come at once," is sufficient to put the telegraph company on notice of the damages which would probably result to the sendee of the message from negligence in failing to deliver it promptly.

Torsey, Brewster & Howell, and Wright, Hamilton & Wright,
for the plaintiff in error.

Fouché & Fouché, for the defendant in error.

*** **SIMMONS, C. J.** 1. When this case was here before, it appeared that the plaintiff had lost the copy of the dispatch which was delivered to him by the telegraph company, and the trial judge allowed him to prove the contents of it without producing or accounting for the original: *Western Union Tel. Co. v. Hines*, 94 Ga. 430. On the second trial, it appeared that the plaintiff had given the telegraph company notice to produce the original which had been filed by the sender in the office of the company in Birmingham. There was no dispute between the parties as to the words of the message, but the dispute was as to whether the message was written on one of the printed blanks of the company or upon ordinary paper. The printed blanks contained a stipulation that, if damages were claimed on account of *** nondelivery of the message, written notice of the same should be given to the company within sixty days. The defendant claimed that the original message was written on one of these blanks, but the plaintiff denied this. The defendant produced at the trial a paper written

on one of its blanks with the above stipulation printed thereon, which it claimed to be the original message called for by the plaintiff. This paper was introduced in evidence by the plaintiff, his counsel stating to counsel for the defendant before so doing, that he "contended it was not the original," but no formal notice was given that the plaintiff intended to attack it on that ground. During the trial he did attack it, and attempted to show that the original message, as received by the company from the sender, was written on ordinary paper, which contained no such stipulation as that above referred to. To this the defendant objected, on the ground that the plaintiff having introduced the paper without notice of an intention to attack it as not being the original paper called for, he could not attack it on that ground subsequently. The court did not err in overruling the objection. It is true that where a party, calling for and inspecting a paper produced in response to notice, does not, at or before the time of introducing it, mention any objection to it, or give any notice of an intention to attack it, he cannot afterward impeach it, unless he has been in some way misled, imposed upon, or deceived, after the exercise on his own part of proper diligence; but we think the statement of counsel in the present case when the paper was produced, that he contended it was not the original paper, was sufficient notice on this point.

2. It appears from the record that Hines, the plaintiff, had been in the employment of Dabney, a railroad contractor, as "boss" or foreman of his hands in the building of a railroad. When the railroad upon which ⁶⁹¹ they were engaged was completed, he left the service of Dabney, with the understanding that if Dabney should secure another contract then in contemplation, he (Hines) was to return and engage in the same employment until the work under the new contract should be completed. It was agreed that he should receive for his work sixty dollars per month and board worth sixteen dollars and fifty cents per month, and the employment was to continue at least one year. Dabney secured the new contract, and on March 11, 1889, delivered to the defendant, to be forwarded to Hines, a telegram stating: "Have work; come at once." The telegram was delivered to the defendant at Birmingham, Alabama, and was directed to Rome, Georgia, where Hines resided, and was received at the defendant's office in Rome on the day it was sent, but was not delivered to Hines until several days had elapsed; in consequence of which he lost the job. He went to the office of the telegraph company at Rome, and told a clerk of this, and that he was going to sue the company for damages; and the manager of the

company at that place soon after called upon him and inquired about the matter. He showed the manager the telegram, and stated that he had lost a job worth sixty dollars per month and his board, in consequence of the nondelivery of the message, and that he intended to sue the company for damages. The manager said to him: "Hold on awhile, and I will see into it and let you know," and also stated that he "would arrange it." Relying on this statement, Hines waited for some weeks before taking further action, but received no further report in regard to the matter from the manager or any other agent of the company. While he was waiting to hear from the manager, the sixty days expired within which, according to the stipulation which the company contends was printed on the blank on which the original message was written, written notice of such claims was required to be given to the company. ⁶³² The telegraph company insisted that, by reason of the failure of the plaintiff to comply with this stipulation, the action was barred; the plaintiff, on the other hand, contended that the conduct of the defendant's manager amounted to a waiver of the stipulation. The trial judge, in his charge to the jury, referred to them the question whether, under all the facts, such conduct amounted to a waiver or not. After careful consideration, we have concluded that, under the facts, it was proper to submit the question to the jury, and that they were warranted in finding that there was a waiver.

According to the evidence, the plaintiff promptly notified the agents of the company of his claim and of his intention to sue, and might have given the more formal notice required by the stipulation referred to if he had not been thrown off his guard and lulled into a false security by the promise of the company's manager to look into the matter and report to him, and his further promise to "arrange it." Having thus led the plaintiff to suppose that his claim would be settled, or, at least, that there was no occasion for him to take any further action until the manager should report to him, we do not think the defendant should be allowed to say that the claim is barred because written notice was not given in time. This case is stronger in its facts than the case of *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257. There the promise of the agent was simply that he would "look into the matter," and the court held that this was not sufficient. Judge Thompson, in his work on the *Law of Electricity*, section 262, says that the conclusion in that case was reached upon "questionable grounds." In the present case, as we have seen, the manager of the company not only stated that he would look into the matter, but that he would let the plaintiff know,

and also promised that he "would arrange it": See, on this subject, *Western Union Tel. Co. v. Stratemeier*, 6 Ind. App. 125.

¶ 3, 4. The questions dealt with in the third and fourth headnotes do not require further discussion.

Judgment affirmed.

TELEGRAPH COMPANIES—WHEN DOES MESSAGE DISCLOSE ITS IMPORTANCE.—On the question as to what form of words in messages, other than cipher messages, is sufficient to apprise the company of the importance of the message, the cases cannot be reconciled. There is an evident tendency on the part of courts to adopt the principle that it is sufficient to render the company liable for actual damages if the message shows upon its face that it relates to a business transaction, and that loss will probably result unless it is promptly and correctly transmitted and delivered, and that it is not necessary that the company should be apprised of the exact amount of loss likely to result from the default: *Extended note to Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 787.

TELEGRAPH COMPANIES—WAIVER OF CONDITION BY AGENT.—A demand for damages for mistake in the transmission of a telegraphic message is properly made upon the agent on duty at the place from which the message was sent, and though he is not bound to recognize an oral demand, still, if he does so, and makes no objection to it on the ground that it is not in writing, but objects to it on the sole ground that the company is not at fault, he thereby waives, on the part of the company, any right to have the demand made in writing, according to the condition attached to the message as sent: *Hill v. Western Union Tel. Co.*, 85 Ga. 425; 21 Am. St. Rep. 166.

TRIAL—OBJECTION TO EVIDENCE.—It is not admissible for counsel to be quiet and let evidence come out, and take advantage of it if favorable, and, if not, ask that it be stricken out and not considered: *Falcon v. Johnston*, 102 N. O. 264; 11 Am. St. Rep. 737.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

ROOK v. WILSON.

[142 INDIANA, 24.]

WILLS, ERROR IN DESCRIPTION.—A will purporting to devise "my real estate, to wit, the southeast quarter of the southwest quarter of section 8," operates as a devise of the northeast quarter of the southeast quarter of that section, if that was the only land owned by the testator.

WILLS—SIGNATURE BY MARK AND WRONG CHRISTIAN NAME.—The signing of a will by the mark of the testator is sufficient, though the Christian name signed with the mark and intended for his was incorrectly written as James, while his name was Samuel.

D. T. Taylor, for the appellants.

La Follette & Adair and R. H. Hartford, for the appellee.

²⁴ **HOWARD, C. J.** This was an action brought by appellee against appellants and other defendants to quiet title to certain real estate. A demurrer having been overruled to the complaint, the appellants filed an answer and a cross-complaint. Afterward, by leave of the court, the answer and cross-complaint were withdrawn, and the appellants stood upon their demurrer. Thereupon, the court, having heard the evidence, found for the appellee, and entered a decree quieting his title to the land in controversy.

²⁵ Appellee traces title through mesne conveyances to a warranty deed made by Mary Rook and David Rook, widow and son of Samuel Rook; and the only question to be considered is, whether the last will of Samuel Rook authorized David Rook to execute said deed.

It is not questioned that by said will certain land was devised to David Rook, on conditions which were fulfilled by him; that

on the death of the testator, in August, 1854, the will was duly proved, and David Rook at once went into possession of the land in controversy, claiming ownership under the will; and that he so continued in possession, under claim of ownership, until the making of the deed under which appellee claims title. It seems, also, that the title and possession thus acquired remained unassailed for nearly forty years.

It is said, however, that the land described in the will is not the same as that in dispute. The description in the will is: "My real estate, to wit: The southeast quarter of the southeast of section eight (8), in township No. eight (8) in (22) north, of range twelve (12) east."

Appellee alleged in his complaint that, in this reference to the lands devised, the testator used an erroneous specific description of land which he did not then, and at no time thereafter, own; but that he did at the time own the land here in dispute, to wit: "The northeast quarter of the southeast quarter of section eight (8), township twenty-two (22) north, range twelve (12) east"; that the last-named land was "the only real estate owned by said Samuel Rook at his death"; and that "the said land [describing it] is and was the land referred to in the said will of Samuel Rook, deceased, by the words, 'my real estate.'"

These allegations, being taken as true, were sufficient, as we think, to make the complaint good as against the objection here urged against it. The intention to devise ²⁵ the land in controversy, "my real estate," is evident from the whole tenor of the will; and the erroneous description cannot obscure this intention. A similar misdescription in *Cleveland v. Spilman*, 25 Ind. 95, was held insufficient to invalidate a devise. Counsel say that that case was not well considered, and ought not to be followed. The opinion in *Cleveland v. Spilman*, 25 Ind. 95, was written by one of the ablest judges that ever sat upon this bench; and the case has since been often cited by this court on the point in question, including the recent case of *Priest v. Lackey*, 140 Ind. 399; and we are still of opinion that it should be followed in such a case as that before us. The language of the will shows that the devise was intended to operate upon the land then owned by the testator, which was the northeast, and not the southeast, quarter of the southeast quarter of the section.

Attention is also called to the circumstance that the will is signed "James (his mark X) Rook, testator," and not Samuel Rook, as it should have been. The defect, if it be such, is not discussed by counsel. A similar defect was noticed in the signature to the will in *Cleveland v. Spilman*, 25 Ind. 95. The will

in this case was duly probated as the will of Samuel Rook. Any mark used by the testator to stand for his name and show his assent to the will would be sufficient: See 1 Jarman on Wills, 6th Am. from 5th Eng. ed., *79, 80.

We have carefully considered every question raised in the several able briefs of counsel on both sides, and find no error in the record for which the judgment should be reversed.

Judgment affirmed.

WILLS—ERRORS IN DESCRIPTION.—This subject will be found discussed in the notes to *Goode v. Goode*, 66 Am. Dec. 637; *Kurtz v. Hibner*, 8 Am. Rep. 669; *Chambers v. Watson*, 46 Am. Rep. 73. A mistake in the description in a will, either of the beneficiaries or the subject matter, will not avoid the will, if enough remains to show, with reasonable certainty, what was intended: *Seebrook v. Fedawa*, 33 Neb. 413; 29 Am. St. Rep. 488, and note.

WILLS.—THE MARK of a testator to his will is just as effective as when he signs his name: *Robinson v. Brewster*, 140 Ill. 649; 33 Am. St. Rep. 265, and note.

SANDAGE v. STUDABAKER BROS. MANUFACTURING CO.

[123 INDIANA, 123.]

EQUITY.—THE FACT THAT THERE IS A REMEDY AT LAW will not prevent the claimant from resorting to equity, unless such remedy is plain and adequate. Therefore, he is entitled to maintain a suit in equity to cancel a contract and to enjoin its enforcement, though he could also urge the same matters in defense to actions brought against him under such contract, if, by waiting until such suits were begun, he might be harassed by, and subjected to, repeated and vexatious litigation.

RESCISSIION.—ONE PURCHASING PATENT RIGHTS which are subsequently adjudged to be invalid is entitled to rescind the contract of purchase, and thereupon, on tendering a reassignment of such rights, to be relieved from payment of such of the purchase price as remains unpaid, and to recover back that part which has been paid.

ON A CONTRACT THE MAKING OF WHICH IS PUNISHABLE BY STATUTE, by the imposition of a penalty, there can be no recovery, although such statute does not, in express terms, prohibit the contract, nor pronounce it void.

PATENT RIGHTS, STATE LAWS RESPECTING THE SALE OF.—A statute requiring the owner of letters patent to file copies thereof in the circuit court of the county in which he makes any sale thereof, and to insert in the obligation, given for the purchase price, that it is given for a patent right, and subjecting him to a penalty for violating the statute, is not in conflict with the constitution or laws of the United States, and, therefore, is not void.

JURISDICTION—SUITS IN ANOTHER STATE—INJUNCTIONS AGAINST.—A citizen of a state may be enjoined from commencing or prosecuting suits against his fellow-citizen thereof in the courts of another state for the purpose of obtaining an advantage which he is not entitled to in the state of their common domicile.

CONTRACT.—PAROL EVIDENCE is not admissible to show what was the consideration of a contract and the understanding of the parties thereto, if the object of such evidence is to contradict a written obligation, and to give it an effect inconsistent with its terms.

A. L. Brick and C. Pickard, for the appellants.

A. Anderson and L. Hubbard, for the appellee.

149 JORDAN, J. The only questions arising and argued by appellants in this appeal are those based upon the alleged error of the court in overruling their separate motions for a new trial. Two principal propositions are presented for our consideration by appellants' learned counsel, namely: 1. That the decision of the court is not sustained by sufficient evidence, and is also contrary to law; 2. That the court erred in excluding certain evidence of the appellant Joshua Sandage. Appellee by this action sought to recover a certain sum of money paid by it to appellant Sandage in the purchase of letters patent for an improvement in steel skeins, and to enjoin him, together with his coappellant, the Sandage Steel Skein Company, from bringing or further prosecuting suits in the courts of Cook county, in the state of Illinois, upon certain contracts in writing, mentioned in the complaint, and for the cancellation of these contracts.

The complaint is in two paragraphs and the following is substantially a correct summary of the facts as alleged in this pleading: Appellants, at and long before the commencement of this action, were residents and had their domiciles at the city of South Bend, Indiana. Appellee is a corporation also having its domicile in said city, long prior to the instituting of this action, and is there engaged in the business of manufacturing wagons and carriages. On July 19, 1882, appellant Sandage was the owner of certain letters patent for an improvement of steel axle skeins, issued to him by the government of the United States. On the date mentioned, he sold and transferred these letters patent to the appellee by a contract in writing, executed by him and appellee. By this contract, the latter agreed to manufacture the patented skein, and to employ Sandage as a foreman in its factory for a period of two years, at a salary of fifteen hundred dollars 150 per year, and to pay him two thousand dollars in cash, and one-third of the net profits arising from the manufacture of the skeins, until he should receive twenty thousand dollars. Sandage agreed to also assign to the company any improvements which he might make in the patent, and in the contract he guaranteed the validity of the letters and agreed to pay all costs and expenses in enforcing and sustaining the same, and to defend the appellee in all suits for infringements, and to pay all costs and expenses occasioned thereby.

Upon the execution of this contract and transfer of these letters to appellee, it erected buildings and provided machinery, and

engaged in the making and selling of the steel skeins, and Sandage was taken into its employ for two years as per agreement. He was paid his stipulated salary, also two thousand dollars in cash, and in addition appellees paid him seven thousand dollars in profits accruing up to 1886, as the consideration for the sale and assignment of the patent. On November 20, 1886, the parties executed what was termed a supplemental contract, whereby they changed the original agreement by providing that Sandage, as a final and additional compensation for and in consideration of his letters patent, and any improvement he might make thereon during the life of the patent, should be paid by the appellee the sum of thirteen thousand dollars, to be payable as follows, to wit: January 1, 1888, four thousand dollars; January 1, 1889, three thousand dollars; January 1, 1890, four thousand dollars; January 1, 1891, two thousand dollars. It was further provided in this supplemental contract, that in the event that appellee was compelled to defend its right and title to the patent, or if it should find it necessary to prosecute persons for infringements between November 26, 1886, and January 1, 1891, the date of the last payment, then, and in that event, the reasonable expenses of these suits should be paid by Sandage, to an ¹⁵¹ amount not to exceed the final payment of two thousand dollars, but in the event the appellee brought a suit and was defeated, appellants were not to be held liable for the cost of such suit. It was also stipulated that "so much of the agreement made between the Studabaker Bros. Manufacturing Company and Joshua Sandage, on the nineteenth day of July, 1882, as relates to the payment by the said Studabaker Bros. Manufacturing Company to the said Sandage, of moneys for and in consideration of his letters patent herein indicated, or which is in any way inconsistent with this agreement, is hereby repealed and made of no effect. The other particulars of said first agreement to continue and remain in full effect." On January 3, 1888, appellee paid Sandage four thousand dollars, being the installment due under the supplemental agreement on the first of that month. After receiving said sum, appellant, in November, 1889, made an assignment of both the aforesaid contracts, to his coappellant, the Sandage Steel Skein Company. The second installment of three thousand dollars was not paid at maturity, and the latter company, claiming to be the holder of these contracts by virtue of an assignment to them by Sandage, brought an action in the circuit court of Cook county, Illinois, upon the contract, in the name of Joshua Sandage, for its use, against appellees, to recover this unpaid install-

ment. In 1890, after the second installment of money specified in the second or supplemental contract had become due, and which appellees had refused to pay, the Sandage Steel Skein Company commenced a second action in the same court against appellee to recover this latter installment. After the assignment of these contracts to said steel skein company, and the commencement of these actions in January, 1890, appellees begun a suit in the circuit court of the United States at Chicago, Illinois, against the Illinois Iron Bolt Company, for an infringement on said ¹⁵³ patent, and on January 27, 1890, served both of the appellants with notice to the effect that such an action had been commenced in that court, and that the validity of the patent would be assailed and in issue therein, and requested that said parties assist in said cause in defending the validity of the letters patent, claiming an estoppel against them by any judgment that might be rendered therein against the validity of the patent. At the March term, 1890, of said United States court, in said action, these letters by that court were adjudged, and held to be invalid for want of novelty. Thereupon, on May 16, 1890, appellees executed and tendered to appellant Joshua Sandage a reassignment of said letters, and a cancellation of said contracts, and requested him to repay to it the sum of twenty thousand dollars, all of which was refused by him. A like demand for cancellation of said contracts was made upon the Sandage Steel Skein Company, which was also refused. That, in addition to the two suits already commenced by said skein company against appellee, said company was threatening to bring other actions on these contracts in the courts of Illinois and attach appellee's property, situated in that state. Sandage, at the time of the sale of the patent right to the appellee, had wholly failed and neglected to comply with the requirements of sections 6054 and 6055 of the Revised Statutes of Indiana, in relation to the sale of patent rights, and sold his said patent to appellee in violation of this statute. The supreme court of Illinois having held a statute of that state in relation to patents (being one similar to the statute cited above) void, on the ground that it violated the federal constitution, it is averred that the appellants have resorted to the courts of Illinois in order to escape the laws of Indiana on that subject.

It is also averred that, after this action was commenced ¹⁵³ and a temporary restraining order was granted against the appellants, that they made a sale of these contracts, in suit, to a resident of Chicago, Illinois. It is also shown that the tender of

a reassignment of this patent was continued by bringing the same into court for appellants' use. These are the conspicuous facts as presented by the record in this action. A trial upon the issues joined in the lower court resulted in a judgment to the effect that appellants be perpetually enjoined from prosecuting or commencing any suit or suits for the purpose of enforcing the contracts in question, and that the same be canceled and delivered up to the appellee, and that appellee recover of Joshua Sandage the sum of thirteen thousand four hundred and forty-seven dollars and forty-two cents and costs.

One of the contentions of appellants is, that "the facts in this case, as alleged in the pleadings, and as shown by the proofs, do not make such a case as entitled the appellee to the equitable relief prayed in the petition and granted by the decree."

Upon the contrary, appellee contends that the evidence fully authorized and justified the court in finding that the appellants commenced their suit in the state of Illinois for the purpose of evading the laws of Indiana, and thereby gaining an advantage over the appellees in the forum of a sister state.

We have examined the evidence in the record, and are of the opinion that it establishes the facts alleged in the complaint, and sustains the finding and judgment of the court. It is insisted by counsel for the appellants that the alleged facts in the case at bar are a complete and adequate defense at law to the actions commenced upon the contracts in controversy in the courts of Illinois. Conceding this contention, however, can it be urged, consistent with reason, that this principle of equity can be invoked, to require appellee, under the facts, to go ¹⁵⁴ into the courts of another state, and there assail these contracts by pleading the facts in bar to the actions therein pending? This contention cannot be sustained upon any reasonable grounds. It is, however, a familiar rule that it is not sufficient that there is a remedy at law, but the same must be plain and adequate, and as practical and efficient to the ends of justice, and its prompt administration, as is the remedy in equity. It is manifest, we think, that had appellee been compelled to avail itself of the facts on which it based its cause of action in this case, as a cause of defense to the suits already commenced by the appellee, or to the others that they might institute upon the obligation in question, its remedy would not have been as adequate and efficient as the one invoked in this cause. Two actions had been commenced upon the alleged invalid contract, and another was threatened, in order to recover the installment of two thousand dol-

lars not yet matured. By waiting to contest, by way of defense, the right of appellants to enforce these payments of money under this contract, appellee might have been at least harassed by, and subjected to, repeated and vexatious litigation and much expense incident thereto, by appellants, or those to whom they might have assigned the contract in controversy. By appealing to a court of equity, the remedy was at once adequate and complete, and by one action all the relief to which appellee was entitled under the facts could be awarded.

Counsel further contend that appellee was not entitled to have this contract rescinded until it had placed Sandage in statu quo. We recognize the full force of the rule that, where a party desires to rescind a contract, he must do so in toto, and return the consideration which he received thereunder, and otherwise do that which will put him and the other party in statu quo. But ¹⁵⁵ what was necessary to be done, in view of the facts and circumstances in this case to put Sandage in statu quo? All that appellee received from him was an assignment of his right and title to the patent right in question. This right proved to be invalid and worthless, and appellee reassigned the letters and tendered back the same to Sandage. This, evidently, in our opinion, was all that appellant could, at the furthest, demand. Sandage had guaranteed the validity of these letters. Their validity was assailed in a court of competent jurisdiction; of this fact he was notified and requested to sustain them. They were adjudged by the court to be void, for the reason herein stated. By this judgment appellant was bound. That money paid for worthless securities or rights, or where the purchaser does not get that for which the money was paid, may be recovered back, is a well-settled proposition: Wharton on Contracts, sec. 744; Benjamin on Sales, 540; Burt v. Bowles, 69 Ind. 1; Jarboe v. Severin, 85 Ind. 496. It was established on the trial that Sandage had failed to comply with the prerequisites of sections 6054 (Rev. Stats. 1894, sec. 8130) and 6055 of the Revised Statutes of 1881, by neglecting to file copies of his letters with the clerk of the circuit court of St. Joseph county, wherein the said patent was sold, and by not inserting in the written contract, wherein appellee obligated itself to pay the purchase price of the patent, the words "given for a patent right." The penalty for disobeying this statute is a fine or imprisonment in jail: Rev. Stats. 1881, sec. 6056; Rev. Stats. 1894, sec. 8132. That the noncompliance with this law rendered the contract, at least so far as appellee therein obligated itself to pay the purchase price of this patent, invalid, as

between the parties, is no longer a disputed question: *New v. Walker*, 108 ¹⁵⁶ Ind. 365; 58 Am. Rep. 40; *Breechbill v. Randall*, 102 Ind. 528; 52 Am. Rep. 695; *Robertson v. Cooper*, 1 Ind. App. 78.

That there can be no recovery on a contract made in violation of a statute, as between the parties thereto, the violation of which is prohibited by a penalty, is a principle well recognized by the courts. This is true, although the statute does not, in terms, pronounce the contract void, nor expressly prohibit the same. This doctrine is well supported by many English and American decisions: *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671, 674, and authorities collected in note; *Dillon v. Allen*, 46 Iowa, 299; 26 Am. Rep. 145; *Winchester Electric Light Co. v. Veal*, 41 N. E. Rep. 334. Counsel for appellant urge that this statute is in conflict with the federal constitution, and therefore void. This question has been settled to the contrary in this state, and is no longer an open question: *New v. Walker*, 108 Ind. 365; 58 Am. Rep. 40; *Hankey v. Downey*, 116 Ind. 118; *Pape v. Wright*, 116 Ind. 502. It was in evidence that the supreme court of Illinois, in the case of *Hollida v. Hunt*, 70 Ill. 109, 22 Am. Rep. 63, held a similar statute of that state relating to patent rights to be repugnant to, and inconsistent with, the rights exercised by Congress in regard to such rights, and therefore void. In view of this latter fact, in connection with the other evidence in the case, we are of the opinion that it is shown that appellants, by bringing actions upon this contract in Illinois, instead of instituting the same in Indiana, where all the parties resided, did so for the purpose of obtaining an advantage over the appellee which they were not entitled to under the laws of the latter state.

As long as a citizen belongs to a state he owes it obedience, and, as between states, the state in which he is domiciled has jurisdiction over his person and his personal ¹⁵⁷ relations to other citizens of the state: *Keyser v. Rice*, 47 Md. 203; 28 Am. Rep. 448. That a citizen of a state, under a showing of sufficient facts, can be enjoined from commencing or prosecuting a suit against his fellow citizen in the courts of another state, is an equitable rule, recognized and enforced by this court and many others: See *Wilson v. Joseph*, 107 Ind. 490; *Keyser v. Rice*, 47 Md. 203; 28 Am. Rep. 448; *Dehon v. Foster*, 4 Allen, 545; 23 Cent. L. J. 268. This rule seems to be sustained by a clear weight of authority in this country: See 10 Am. & Eng. Ency. of Law, 909. It is declared in the decisions, that the court, in

the exercise of this authority, does not proceed upon any claim of right to control or stay proceedings in the courts of another state or country, but upon the grounds that the person against whom the restraining order is issued resides within the jurisdiction, and within the power of the restraining court. The court issuing the writ does not pretend to direct or control the one in the foreign state, but, without regard to the subject matter of the dispute, it considers the equities between the parties, and decrees in personam according to these equities, and enforces obedience to its decree. We think that in the case at bar the facts sufficiently show a manifest equity in favor of appellee as to entitle it to the decree herein.

Appellants complain of the action of the court in not permitting Joshua Sandage to answer the following questions of appellee: "What, if anything, was the consideration of the second or supplemental contract as to releasing you of your guaranty in the second contract?" The appellants' attorney explained to the court, on the court's request, as follows: "That that statement in the first contract and the second statement in the supplemental contract in reference to the having of suits and payments of costs, are ambiguous and not ¹⁵⁸ fully explained in the contract; that the contract was entirely abrogated, and that was a part of the consideration of the second contract; that the first contract was for royalties, and in consideration that Mr. Sandage gave up his right to the royalties more valuable to him than the second contract gave him, in consideration that, if he gave that up, he should not be held responsible for the patent, and not be liable for any expense on the patent, explained, as stated in the contract; and that the defendants wished to show by this witness, in answer to this question, that the second contract was made upon the consideration, and with the full understanding of the plaintiff, that they had investigated the said patent and told the defendant, Joshua Sandage, that they were willing to take their chances as to the patent being upheld in the courts; and that the said Joshua Sandage should not be held responsible for such patent if such patent was at any time held to be invalid."

By this question, appellants' counsel say that they desired and sought to show what the consideration of the supplemental contract was, and to explain what was meant to be repealed by it. It is obvious, we think, that the purpose of the evidence sought to be elicited by this question was to contradict the written obligation. The written contract in question is not incomplete, and

there is no apparent ambiguity therein that requires an explanation by parol evidence; nor was it in any way rendered necessary to show what part of the first agreement had been repealed and rendered of no effect by the second. This was easily disclosed by a comparison of the one with the other.

The evident purpose of the question, as it appears from the statements of counsel, was to show that the guaranty of appellant Sandage, made in the first contract, as to the validity of his patent right had been repealed ¹⁵⁹ by a parol agreement contemporaneous with the second written contract, and thereby contradict this latter instrument. The cases of *Keith v. Kerr*, 17 Ind. 284, to the effect that, when a written contract is incomplete, parol evidence that does not contradict it may be admitted to show the whole contract, and *Martindale v. Parsons*, 98 Ind. 174, where it is held that parol evidence may be received to aid in the construction of ambiguous contracts, lend no support to appellants' claim upon this question as herein presented. The court did not err in excluding this question. We have examined all the questions necessarily presented by this appeal, and are of the opinion that there is nothing appearing in the record that would entitle appellants to a reversal.

The judgment is therefore affirmed.

Howard, J., was absent, and took no part in the decision of this cause.

EQUITY—REMEDY AT LAW.—The mere fact that one has a remedy at law is not enough to bar him from proceeding in equity, unless such remedy is an adequate remedy: *Pierstoff v. Jorge*, 86 Wis. 128; 39 Am. St. Rep. 881, and note; *Godfrey v. White*, 60 Mich. 443; 1 Am. St. Rep. 537. Equity assumes jurisdiction where the remedy at law is inadequate: *McAfee v. Reynolds*, 130 Ind. 33; 30 Am. St. Rep. 194.

INJUNCTION AGAINST SUIT IN ANOTHER STATE.—An injunction will not issue in one state to enjoin suits in another against parties there resident, when there is nothing to show that the prosecution of such suits would not be lawful and successful, or that it would cause any unusual expense or inconvenience to the parties: *Metropolitan etc. Ins. Co. v. Fuller*, 61 Conn. 252; 29 Am. St. Rep. 196, and note. See, also, the note to *Thorndike v. Thorndike*, 34 Am. St. Rep. 91.

PAROL EVIDENCE RESPECTING THE CONSIDERATION OF A WRITTEN CONTRACT is admissible in all cases between the original parties: *Folsom v. Massey*, 8 Greenl. 400; 23 Am. Dec. 522, and note. It is also admissible to show the consideration of a contract to be illegal: *Patton v. Gilmer*, 42 Ala. 548; 94 Am. Dec. 665, and note; but a contract which is certain, complete, and unambiguous cannot be varied by evidence of the situation of the parties: *Fawcner v. Smith Wall Paper Co.*, 88 Iowa, 169; 45 Am. St. Rep. 230, and note.

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CONSTITUTIONAL LAW.—IF THERE IS DOUBT in the mind of the court respecting the validity of the statute, it must be sustained.

STATUTES.—IN CONSTRUING an act, the court ought to examine the history of the times so as to relieve from the mischief and accomplish the purpose of the act. The legislative intention, as collected from the whole act, must prevail over the literal import of particular terms, and control the strict letter of a statute, where an adherence to the strict letter would lead to absurdity, injustice, or contradictory provisions.

CONSTITUTIONAL LAW.—IF THE TITLE OF AN ACT SHOWS that it is to limit, restrict, and prohibit horseracing, a section purporting to deal with races and race meetings must be construed as referring to horseracing, when to construe it as referring to races of a different character would require the court to declare it to be unconstitutional for including subjects not embraced within its title.

STATUTES, CONSTRUING.—THE TITLE of an act may be considered to aid in determining the legislative intent.

CONSTITUTIONAL LAW.—THE CONSTRUCTION OF A STATUTE should, if possible, be such as to sustain it from objections urged against its constitutionality.

CONSTITUTIONAL LAW.—IF THE TITLE of an act declares it to be an act regulating horseracing at certain seasons, prescribing a penalty for a violation of the provisions of the act, prescribing rules of procedure, giving certain civil remedies, authorizing the institution of suits, and declaring emergencies, a section of such act making it unlawful to hold, or advertise for, race meetings oftener than three times in a year, fixing the maximum length of race meetings, naming periods when they shall not be held, and providing a penalty for violating the act, is within the title.

CONSTITUTIONAL LAW.—A STATUTE REGULATING HORSERACING and race meetings, providing penalties to be suffered by persons found to be guilty of its violation, and authorizing injunctions to issue to prevent the use of property in violation of the act, does not conflict with the clauses of the state constitution prohibiting the passage of local and special laws regulating practice in courts of justice, and declaring that no person shall be put in jeopardy twice for the same offense.

CRIMINAL LAW.—A PERSON IS NOT PUT TWICE IN JEOPARDY for the same offense if punished for violating a statute, and also for disregarding an injunction to prevent such violation. The two offenses are not the same.

INJUNCTIONS.—A statute authorizing the issuing of an injunction or restraining order to prevent acts declared to be unlawful by such statute, without exacting a bond, does not deprive a party of the use of his property without redress or remedy, though the injunction should be subsequently dissolved because improvidently or wrongfully issued, if, notwithstanding the injunction, the owner of the property is still at liberty to use it for all lawful purposes.

CONSTITUTIONAL LAW.—AN ACT PROHIBITING HORSE-RACING and race meetings, except at intervals stated therein, is a legitimate exercise of the police power of the state.

W. A. Ketcham, attorney general, J. Kopelke, T. H. Heard, J. G. Ibach, W. H. H. Miller, F. Winter, and J. B. Elam, for the appellant.

J. W. Youche, W. Olds, C. F. Griffin, and J. B. Peterson, for the appellees.

¹⁰⁰ McCABE, J. The governor of this state in his biennial message to the legislature of the state in January, 1895, called attention to certain facts, and made certain recommendations for the consideration of that body as follows:

WINTER RACING.

"Near the city of Hammond there has been located what is known as the 'Roby Fair Association.' It is not incorporated under the laws of this state, nor, so far as I can ascertain, of any state; and what is the legal nature of the association is sedulously concealed. What its actual nature is, its purposes and character are without any concealment. It is simply an immense gambling concern, with a racing attachment to give it the appearance of respectability, and draws within our borders the lawless and disreputable elements of Chicago, for a purpose that is not permitted, nor could be tolerated within that city's limits. Its every influence is demoralizing, encouraging vice, propagating crime, and thus brings our state into disrepute. Its transactions have been open and notorious, but the authorities of Lake county seem to be either indispensed or powerless to prevent ¹⁷⁰ them. I have been earnestly seeking some means, warranted by law, by which this disgrace to our state could be prevented, and although having the able advice, earnest assistance, and active co-operation of Attorney General Ketcham, have failed to find the way. . . .

"To contend that racing of horses can be humanely or interestingly conducted in this climate during the winter months is a rank delusion and fraud. It is but a cloak to deceive and afford opportunity to conduct gambling on a gigantic scale and the assembling of disreputable crowds. . . .

"I, therefore, in the name of the people, insist that you shall take action upon this subject, and recommend that you make it unlawful for any association within the state to hold such meetings between the first day of November and the first day of April, that no race meetings shall be held within the state, except by associations duly incorporated under the laws of this state."

Pursuant to this information and recommendation, that legislature passed the following act (Acts 1895, p. 92):

"An act regulating horseracing, defining the meaning of certain terms, prohibiting horseracing at certain seasons, prescribing a penalty for a violation of the provisions of this act, prescribing

ing rules of procedure, giving certain civil remedies, authorizing the institution of civil suits, and declaring an emergency.

"Section 1. Be it enacted by the general assembly of the state of Indiana, that it shall be unlawful for any person, corporation, company, or association to cause, permit, or allow any horse, mare, filly, gelding, colt, or mule to race on any track or course wholly or partly within this state at any time between the fifteenth day of November and the fifteenth day of April in any year ¹⁷¹ for a purse or a prize in the presence of fifty persons or more, or in cases where advertisements or notices of such race or races are published or given notifying the public that such a race will take place. Any person, corporation, company, or association aiding or abetting in such race, by taking part in advertising therefor, or by furnishing any animal to participate in such race, or by acting as driver therein, or by allowing or suffering the use of a track, course, or other place owned, managed, or controlled by him or it, or by aiding in any way in conducting such race, shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than five hundred dollars, to which may be added imprisonment in the county jail for a period not exceeding six months.

"Sec. 2. It shall be unlawful for any person, corporation, company, or association to hold or advertise for a race meeting oftener than three times in any year, and no race meeting shall be held longer than fifteen days. It shall be unlawful to hold any race meeting oftener than twice in any period of sixty days, and it shall also be unlawful to hold any race meeting until after the full period of thirty days has elapsed after meeting has been held. Any person violating the provisions of this section, or aiding or abetting in the violation thereof, shall be fined in any sum not less than one hundred dollars, nor more than five hundred dollars, to which may be added imprisonment in the county jail for a period not exceeding sixty days.

"Sec. 3. The term 'race,' as herein used, shall be taken to mean any and all trials of speed of animals of the horse kind, and any and all matches where such animals are suffered to run, gallop, pace, or trot for money or prizes, or upon public exhibition, on any track or course.

"The term 'race meeting,' as used in this act, shall be ¹⁷² taken to mean and include all assemblies of persons, or all meetings of persons, who come together, or are notified to come together, for the purpose of witnessing any trial of speed, whether running, galloping, pacing, or trotting.

"The terms 'track' or 'course' shall be deemed to mean and include all places prepared, used, kept, or maintained for the purpose of conducting races, or of giving public exhibitions of trials of speed or matches between animals of the horse kind, wherein prizes, money, or reward is contested for by running, galloping, trotting, or pacing.

"Sec. 4. In case of a violation of any of the provisions hereof by any person, whether he was at the time acting with the sanction of the owner, lessee, or manager of such track or not, it shall be competent for any citizen of the state to file an information, in the name of the state, on his relation, in the circuit court of the county where such track is situate, alleging that any of the provisions hereof, and that the person or persons against whom such information is filed threaten, propose or give out that he or they will do any act hereby prohibited, has been violated, whereupon it shall be the duty of such court, or the judge thereof in vacation, to issue a temporary restraining order restraining all persons from in any way violating or assisting in the violation of this act. As soon thereafter as possible, the court or judge shall direct notice to be given to all defendants, so far as they can be reached by notice, that at a certain time, to be fixed by the court or judge, they may appear and show cause, if any they have, why such order shall not continue until the final hearing. Such notice may be served upon any agent, employé, or servant of the defendant or defendants, and shall be as effective as if served upon the defendant or defendants personally, or, ¹⁷³ if the defendants are not residents of this state, or are unknown or cannot be found, notice may be given by publication as hereinafter provided.

"Sec. 5. All persons who appear to have any interest in such race track property upon the records of the county may be made defendants to such suit, and such persons, as well as all others concerned (the latter of whom need not be mentioned by name), may be notified of the pendency of such proceedings for at least two weeks by publication in some weekly newspaper of the county, of general circulation therein. At the expiration of such time, any person having a legal interest in the result of such suit may, upon petition, be admitted as an additional party defendant. Any person having an interest in such property, whether made a party or not, shall be bound by the judgment.

"Sec. 6. Changes of venue may be granted from the county to either party, as in other cases, and the relator shall not be liable for any costs. The suit shall be prosecuted either by the

prosecuting attorney, or, at the request of the governor, by the attorney general or by an attorney designated by the governor.

"Sec. 7. An emergency is declared to exist for the immediate taking effect of the act, and it is therefore declared to be in effect from and after its passage."

On May 8, 1895, this suit was begun by the appellant, under the provisions of the above statute, by filing a complaint or information, in a single paragraph, against the appellees, in the Lake circuit court, in the name of the state, on the relation of Julius Duensing, a citizen of the state of Indiana, which was duly verified. A temporary injunction was granted until the final hearing.

On May 15, 1895, on the motion of appellee Roby, the temporary injunction was dissolved.

On May 24, 1895, being the twenty-ninth judicial day of the ¹⁷⁴ April term of said circuit court, the appellant filed a verified amended information in two paragraphs. And afterward, at the same term, filed a supplemental information on leave of court, which was also duly verified.

Afterward, the defendants, Edward Roby, Edward A. Shedd, Charles B. Shedd, the Roby Fair Association, the Roby Breeders' Association, John Condon, Rod Wells, and John Kelsey, appeared and separately demurred to the information, and to each paragraph thereof, and to the supplemental information for want of sufficient facts, which demurrer the court sustained, and the plaintiff refusing to further plead, the appellees took judgment upon the demurrer that the plaintiff take nothing by this suit.

The substance of the first paragraph of the amended information is, that the relator informs the court that he is a citizen of the state of Indiana, prosecuting this action, at the request of the governor of the state, by the attorney general; and that the defendants Roby and the Shedd's are the owners as appears of record in the recorder's office of said county, of certain real estate, describing it, situated in said county; that the other defendants, to wit, James A. Webb, the Indiana Racing Association, the Roby Breeders' Association, the Roby Fair Association, and the Hammond Fair Association, John Condon, Rodman Wells, John Kelsey, ——— Dwyer, whose Christian name is to the plaintiff unknown, with others whose names are unknown to the relator, have, either jointly or separately, some interest in, or contracts in relation to, said real estate as to its use and occupancy, but which interest does not appear of record in the recorder's office of the county, or elsewhere, and hence plaintiff is unable to set

it forth, but makes them defendants to answer as to their interest; ¹⁷⁶ that the Indiana Racing Association, the Roby Breeders' Association, the Roby Fair Association, and the Hammond Fair Association are not, nor is either of them, incorporated under the laws of the state of Indiana; that said association defendants, and each of them, are partnerships or some other form of association, of the particulars or character of which the relator is not advised; that said defendants, other than Roby and Shedd, are each and all interested as partners or otherwise in said several associations or partnerships for the purpose of carrying on racing upon the premises herein described, and are organized and doing business under said several and different names for the purpose of evading the statutes of the state of Indiana in that behalf enacted, as hereinafter more fully averred and set forth; that there is situated upon the real estate a race track or course, prepared, used, kept, and maintained by the defendants for the purpose of conducting races and holding race meetings to give public exhibitions of trials of speed or matches between animals of the horse kind, wherein prizes, money, and rewards are contested for by running, galloping, trotting, or pacing of such animals, and for the purpose of assemblies and meetings who come together for the purpose of witnessing such trials of speed, which place, track, and course are commonly known and designated as the "Roby Race Track"; that on April 15, 1895, previous notice thereof having been given by publication in newspapers, a certain race meeting was held, to continue, according to such notice, for a period of fifteen days from, after, and including said April 15th, upon said grounds, and continuously from said fifteenth day of April, for a period of fifteen days, excluding Sundays, said race meeting was held, whereat were given races upon each and every day, except Sundays, up to and including the second day of May, 1895, ¹⁷⁶ such race meeting being held by the defendants, other than the defendants Roby and Shedd, under the name and designation of "the Roby Fair Association," each of said defendants, other than Roby and Shedd, participating together with other persons to the plaintiff unknown in the holding of said race meeting, and the defendants Roby and Shedd having full knowledge at the time such race meeting was being held and such races were being run upon the real estate hereinbefore described, of which they were the owners as aforesaid; that thereupon, at and prior to the third day of May, 1895, the defendants, other than Roby and Shedd, did, with their knowledge, consent, connivance, assistance, and

co-operation, and with that of others, cause notice to be published that, commencing with May 3, 1895, and thenceforward continuously for a period of fifteen days, "the Roby Breeders" Association would hold a race meeting, and would upon each day, for a period of fifteen days from, after, and including said third day of May, but excluding Sundays, give races, trials, and exhibitions of speed and matches wherein animals of the horse kind would be permitted to run, gallop, pace, and trot for money and other prizes upon public exhibition; and upon said May 3, 1895, and at and prior to the filing of the original information, said defendants, other than Roby and Shedd, did, as advertised, begin a race meeting before the period of thirty days had elapsed from and after the first race meeting as hereinbefore set forth, and said last-named race meeting, when taken in connection with the first, constitutes a holding of a race meeting oftener than twice in a period of sixty days, contrary to and in violation of the statute in such cases made and provided, which last-named race meeting was begun and continued from day to day until the same was enjoined and restrained by the temporary injunction ¹⁷⁷ already mentioned, with the knowledge, consent, acquiescence, and connivance of the defendant Roby and the defendant Shedd, by the same parties, to wit, the defendants herein and others unknown to the plaintiff, under the name of the Roby Breeders' Association, who, under the name of the Roby Fair Association, held said first-named race meeting as hereinbefore averred; that the above-named defendants, other than Roby and Shedd, with the knowledge, consent, acquiescence, and connivance of the defendant Roby and the defendant Shedd, with other persons concerned, connected, and interested with them, whose names are unknown to the relator and to the plaintiff, threaten, propose, and give out that they will hold such race meetings oftener than three times in any one year; that they will hold such race meetings longer than fifteen days at a time; that they will hold and cause such race meetings to be held, but under different names, oftener than twice in any period of sixty days; that they will not allow thirty days to elapse after any such race meeting has been held by them until they will hold another on said premises; that as soon as one race meeting of fifteen days duration has been held by them, they will hold other meetings and continue such meetings, but for the purpose of evading the law, while seeming to comply therewith, they will hold such race meetings, while in their interest and by them or by some of them, under different names, and that the owners of said racetrack property concur and unite with the other defendants in their said

threats and propositions to continue such race meetings continually; that each of the race meetings heretofore held and that are proposed to be held by said defendants, are all in the interest of the owners of said real estate and racetrack property, and of the other defendants hereto engaged ¹⁷⁸ in the business of racing and holding race meetings; that the defendants herein and the parties whose names are unknown to the plaintiff are members of the said several associations herein named, and that said associations are, in truth and in fact, one and the same association, maintained and controlled by the same parties and for the same purposes; that since the filing of the original complaint herein, the defendant, the Hammond Fair Association, has been organized for the purpose of advertising and holding a race meeting upon said real estate, and therefore it is a proper party defendant herein, and plaintiff asks that it be made a party defendant and to amend the complaint in that respect. That the defendant Edward A. Shedd was not originally made a party defendant hereto, by inadvertence and oversight, but that he has an interest in the subject matter of this action by reason of his interest in said real estate, and plaintiff, therefore, asks leave to make him a party defendant. Prayer for a temporary restraining order, and, on the final hearing, for a perpetual injunction.

The second paragraph only differs from the first in substance, in that it alleges that said defendants Roby and Shedd had leased said premises, said track and course, to the other defendants, and such incidental changes as that change would require.

The supplemental information only differs in substance from the first paragraph, in that it states dates of race meetings differently, and makes a new party defendant not before brought in, Louis E. Hohman. The demurrer to these several pleadings presents substantially the same question, and has been so treated in the main by the counsel.

The action of the trial court in sustaining the demurrer ¹⁷⁹ is defended by appellees' learned counsel, on the ground, mainly, that the statute is unconstitutional.

Their first contention, however, is that the first section is void, because they say it is insensible.

It is assumed by the appellant's counsel that it was intended to prohibit winter racing, that is, horse racing between the fifteenth day of November and the fifteenth day of April. But appellees' counsel contend that it does not mean that at all, because the inhibition is "at any time between the fifteenth day of November and the fifteenth day of April in any year."

They contend that the period of time there designated must be that period intervening between April 15th and November 15th in the same year, thus making the statute prohibit summer racing instead of winter racing. This, they say, contradicts that part of the clause which makes the forbidden period begin the next day after the fifteenth day of November, and end with the day before the fifteenth day of April, which plainly requires the time prohibited to run forward and not backward.

But it is not the first section with a violation of which the appellees were charged in the information, nor against a threatened violation of which the injunction was sought by the appellant. It will be time enough to construe that section when the question arises.

It is for an alleged violation of section 2 of the act that this action was brought, such action being authorized by sections 4 and 5. But it is contended that the second section is unconstitutional because not covered by the title of the act, and that the whole act is in violation of the constitution of the state, in that it embraces two distinct subjects of legislation, namely, the creation of misdemeanors, prescribing punishment therefor, and creating certain civil remedies authorizing the institution of civil suits and prescribing rules of procedure therein.

¹⁸⁰ In *Robinson v. Schenck*, 102 Ind. 307, at page 319, it was said: "The power to declare a statute void on the ground that it is in conflict with the constitution is peculiar to the American courts, and the doctrine established by our cases is not found in other systems of jurisprudence. The early cases . . . show that the courts at first asserted this doctrine with much hesitation, and there are still some writers who deny the existence of the power, but it is now firmly fixed in our law (citing authority). . . . The power is one of the highest possessed by any judicial tribunal in the world, and is, as all the authorities agree, to be exercised with the utmost care and only in the clearest cases. If there is a doubt in the mind of the court as to the validity of the statute, it must be resolved in favor of the legislature." There are many good reasons in support of the principles thus announced. Under our form of government, there never ought to have been any doubt of the right and the duty of courts, in a proper case, to declare a statute void because of its conflict with the constitution. This right and duty does not grow out of the condition that statutes and acts of the legislative department within its domain are not absolutely binding upon the judiciary. But it grows out of the fact that the constitution is the supreme

law of the land. Hence, when it is found that a statute contravenes its mandates, the duty to support the constitution, emphasized by the solemn sanctions of an oath, can only be discharged by overthrowing the statute.

On the other hand, acts of the legislature come to us as the expression of the will of the sovereign people clothed with the majesty of law, imposing upon the judiciary the solemn duty of upholding the same, unless found to clearly conflict with the constitution, state or federal. There is the best of reasons why doubts should ¹⁸¹ be solved in favor of the validity of the act of the legislature. In case of doubt, there might be a mistake in declaring the act unconstitutional by the court. To declare an act void for unconstitutionality in a doubtful case through a mistake of a court of last resort would have the effect, not only of paralyzing one of the co-ordinate departments of the state government, but it would be an usurpation of power by the court, a power withheld from it by the people in the constitution.

The dangerous consequences liable to result from a possible mistake in declaring an act of the legislature void for unconstitutionality are sufficient alone to inspire the judiciary with the greatest caution in that respect, and furnish ample justification for the rule, that no statute will be declared unconstitutional unless its conflict with the constitution is beyond reasonable doubt. Guided by these salutary rules, we proceed to examine the constitutional question.

It is contended that the second section is void because not within the title of the act. As we have seen, the title of the act is limited to regulating horseracing and prohibiting the same at certain seasons of the year. The contention is, that the second section only prohibits "race meetings" oftener than three times in any year, and the holding of race meetings longer than fifteen days, or oftener than twice in any period of sixty days, and the period between such meetings is required to be not less than thirty days, without any requirement that the race meetings thus limited and restricted were meetings for horseracing. It is contended that as the term "horse" is not once mentioned in the section, and as that part of section 3 which undertakes to define the terms "race" and "race meetings," as used in the act, also fails to mention the term "horse," both sections may include other kinds of races or trials of speed, ¹⁸² such as races between cattle, men, reindeer, dogs, or other beings or animals that can run, gallop, pace, or trot, and therefore it embraces a subject not expressed in the title.

It is true the title is so framed as to limit the act to racing of horses, and it is true also that section 2 does not use the term "horse" or "horseracing," and it is also true that the defining part of section 3, as to the meaning of the terms "race" and "race meeting," does not use the term "horse" or "horseracing," but the concluding clause of section 3 does use the language, "giving public exhibitions of trials of speed or matches between animals of the horse kind by . . . running, galloping, trotting, or pacing." This gives an indication of the particular kind of racing the legislature had in mind in both sections. In construing an act, the court ought to examine the history of the times so as to relieve from the mischief and accomplish the purpose of the act: Maxwell on Interpretation of Statutes, 133, 318, 333, 345; Potter and Dwarris on Statutes, 240, 247, 262; Sutherland on Statutory Construction, secs. 234, 235, 241, 246, 349, 354, 356. In *Stout v. Board etc.*, 107 Ind. 343, 347, it was said: "The legislative intention, as collected from an examination of the whole, as well as the separate parts, of a statute, will prevail over the literal import of particular terms, and will control the strict letter of the statute, where an adherence to such strict letter would lead to injustice, to absurdity, or contradictory provisions": *United States Savings etc. Co. v. Harris*, 142 Ind. 226, and authorities there cited.

In view of the current historical facts to which the legislative attention was called by the governor's message, and in view of the whole act including its title, it would be difficult to say that the terms "race" and "race meetings," used in the second section, did not refer ¹⁸³ to and mean only horseraces and meetings for having and carrying on horseraces. Especially is this true in view of the fact that the public morals and good order of society were never threatened by cowraces or cattleraces, dograces, or any kind of races other than horseraces.

An eminent author states the rule thus: "The practical inquiry is usually what a particular provision, clause, or word means. To answer it one must proceed as he would with any other composition; construe it with reference to the leading idea or purpose of the whole instrument. The whole and every part must be considered. The general intent should be kept in view in determining the scope and meaning of any part. This survey and comparison are necessary to ascertain the purpose of the act and to make all the parts harmonious. They are to be brought into accord, if practicable, and thus, if possible, give a sensible and intelligible effect to each in furtherance of the general de-

sign": Sutherland on Statutory Construction, sec. 239. The same author says: "If the meaning is doubtful, the title, if expressive, may have the effect to resolve the doubts by extension of the purview, or by restraining it": Sutherland on Statutory Construction, sec. 210. "But the title of an act is now so associated with it in the process of legislation that when, in performing its constitutional functions, it affords means of determining the legislative intent, in cases of doubt its help cannot be rejected for being extrinsic and extralegislative. The language of an act should be construed in view of its title and its lawful purposes; broad language should be confined to lawful objects": Sutherland on Statutory Construction, sec. 211. To the same effect is *Garrigus v. Board etc.*, 39 Ind. 66.

Guided by these rules, we would be justified in holding that no other racing than horseracing, and no other ¹⁸⁴ race meetings were intended in the act than those at which horses were to be run.

At least, there must be a reasonable doubt whether those terms, as used in section 2, did not have reference solely to horseraces and meetings for the purpose of carrying on horseraces and horseracing. That doubt should be resolved in favor of that construction that would bring the section within the title, and thus uphold its constitutionality. Where the constitutionality of a statute or any of its provisions is under consideration, it has been the uniform rule of this court to so construe and interpret it, if possible, as to sustain, and not defeat, the law; and it is not enough that the constitutionality of the legislation may seem to be doubtful, for, in such case, the benefit of the doubt must be given in favor of the constitutionality of the legislation: *Warren v. Britton*, 84 Ind. 14; *Campbell v. Dwiggin*, 83 Ind. 473; *Hays v. Tippy*, 91 Ind. 102.

But the learned counsel, for the purpose of showing that the section is not covered by the title, invoke the aid of the rule of strict construction. They contend that the section is highly penal, and must be strictly construed; and, in support thereof, quote the following rules: "Penal statutes receive a strict interpretation. The general words of a penal statute shall be restrained, for the benefit of him against whom the penalty is inflicted. . . . Potter and Dwaris on Statutes, 245. . . . The law of England does not allow of constructive offenses. No man incurs a penalty, unless the act which subjects him to it is clearly both within the spirit and the letter of the statute imposing such penalty: Potter and Dwaris on Statutes, 247. . . . By another

restrictive rule of construing penal statutes, if general words follow an enumeration of particular cases, such general words are held to apply only ¹⁸⁵ to cases of the same kind as those which are expressly mentioned: *Potter and Dwarris on Statutes*, 247."

Without deciding that these rules of strict construction are entirely and fully applicable at this day in this state, it is sufficient to say that they work against appellees' contention as to the construction of section 2 of the act. The appellees are not asking to restrain the general words of the section, but to expand and extend them. It is the appellant that asks to restrict the words of the section to their narrowest possible scope by confining them to horseracing alone, while the appellees want, under the guise of strict construction, to extend their meaning so as to include all kinds of racing between all kinds of animals, and all kinds of things, in order to reach a conclusion that the section is not covered by the title, that this court may declare it unconstitutional. The doctrine of strict construction of a penal statute does not serve appellees' purpose, or aid them in their contention.

We come now to the objection that the act embraces more than one subject of legislation in creating and defining misdemeanors and prescribing punishment therefor, and authorizing the civil remedies and the institution of civil suits and prescribing rules of procedure therein.

In *Warren v. Britton*, 84 Ind. 23, it was said: "In the case at bar, we are of opinion that the fees or salaries of county treasurers, the officers charged by the law with the collection of taxes, are matters properly connected with the subject of 'An act concerning taxation'; and that the closing sentence of section 251 of the act, fixing the fees of such officers for collection of delinquent taxes, is a constitutional and valid enactment."

The fee and salary law of 1879 contained a provision ¹⁸⁶ in relation to the publication of the delinquent list and the price thereof, and it was contended that the latter provision made the act embrace two subjects, and therefore void. It was said by this court of that statute that: "The act does not embrace two subjects. It makes provision for the performance of certain duties by public officers, and prescribes the compensation which shall be paid to officers or others rendering service to the public, in connection with public matters and official duties. Whatever is connected with official duty, and is the subject of compensation from the public treasury, is within the act and forms part of one general subject. . . . No provision of the constitution is invaded by gathering such provisions together in one general

act": *Bitters v. Board etc.*, 81 Ind. 125 (127). To the same effect are *Benson v. Christian*, 129 Ind. 535; *Farrell v. State*, 45 Ind. 371; *Thomasson v. State*, 15 Ind. 449; *Reams v. State*, 23 Ind. 111; *Bank etc. v. New Albany*, 11 Ind. 139; *State v. Sullivan*, 74 Ind. 121; *Indianapolis v. Huegele*, 115 Ind. 581; *Hunter v. Burnsville etc. Co.*, 56 Ind. 213; *Walker v. Dunham*, 17 Ind. 483; *McCaslin v. State*, 44 Ind. 151.

The title of an act was, "An act providing for the election or appointment of supervisors of highways, and prescribing certain of their duties," under which there was a provision authorizing the supervisor to bring a civil suit for the obstruction of a highway to recover damages, and it was held not to embrace two subjects, and that such provision was properly placed under the title: *Indiana etc. Ry. Co. v. Potts*, 7 Ind. 681. To the same effect is *Hines v. Aydelotte*, 29 Ind. 518.

Hingle v. State, 24 Ind. 28, is a case upon the question here involved, and is, perhaps, more frequently referred ¹⁸⁷ to in the subsequent decisions of this court as furnishing a more correct standard than any other.

It was there said by Mr. Justice Frazer, whose name adds weight to the decision, speaking for the court, that: "The words 'subject' and 'matter' are often used as synonymous. Indeed, in the sense in which they are employed in the constitution, they are as nearly so as it is possible for two English words to be, and both are used simply to avoid repetition. The only difference between them is created by the offices which they are respectively made to perform in the clause in question. 'Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title.' Now, it is quite evident that the word 'subject' is here used to indicate the chief thing about which legislation is had, and 'matters,' the things which are secondary, subordinate, or incidental. . . . Is the insertion in an act to regulate the liquor traffic, of a section conferring upon particular courts jurisdiction of cases prosecuted for its violation, within any of the mischiefs intended to be prevented? This question can only be answered in the negative, and such an answer conclusively disposes of this constitutional objection. We happen to have laws in force by the operation of which, when a new offense is created, some one of our courts can take jurisdiction of it. . . . In the absence of such statutes, the creation of a new offense would beget a necessity for conferring jurisdiction of it upon some court. Can there be a doubt, then, that the two

things are properly connected, as the constitution requires? It really seems that to state the question ought to be sufficient."

That case and its reasoning are closely analogous to the case before us. If the civil remedy provided in the statute under consideration extended to the suppression of all violations of law and public morals, or any part ¹⁸⁸ of them, outside of the things made unlawful in the main part of the act, then the case referred to would have no bearing, and the act would embrace two independent and separate subjects of legislation. But the civil remedy provided has no connection with any other subject of legislation, either direct or remote. It has no connection with any other crime or misdemeanor than those defined in the act. Nor can it be used to suppress any other violation of law than those that fall within the provisions of the act.

It is necessarily and inherently connected with the main part of the act making horseracing and its incidents unlawful at certain times and under certain circumstances. Indeed, the connection between the two things is so inherent and necessary that the civil remedy part of the act would be nugatory and fall to the ground without the main part of the act. It was designed as an additional and more efficient means of preventing a violation of the main part of the act. It was, therefore, a matter properly connected with the subject of the act, within the meaning of the provision of the constitution quoted.

It is further contended that the act violates section 22 of article 4 of the constitution, which forbids the passage of local or special laws upon the subject of "regulating the practice in courts of justice" among other things. That question is decided directly against such contention, in *Hingle v. State*, 24 Ind. 28, and cases there cited, and *Board etc. v. Silvers*, 22 Ind. 491; *Toledo etc. Ry. Co. v. Nordyke*, 27 Ind. 95.

It is further contended that the act violates section 14 of article 1 of the state constitution, which provides that: "No person shall be put in jeopardy twice for the same offense." It is insisted that the defendant may be punished by a fine on a criminal prosecution and again ¹⁸⁹ made subject to an injunction and deprived of the use of his property, thus punishing him twice for the same offense or act. But the civil suit authorized by the act is not a criminal prosecution, and the injunction is not a punishment, within the meaning of the section of the constitution cited: *State v. Vankirk*, 27 Ind. 121. But it is further contended that, in case of a violation of an injunction under the civil remedy part of the act, the court might fine the defendant

for contempt for disobeying the order of injunction, and that would make him liable to double punishment. The statement of that proposition furnishes a sufficient answer thereto. In that case, he would not be punished for crime, but for contempt of court: *State v. Schoonover*, 135 Ind. 526; *State v. Stevens*, 103 Ind. 55; 53 Am. Rep. 482.

It is also objected that the act, as to the civil remedy part thereof, violates the state and federal constitutions, in that it deprives the owner of his property without due process of law. This objection is founded on the fact that the act provides that the injunction may issue without any provision for a bond.

The contention is, that so long as the injunction remained in force, the defendant is deprived of the use of his property without recourse or remedy, though the injunction is afterward dissolved because improvidently or wrongfully issued.

The same objections might be urged against that large class of injunctions where no temporary restraining order is asked, no bond given, and no injunction awarded until the final hearing, when a perpetual injunction is granted without bond, but which judgment is afterward reversed on appeal. In that case, the successful appellant has no remedy.

But it is a serious mistake to suppose that the injunction ¹⁹⁰ provided for in any just or legal sense deprives the defendant of the use of his property. The fourth section authorizes the judge, in vacation, "to issue a temporary restraining order, restraining all persons from in any way violating, or assisting in the violation of, this act." And the section further provides for "notice to all concerned to appear and show cause, if any they have, why such order shall not continue until the final hearing." And the clear intent of the act is, that on the final hearing, if the facts set forth in the information are established by the evidence, the temporary injunction shall be made perpetual; of what use of the property does the injunction deprive the owner? None on earth, except a criminal use; none except that which is made criminal by the other part of the statute. The provision of the constitutions, state and federal, securing to every person for injury done him in person or property due process of law, were never designed to protect him in the commission of crimes or misdemeanors. After the issue of the injunction, either temporary or final, the defendant or the owner may use his property for any and every purpose, except in violation of the criminal part of this statute. He may use it even for the purpose of horseracing and holding race meetings; "for the purpose of conducting races, or giving

public exhibitions of trials of speed or matches between animals of the horse kind, wherein prizes, money, or reward is contested for by running, galloping, trotting, or pacing," provided such meetings are not held oftener than three times in any year, and any such meeting is not held longer than fifteen days, or oftener than twice in any period of sixty days, and that any such meeting is not held until after the full period of thirty days has elapsed after one such meeting has been held; and provided such races are not conducted at such seasons of the year as fall ¹⁹¹ within the prohibition of section 1 of the act. That section only prohibits such races during certain months of the year.

But it is insisted that the charge against the defendant owner may be false, and that while he is waiting trial he is suffering unjustly. If he is falsely charged in the information with a violation of the statute, while he in fact is not violating it, the injunction will not interrupt him in pursuing the even tenor of his way.

Therefore, the injunction provided for does not deprive the owner of the free use of his property for any lawful purpose, and the statute does not deprive him of due process of law.

It is further contended that the civil remedy provided violates the constitution in depriving the defendant of a jury trial. That question, however, is not presented by the record, no jury having been demanded or refused.

It is further claimed that the act is void because it provided for an unwarrantable interference with the management of private property by its owner. "The legislative authority of this state is the right to exercise supreme and sovereign power, subject to no restriction, except those imposed by our own constitution, by the federal constitution, and by the laws and treaties made under it": *Hedderich v. State*, 101 Ind. 564; 51 Am. Rep. 768, and authorities there cited; *State v. McClelland*, 138 Ind. 395, and authorities there cited.

The right of the state to interfere with the use of private property by its owner belongs to the police power of the state. It was said by this court in *Champer v. Greencastle*, 138 Ind. 339, 46 Am. St. Rep. 396, that: "The police power of the state, so far, has not received a full and complete definition. It may be said, however, to be the right of the state or state functionary to prescribe regulations for the good order, peace, health, protection, ¹⁹² comfort, convenience, and morals of the community, which do not encroach on a like power vested in Congress by the federal constitution, or which do not violate any of the provisions of

the organic law. Of this power it may be said that it is known when and where it begins, but not when and where it terminates. But this power, whatever may be its limits, resides in the state in its sovereign capacity."

We think the act was a legitimate exercise of the police power of the state: *Fry v. State*, 63 Ind. 552; 30 Am. Rep. 238; *Shuman v. Fort Wayne*, 127 Ind. 109; *Jamieson v. Indiana etc. Oil Co.*, 128 Ind. 555; *Baumgartner v. Hasty*, 100 Ind. 575; 50 Am. Rep. 830; *Powell v. Pennsylvania*, 127 U. S. 678; *Lake View v. Rosehill etc. Assn.*, 70 Ill. 191; 22 Am. Rep. 71; *Tiedeman on Limitations of Police Power*, 203; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1; *Eilenbecker v. District Court of Plymouth County*, 134 U. S. 31.

It is also urged that the act is unconstitutional because it provides in the fifth section that: "Any person having an interest in such property, whether made a party or not, shall be bound by the judgment." It is sufficient to say that no such party is now before this court raising such question, the only question presented being raised by the appellees, who were made parties to the information to which they successfully demurred. It will be time enough to decide that question when it is presented.

Another objection urged to the validity of the act is, that it prohibits race meetings oftener than three times in any year, or oftener than twice in any period of sixty days, and within less than a period of thirty days between meetings throughout the entire state. That is, that if such a meeting should be held at the Roby racetrack at ¹⁹³ a stated period, and another should be held at Evansville in less than thirty days therefrom, those holding the latter would violate the statute. No such question is presented by the record before us, but all the races and race meetings complained of were held, proposed, and threatened to be held at the Roby racetrack in Lake county, Indiana. We will not go outside of the record to decide that question. It is further contended that the information is not good, because a proper construction of section 2, as appellees' counsel say, shows that it applies to persons and corporations, and prohibits any one of them from holding a meeting for a longer period than fifteen days, or oftener than prohibited, but another individual or corporation may hold a meeting succeeding the previous meeting held by some other person or corporation on the same track without the intervention of thirty days, and not amenable to the statute." The first clause of the section ending with the period is so framed as

to make this construction very plausible, though it would tend to defeat the whole scope and object of the act, as gathered from the current history of the times, the evils that gave rise to the enactment, the evident purpose and intent of the legislature as evinced in the language employed throughout the whole act, and in its several parts. But the language of the second clause following the period makes it plain enough that the construction contended for is not the correct one. It reads: "It shall be unlawful to hold any race meeting oftener than twice in any period of sixty days, and it shall be unlawful to hold any race meeting until after the full period of thirty days has elapsed after meeting has been held."

This language is broad enough to embrace all persons, corporations, companies, and associations, and prohibits holding the meetings within the inhibited time, whether ¹⁹⁴ held by the same persons, corporations, associations, companies, or different ones. Moreover, this construction makes the act a harmonious whole, and consistent with itself, while the other one makes the act inconsistent with itself, and incongruous. The former is the construction which the law requires us to place upon the section: Sutherland on Statutory Construction, secs. 339-341.

It follows from what we have said, that the circuit court erred in sustaining the demurrers to the information, and to each paragraph thereof. The judgment is reversed, the cause remanded with instructions to overrule said demurrers and for further proceedings not inconsistent with this opinion.

STATUTES—VALIDITY.—In determining whether a statute is void because in conflict with the constitution, the courts will resolve every doubt in favor of the validity of the law: *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696, and note; *Miller v. Dunn*, 72 Cal. 462; 1 Am. St. Rep. 67. All presumptions are solved in favor of the constitutionality of a statute: *Mauldin v. City Council*, 42 S. C. 293; 46 Am. St. Rep. 723, and note.

STATUTES—CONSTRUED AS A WHOLE.—For the purpose of construing a statute and ascertaining the intent of the legislature, the courts will look to the whole statute and all its parts, and when such intention is ascertained, it will prevail over the literal import and strict letter of the statute: *Farvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254, and note.

STATUTES—CONSTRUCTION—RESORT TO TITLE.—In the construction of a statute, the intention of the lawmakers is to be found and given effect. When there is otherwise doubt and obscurity in the act, resort may be had to its title to enable the court to discover the intent and remove what otherwise might be uncertain or ambiguous: *Cohn v. People*, 149 Ill. 486; 41 Am. St. Rep. 304, and note. The headings of chapters of the code or of any other statute may be examined, for the purpose of ascertaining the intention of the legislature with respect to such chapters or statutes: *Keyes v. Cyrus*, 100 Cal. 322; 33 Am. St. Rep. 296, and note.

CONSTITUTIONAL LAW.—IF A STATUTE CAN BE SO CONSTRUED as not to offend against any constitutional limitation, such construction will be indulged; *Fox v. McDonald*, 101 Ala. 51; 46 Am. St. Rep. 98; *Wadsworth v. Union Pac. Ry. Co.*, 18 Col. 600; 36 Am. St. Rep. 309, and note with the cases collected.

CONSUMERS' OIL COMPANY v. NUNNEMAKER.

[142 INDIANA, 560.]

A CONTRACT IN RESTRAINT OF TRADE, if inimical to the public interest, must be held hostile to public policy, and therefore void.

DEFINITION.—PUBLIC POLICY IS that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public and against public good.

THE RESTRAINT OF TRADE involved in the sale of the property and goodwill of a business will be sustained as to the future engagements of the seller so far only as appears to be a reasonable space of interdicted territory; and what was a reasonable limit is a question of law for the court.

RESTRAINT OF TRADE.—If a person engaged in the business of selling and delivering oil and gasoline by retail within a city sells his business and the goodwill thereof, and agrees not to engage in the same business in the state, except in another city named in the agreement, such agreement is an unreasonable restraint of trade, and cannot be enforced even as to the trade in the town or city in which it was made, though the agreement limited to that city would have been reasonable and valid.

Olds & Griffin, for the appellant.

560 JORDAN, J. Appellant instituted this action to enjoin appellee from pursuing the business of selling oil and gasoline, and delivering the same to consumers, in the city of Hammond, Indiana. The action was commenced upon a written contract made and entered into by and between appellee and one H. T. Bernham (who is described as "trustee and manager") on the third day of February, 1893. The complaint avers "that on and prior to said date the said defendant was the owner of one horse and one spring wagon and three tanks and harness, cans, and other utensils for use in his said business as hereinafter alleged, and was engaged in the business of a retail oil and gasoline merchant, and in selling and delivering oil and gasoline to the citizens of the city of Hammond, in Lake county, Indiana, and, in conducting his business, he traveled through the streets of the said city of Hammond, calling upon residents of said city at their places of business and residences, and sold and delivered them oil at the places desired by them, for the use of said citizens; that he had at that time 561 established a trade in business in that line; that upon said date he entered into a written agreement with one

Henry T. Benham, described in said contract as H. T. Benham, 'trustee and manager,' a copy of which is attached hereto and marked 'Exhibit A' and made a part hereof, by which contract the said defendant, in consideration of three hundred dollars to him in hand paid by said Benham, the receipt of which was acknowledged, the said defendant sold, transferred, and conveyed to the said Benham, his successors and assigns, all his right, title, and interest in and to his oil and gasoline business and plant, including the goodwill and reputation of said business, and all and singular the materials, chattels, and personal property of every nature and kind whatsoever belonging to, or in any way pertaining or used in or about, said oil and gasoline business, among other things including one (1) horse, one (1) spring wagon, three (3) tanks, harness, cans, utensils, etc., consisting of everything used by the said defendant in his said business, and the said defendant further contracted and agreed with said Benham, his successors and assigns, that he, the defendant, would not, during the period of five years then next ensuing after the fourth day of February, 1893, do anything within the state of Indiana, outside of the city of Indianapolis, in the line of selling or delivering oil or gasoline to the houses of consumers by horse and wagon or otherwise, neither in his own behalf, nor in his own name, nor in connection with any partnership or corporation, nor as the agent of any person, partnership, or corporation, nor in anywise do anything that would interfere with, or compete with or work against, the profit, advantage, and business of the said Benham, as trustee and manager, or in any other name or style whatever, which he might assume or by which he might be known, or his successors or ⁵⁶² assigns, during the said period of five years. Said defendant further covenanting and agreeing in said contract that he would not, during said period of five years, within said territory, accept any employment directly or indirectly, nor receive, solicit, or fill orders, in any capacity whatsoever, for any oil or gasoline to be sold direct to or delivered at the houses or places of business of consumers, by wagon or other conveyances, after the manner of the business hereinbefore described and carried on as aforesaid by the said defendant, as oil merchant and dealer, or as commission merchant or agent, and further agreed that he would not countenance, promote, or encourage the business of any competitor of the said H. T. Benham, trustee and manager, or of his successors or assigns, within the territory aforesaid, during the said five years aforesaid; and further agreeing, stipulating, and authorizing any court of law or equity to interpose

its authority to compel the performance of said contract, and to restrain any breach of the terms thereof."

It is further alleged that before the violation of the contract in question, Benham sold, assigned, and transferred all of his right, title, and interest in and to the property so purchased to plaintiff, a corporation duly organized under the laws of the state of New Jersey, and also assigned and transferred the written contract, and all right, title, interest, and goodwill of said business in the territory aforesaid, to plaintiff. It further avers that the defendant has entered into and is pursuing his said business of selling and delivering oil to the consumers of said city of Hammond, in violation of his said contract and is threatening to so continue in violation of the rights of plaintiff, inasmuch as he comes in competition with plaintiff, who is engaged in the same business. Appellee's insolvency is also alleged, ⁵⁶³ and a copy of the contract is filed with the complaint. An injunction is prayed to restrain the appellee from further pursuing his business in the city of Hammond.

A demurrer for insufficiency of facts was sustained to this complaint, and this ruling of the court is assigned as error.

We are not favored with a brief upon appellee's part, but infer from statements in the brief of the learned counsel for appellant that the contract in controversy was assailed by the appellee upon the ground that it sought to prohibit him from selling and delivering oil at any place in the state of Indiana outside of the city of Indianapolis, and constituted an unreasonable restraint upon trade, and was, therefore, invalid and not enforceable in any respect.

Appellant contends that, notwithstanding the territory is the entire state of Indiana, with the exception mentioned, in which appellee is restricted from pursuing his business as an oil merchant, the restraint is a reasonable limitation, and that the complaint based upon the contract in question set forth a sufficient cause of action for the relief thereby sought. It is settled that a contract in general restraint of trade is invalid, but one restraining a party from trading within reasonable limits, so as not to be injurious to the interest of the public, is valid, and may be enforced by an injunction, upon a proper showing of facts: *Beard v. Dennis*, 6 Ind. 200; 63 Am. Dec. 380; *Duffy v. Shockey*, 11 Ind. 70; 71 Am. Dec. 348; *Spicer v. Hoop*, 51 Ind. 365; *Baker v. Pottmeyer*, 75 Ind. 451; *Beatty v. Coble*, 142 Ind. 329.

The settled rule, as enunciated by the American and English decisions of the highest courts, seems to be that where, in

the particular case before the court, the restraint in controversy, as to territory, appears to be broader or larger than is necessary to the protection of ⁵⁶⁴ the party seeking to enforce the restrictive contract, it is of no benefit to either party, but in that event becomes oppressive upon the party against whom the enforcement is sought, and, being oppressive, the law regards the restriction as unreasonable and injurious to the interests of the public.

It is not the interests of the parties alone, which in the eye of the law are to be considered the true test, but in each particular case, under the facts, the judicial inquiry is: Will it be inimical to the public interest? If so, then, and in that event, the agreement must be held as hostile to public policy, and therefore void. Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. This principle owes its existence to the very sources from which the common law is supplied: Greenhood on Public Policy, 2, 3.

The law regards the goodwill of a particular trade or business as a species of property, possessing a market value, and subject to sale or disposal. But it is also a well-established principle of law and public policy, that where a person is engaged in trading or other legitimate pursuits, he shall not be unreasonably fettered in the exercise of such business, and when he sells or disposes of the goodwill incident thereto, the law will only sustain such a restraint as to his future engagement in such business or pursuit, as will appear to be a reasonable space of interdicted territory, and what are such reasonable limits is a question of law for the court to determine under all the facts and circumstances in each particular case. In support of the several general propositions herein asserted, see Wiley v. Baumgardner, 97 Ind. 66; 49 Am. Rep. 427, and authorities there cited; Lawrence v. Kidder, 10 Barb. 641; Hubbard v. Miller, 27 Mich. 15; 15 Am. Rep. 153; ⁵⁶⁵ Horner v. Graves, 7 Bing. 735; Oregon Steam etc. Co. v. Winsor, 20 Wall. 64; Taylor v. Blanchard, 13 Allen, 370; 90 Am. Dec. 203; Dunlop v. Gregory, 10 N. Y. 241; 61 Am. Dec. 746; Greenhood on Public Policy, c. 6, p. 683; 3 Am. & Eng. Ency. of Law, 883, and authorities there cited; 22 Am. Law Rev. 873-889; Mallan v. May, 11 Mees. & W. 652.

In the case of Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746, the court of appeals of New York said: "Contracts, upon whatever consideration made, which go to the total restraint of

trade, ... anywhere in the state, are void. Such contracts are injurious to the public, and operate oppressively upon one party without being beneficial to the other. . . . The contract, to be upheld, must appear from special circumstances to be reasonable and useful, and the restraint of the covenantor must not be larger than is necessary for the protection of the covenantee in the enjoyment of his trade or business."

In the case of *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203, it was held that an agreement not to set up, exercise, or carry on the trade or business of manufacturing or selling shoecutters at any place within the commonwealth of Massachusetts was void.

In the case of *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621, a stipulation not to engage in a business of a particular kind in the county or city of San Francisco or state of California, was held to be void.

In *Lawrence v. Kidder*, 10 Barb. 641, a covenant not to conduct the business of manufacturing or trading in palm leaf beds or mattresses in the state of New York, west of Albany, was held to be invalid.

In *Price v. Green*, 16 Mees. & W. 346, a contract not to carry on the perfume business within six hundred miles of London was adjudged void.

In *Horner v. Graves*, 7 Bing. 735, an agreement not to ~~use~~ practice dentistry within a district two hundred miles in diameter was held to be void.

In *Beal v. Chase*, 31 Mich. 490, where it appeared that the obligor sold a printing establishment and the business thereof, which extended over the entire state, a covenant not to engage in the same business in that state so long as the vendee should continue in the business at the place of sale, under the circumstances, was held to be reasonable and valid.

In *Rousillon v. Rousillon*, reported in L. R. 14 Ch. Div. 351, 22 Alb. L. J. 212, the English court of chancery held that there is no "hard and fast" rule holding contracts of this character, unlimited as to space, void, but that the validity depends upon the reasonableness of the contract, and, where it appears that the broad restriction is reasonably necessary for the full protection of the contractee, it will be sustained.

In a recent English decision in the appeal of *Nordenfelt v. Maxim etc. Co.* (1894), L. R. App. Cas. 535, where a patentee and manufacturer of guns and ammunition for war purposes transferred his patent to a company, and covenanted with the latter

not to engage in that business for a term of twenty-five years, it was held that, owing to the nature of the business, and the limited number of customers to whom sales might be made (confined mainly to governments of countries), that the restraint imposed in that case was not larger than was necessary for the protection of the contractee, and not injurious to the public interest.

These decisions serve to illustrate the manner in which the courts, under varied circumstances, have been, and are, inclined to view such contracts. The rule in question, in its application by the courts, in later decisions, to an extent, seems to have been modified, and is made to yield, in some respects, to the nature or ⁵⁶⁷ character of the particular trade or business, and the territory over which it extends at the time of the sale of the goodwill.

Cases do, and will arise, as for instance in *Beal v. Chase*, 31 Mich. 490, and *Nordenfelt v. Maxim etc. Co.* (1894), L. R. App. Cas. 535, where the particular business has been built up so as to extend over an entire district or state, and sometimes beyond, or where, from its nature, the number of those who patronize it are comparatively of a limited number, and where, consequently, broad or enlarged restrictions are considered as reasonably necessary for the desired protection, and are, therefore, sustained.

Viewed, then, in the light of the authorities cited herein, how stands the case at bar? It appears, and is conceded by appellant, that the particular business or trade in which appellee was engaged at the time he sold out, and executed the contract in controversy, was confined to the limits of the city of Hammond. There is no contention that it extended to any other parts of the state, beyond these limits. Neither from the nature of the business nor otherwise does it appear that it was necessary for the protection of appellant that the appellee should be prohibited from engaging therein at any and all places in the state, other than the city of Indianapolis. It is a matter of general knowledge that there are numerous consumers of oil for fuel and illuminating purposes in this great and growing state, and it is manifestly to their interest that there should be competition in the selling of the same, at least, that the price thereof may be reasonable. The enlarged covenant of restraint as to territory, it is obvious, was unnecessary under the circumstances. It could serve no purpose, except as a tendency toward the monopoly of the business. If appellant could buy out appellee and ⁵⁶⁸ restrict him in this manner, it might proceed to do so to

every other person in the whole state engaged in a similar business, and eventually reduce the sale of oils in the state to comparatively few hands, or possibly to its own absolute control, and thus virtually stifle legitimate competition. The law has always been hostile to the creation of monopolies, when they tend to impair the interest of the public. It is elementary that whatever is injurious to or against the public good, is void on the ground of public policy. This policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies which tend to advance prices to the injury of the public in general: *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319.

Appellant apparently insists that the contract may, at least, be held enforceable against appellee in the city of Hammond, and cite *Peltz v. Eichele*, 62 Mo. 171. In that case, the agreement was not to enter into the manufacture of matches in the city of St. Louis, or any other place, for five years. The stipulation as to St. Louis was sustained, upon the ground that it was reasonable, and could be separated from the other clause. It is a recognized principle that when a contract is or can be so separated in parts as to constitute two agreements, one illegal and the other legal, the latter may be enforced and the transaction *pro tanto* sustained. But it is otherwise where the contract in its nature is not divisible: *Beard v. Dennis*, 6 Ind. 200; 63 Am. Dec. 380; *Wiley v. Baumgardner*, 97 Ind. 66; 49 Am. Rep. 427.

The contract before us is not of this character, and does not come within the provisions of the rule stated, and it must either stand or fall as an entirety. The ⁵⁰⁰ restraint of the trade or business as therein stipulated as to territory, under the circumstances, was manifestly too large, and is, therefore, in violation of the principles of public policy to which we have referred, and consequently void, and cannot in any respect be enforced.

Judgment affirmed.

CONTRACTS IN RESTRAINT OF TRADE.—Combinations of individuals formed for the purpose of stifling competition in trade are against public policy and void: *Texas etc. Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690, and note; *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124.

CONTRACTS IN RESTRAINT OF TRADE are not necessarily void by reason of universality of time or of place. Their validity depends upon the reasonableness of the restrictions under the conditions in each case, and the test of reasonableness in contracts of this kind is

the test of validity: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; 49 Am. St. Rep. 784, and especially note. A contract prohibiting a party from carrying on a specific business without limit as to time or place is void: *Long v. Fowl*, 42 Mo. 545; 97 Am. Dec. 355.

CONTRACTS IN RESTRAINT OF TRADE.—An agreement in restraint of trade is not absolutely void on the ground of public policy, because it extends throughout the state: *Herreshoff v. Boutineau*, 17 R. I. 3; 33 Am. St. Rep. 850, and note with the cases collected. See, also, the note to *Oakdale Mfg. Co. v. Garst*, 49 Am. St. Rep. 789.

CONTRACTS—WHEN VOID AS AGAINST PUBLIC POLICY.—Contracts are against public policy, and therefore void, whenever their subject matter tends to produce injustice or oppression, restraint of liberty or of legal right, to obstruct or pervert the administration of law, to interfere with or control executive, legislative, or other official action, or to prevent competition: *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793. Contracts which are at war with the established interests of society, and in conflict with the morals of the times, are void as against public policy: *McNamara v. Gargett*, 68 Mich. 454; 13 Am. St. Rep. 355, and note. See, also, the extended note to *Parsons v. Trask*, 66 Am. Dec. 506.

HUNTINGTON v. MAHAN.

[142 INDIANA, 695.]

INTERSTATE COMMERCE.—AN AGENT of a nonresident firm who has received, and is engaged in distributing, goods which have been sold by another agent, orders for which have been forwarded by him to his principal in another state, is engaged in interstate commerce, and is not subject to an ordinance of a municipality prohibiting peddling within its limits without a license.

Kenner & Lesh, for the appellant.

E. E. Stevenson, for the appellee.

695 **HACKNEY, J.** The appellee was charged and found guilty, before the appellant's mayor, of violating an ordinance of the city prohibiting peddling within said city without a license, as prescribed by said ordinance. On appeal to the circuit court, there was a special answer by the appellee, a demurrer to which was overruled, and a special reply by the appellant, a demurrer to which was sustained, and, upon a trial by the court, the appellee was acquitted. The questions arising upon the rulings as to the special answer and special reply more fairly and fully arise upon the motion for a new trial which assigned, as causes therefor, that the finding was contrary to law and was contrary to the evidence. Without conflict, the evidence established the following facts: During and prior to September and October, 1894, P. F. Collier & Co. were a firm of book publishers, located in and conducting their business, throughout various states, from the city of New York, in the state of New York. 696 In said months, said firm had an agent, P. J. Flanady, located in the city of Indianapolis,

and had other agents traversing the various parts of this state soliciting purchasers and taking orders for the books so published by said firm, and acting solely as the salaried agents of such firm. The Indianapolis agency, after receiving the orders for such books as the canvassing agents might secure, would combine numbers of such orders and forward them to P. F. Collier & Co., at New York City, which firm, in response to such orders, would ship to the Indianapolis agency, from New York City, the books so ordered. When the books so ordered and shipped were received at Indianapolis, they were repacked in parcels to suit the orders from the various localities in Indiana, and were shipped to such localities for distribution by salaried agents acting for P. F. Collier & Co., in such localities. The appellee, while acting as such distributing agent at the city of Huntington, on the fifth day of October, 1894, and while distributing to various purchasers such books, of the publications of said firm, as had been ordered by the citizens of said city, through one Gamble, another agent of said firm, during the month of September, 1894, was arrested for the violation of said ordinance. The books, being delivered by the appellee, had been received by him through orders and shipments as above described, and had not, prior thereto, gone into storage or become a part of the stock in trade in any business conducted wholly within this state.

The theory upon which the appellee was discharged by the lower court and that upon which the judgment of that court is here supported is, that the appellee was engaged in interstate commerce, the regulation of which is reserved, by the federal constitution, to the Congress of ⁶⁹⁷ the United States, and which is not the subject of regulation or restriction by state or municipal authority.

In the recent case of *South Bend v. Martin*, 142 Ind. 31, the question here presented was fully considered, and many of the federal and state decisions were reviewed. The rule there recognized was, that if the goods, prior to their sale, had come into this state and had become here permanently fixed and mingled with the mass of property within this state, and, as such, were subjected to sale by present exposure and delivery, their sale was not a transaction of interstate commerce, while, if they had not, at the time of their sale, come into this state, had not become mingled with the mass of property within this state, were not subject to inspection and delivery at the time of the sale, the soliciting of orders and the subsequent shipment and delivery from another state were transactions of interstate commerce. Upon this recognized rule, there can be no doubt, under the facts here presented,

that this case falls within the limits where state and municipal authorities have no control. In addition to the numerous cases cited in *South Bend v. Martin*, 142 Ind. 31, see *In re Spain*, 47 Fed. Rep. 208; *In re Nichols*, 48 Fed. Rep. 164; *In re Tyerman*, 48 Fed. Rep. 167; *McLaughlin v. South Bend*, 126 Ind. 471; *Martin v. Rosedale*, 130 Ind. 109.

The right of Congress to regulate interstate commerce "is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of the state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered": *Brennan v. Titusville*, 153 U. S. 289; *Leisy v. Hardin*, 135 U. S. 100; *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419. The right to deliver goods sold when not within the state has the same immunity from state or municipal interference, by way of taxation, as the sale itself has: *In re Spain*, 47 Fed. Rep. 208.

We conclude, therefore, that the record discloses no error, and the judgment of the circuit court is affirmed.

INTERSTATE COMMERCE—SALES OF GOODS IN OTHER STATES.—The negotiation of sales of goods which are in other states, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce, and cannot be interfered with or regulated by the state in which the negotiation was made: *Bloomington v. Bourland*, 137 Ill. 534; 31 Am. St. Rep. 382. See the extended note to *People v. Wemple*, 27 Am. St. Rep. 562.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

MOORE v. BAKER.

(4 INDIANA APPEALS, 118.)

WILLS—ELECTIONS.—A wife to whom her husband transfers certain bank stock in fee, and subsequently, by his will, devises the use of such stock to her for life, with remainder over, is estopped, if she elects to take under the will, from denying the testator's right to thus dispose of the stock, although the title is in her, and if, after so electing, she sells the stock, the remainderman may sue her for its conversion.

VERDICT—RIGHT OF COURT TO DIRECT.—If the evidence clearly establishes the right of the plaintiff to recover, and no defense is proven, it is proper for the court to direct a verdict for plaintiff, but not otherwise.

ELECTION UNDER WILLS is of equitable origin, and cannot exist unless the testator confers some benefit upon the devisee, and, by the terms of the will, assumes to dispose of some right of the latter. The party electing to take under the will is bound to give effect to all of its provisions, and perform the burdens attached to his benefit.

ELECTION UNDER A WILL CONSISTS in the exercise of a choice offered the devisee of accepting the devise and surrendering some right of his which the will undertakes to dispose of, or of retaining such right and rejecting the devise.

T. J. Kane, T. P. Davis, and M. Garrigus, for the appellant.

J. C. and W. E. Blacklidge, B. C. Moon, R. R. Stephenson, and W. R. Fertig, for the appellee.

118 CRUMPACKER, J. On the twenty-sixth day of November, 1878, James A. Crowley assigned and transferred to Susan Crowley, his wife, twenty shares of stock, of the face value of one hundred dollars each, in the Howard National Bank of Kokomo. The certificate was taken up by the bank, and another issued to Susan Crowley, and thus the transfer was effected on the bank records. On the same day, said James gave his wife a warranty deed for lot 69 in the original plat of

the town of Kokomo. On the twenty-eighth day of that month, said James made his will, by the terms of which he devised and bequeathed considerable property to his said wife, among which was the lot he had so conveyed to her, and "the two thousand dollars (\$2,000) of stock in the Howard National Bank of the city of Kokomo," to be transferred to her, she to have the proceeds and dividends of such stock during her life, and, at her death, it was bequeathed absolutely to Lotta Mitchell, now Lotta Baker, the appellee. Said testator died on the eleventh day of January, 1879, and his will was duly admitted to probate. The widow elected to take under the provisions ¹¹⁷ of the will, and the estate was administered accordingly. On the thirty-first day of December, 1884, she sold and transferred, absolutely, said bank stock to one Nathan Pickett for two thousand two hundred dollars. She died testate in the latter part of the year 1888, in Howard county, and John E. Moore, the appellant, was appointed executor of her will. The appellee filed a claim against the executor for the conversion of the stock by the testatrix. The cause was taken to the Hamilton circuit court on change of venue, where it was tried by a jury, and resulted in a verdict in favor of appellee for two thousand seven hundred and eight dollars and thirty-three cents, upon which judgment was rendered. From such judgment the executor appeals. It was shown conclusively that the testatrix elected to take under the will of James A. Crowley, and that the bank stock mentioned in the will was the same stock transferred by said James to the testatrix on the twenty-sixth day of November, 1878; also, that the testatrix sold the stock and converted the proceeds to her own use. Upon these facts, the court directed the jury to return a verdict in favor of the appellee, to which appellant excepted.

Where the evidence clearly establishes the right of the plaintiff to recover without contradiction, and no defense is proven against such right, it is proper for the court to direct a verdict for the plaintiff, but not otherwise: *Hazzard v. Citizen's State Bank*, 72 Ind. 130; *Beckner v. Riverside etc. Co.*, 65 Ind. 468. It is very earnestly insisted, on behalf of appellant, that the transfer of the stock to the testatrix on the twenty-sixth day of November, 1878, was a valid gift, and conferred upon her an absolute and indefeasible title thereto, and that James A. Crowley had no right to afterward dispose of it by will. This may be conceded, but, when the testatrix elected to avail herself of the benefits of her husband's will, she was thereby estopped to deny his right to dispose of the bank stock, though

the title was in her. The doctrine of election is of equitable origin, and is universally recognized in this country and ¹¹⁸ England. There can be no election unless the testator confers some benefit upon the devisee, and by the terms of the will assumes to dispose of some right of the latter. Election consists in the exercise of the choice thus offered the devisee, of accepting the devise and surrendering that right of his which the will undertakes to dispose of, or retaining such right and rejecting the devise. He cannot have both. If he elects to take under the will, he is bound to give effect to all of its provisions, and perform the burdens attached to his benefit. If one conveys land to A as a gift, and, by the same instrument or as part of the same transaction, gives A's horse and carriage to B, A is required to elect whether he will accept the land and give up his horse and carriage, or retain them and reject the land. If he accepts the benefit, he is estopped to deny the donor's right to dispose of his horse and carriage; and, by such acceptance, the title to the chattels at once vests in B: *Thomas v. Thomas*, 108 Ind. 576; *Ridgway v. Manifold*, 39 Ind. 58; *Sheddon v. Goodrich*, 8 Ves. 481; *Arnold v. Gilbert*, 3 Sand. Ch. 531; *Havens v. Sackett*, 15 N. Y. 365; *Painter v. Painter*, 18 Ohio, 247; 2 *Redfield on Wills*, 359; *Pomeroy's Equity Jurisprudence*, sec. 461, et seq. Applying this doctrine to the case in hand, when the testatrix accepted the benefits of her husband's will, she was bound to give effect to its adverse provisions, and was estopped to deny his right to dispose of the bank stock.

A number of questions arising upon the admission and rejection of evidence are discussed by counsel for appellant, but, in view of the fact that appellee was entitled to recover upon the theory we have indicated, such questions are immaterial. No ruling the court could have made respecting them would have affected the result of the suit.

It is also argued that, if the testatrix had no right to sell the stock, the purchaser obtained no title thereto, and appellee's remedy was against him for the stock. If the ¹¹⁹ transfer conferred no greater right upon the purchaser than the testatrix had, the appellee was not bound to follow the stock. She had the right to sue for its conversion, as she has done, and treat the title as vested by the sale.

There is no error in the record. Judgment affirmed.

TRIAL—DIRECTING VERDICT.—A motion by defendant to direct a verdict in his favor can only be sustained by the court when there is a failure to prove some material fact in the case by reason of which no liability of the defendant to the plaintiff is shown: *Union Stockyards*

Co. v. Conoyer, 38 Neb. 488; 41 Am. St. Rep. 738, and note. A judge may direct the verdict when there is no evidence to support the cause of action or defense: *Oatlett v. Railway Co.*, 57 Ark. 461; 38 Am. St. Rep. 254, and note. If there is no evidence upon an issue before a jury, and the weight of evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit or to direct a verdict as the case may require: *Linkauf v. Lombard*, 137 N. Y. 417; 33 Am. St. Rep. 743, and note.

WILLS—ELECTION.—Election by the widow allowed by statute is a right to choose between abiding by her husband's disposition of his property or the right to disregard it and claim under the intestate law. These rights are inconsistent and cannot coexist. She must choose one or the other, and cannot choose both; nor does her right of choice depend in any degree on the mention or omission of her in her husband's will, or on the quantum of benefit she receives or renounces under it: *Estate of Cunningham*, 187 Pa. St. 621; 21 Am. St. Rep. 901, and note. See the notes to *Ford v. Ford*, 5 Am. St. Rep. 147, and *Estate of Vance*, 23 Am. St. Rep. 273.

LOUISVILLE, NEW ALBANY, AND CHICAGO RAILWAY COMPANY v. NICHOLAI.

[4 INDIANA APPEALS, 112.]

CARRIERS—LIMITING LIABILITY FOR BAGGAGE.—A contract by which a railway company exempts itself from liability "on baggage except for wearing apparel, and then only for a sum not exceeding one hundred dollars," not relating to loss or damage from any particular cause, does not limit the liability of the company for negligence in failing to deliver wearing apparel.

CARRIERS—LIABILITY FOR BAGGAGE.—If the exemption provided by contract between a carrier and a passenger is not for loss or damage to baggage from a particular cause, but as to amount only, and the carrier does not account, nor attempt to account, for a refusal or failure to deliver the property, the jury has a right to infer negligence on the part of the carrier, and the passenger may recover the amount of his loss.

CARRIERS—DUTY OF PASSENGER TO READ TICKET.—If a passenger ticket is free from anything calculated to mislead or deceive the person buying it, and professes to, and does set out, a special contract between the carrier and the passenger so legibly and plainly, that it is carelessness on the part of the latter not to read it, his failure to read it when he has an opportunity estops him from saying that he has not read it, and he is bound by its stipulations.

APPELLATE PRACTICE.—A verdict which is right upon the evidence will not be reversed on appeal because of erroneous instructions.

E. C. Field and A. Q. Jones, for the appellant.

W. J. Beckett and W. S. Doan, for the appellee.

120 NEW, J. This is an action by the appellee against the appellant, as a common carrier, to recover the value of certain baggage alleged to have been lost in its transmission from the city of Portland, Oregon, to the city of Indianapolis.

The material averments of the complaint are, that on the 19th of October, 1889, the appellant, in consideration of forty-nine dollars to it paid, undertook to safely carry the appellee and her baggage from Portland, Oregon, to Indianapolis, Indiana, by way of the Northern Pacific Railroad, the Wisconsin Central Railroad, and the appellant's own railroad; that said baggage consisted of one trunk, containing the appellee's wearing apparel, and other articles of personal use and comfort; that the appellee delivered said baggage to the appellant at Portland, Oregon, and received a check therefor—No. 34,850—for the carriage of the same to Indianapolis over said route; that the appellee, on arriving at Indianapolis, presented said check to the appellant's proper agent, and received said trunk, but, on opening it, discovered that there had been abstracted therefrom, en route, a sealskin cloak, set of diamond earrings, diamond scarf-pin, gold watch chain, three gold rings, set of turquoise earrings, gold breastpin, scarfpin, two pairs of cuff-buttons, gold thimble in ivory case, silver sugar bowl, silver cream pitcher, silver spoon-holder, all of the value of three hundred and thirty dollars; that the appellee notified the appellant of the loss of said articles, and demanded that the same be delivered to her, or that she be paid the value thereof, all of which the appellant refused to do.
¹²¹ Wherefore, said baggage has been wholly lost to the appellee, to her damage five hundred dollars.

A demurrer to the complaint for want of facts was overruled, and exceptions taken. An answer of general denial was filed to the complaint, the cause submitted to a jury for trial, and verdict returned in favor of the appellee for three hundred and fifty-four dollars and seventy-five cents. A motion for a new trial by the appellant was overruled, and judgment rendered upon the verdict for the appellee.

The appellant has assigned as error the overruling of the demurrer to the complaint, and the overruling of a motion for a new trial. The sufficiency of the complaint is not discussed by counsel, and we, therefore, treat that portion of the error assigned as waived.

Upon the trial, the appellee submitted proof in support of the allegations of her complaint and rested. The appellant then introduced as its only evidence the passenger ticket by it sold to the appellee in consideration of the forty-nine dollars paid by the latter, as alleged in the complaint.

Said ticket, among other things, contained the following words: "None of the companies represented in this ticket will assume any liability on baggage, except for wearing apparel,

and then only for a sum not exceeding \$100.00." Following this is the signature of "Charles S. Fee, Gen'l Pass. & Ticket A.," and immediately after that the following:

"I agree to the above contract.

"MRS. OSCEOLA NICHOLAI

"Witness: A. D. Charlton."

The effect of this agreement, upon the amount of loss sustained by the appellee, is the question presented for our decision.

A passenger ticket may be in such form as to give to it the nature of a receipt rather than contract. Its office being, in such case, mainly that of a token or voucher, to enable ¹²² persons having charge of carriages, or vessels of common carriers, to recognize the persons who are entitled to be carried as passengers: Thompson on Carrier of Passengers, 65, 423; 2 Redfield on Law of Railways, 6th ed., 303; Hutchinson on Carriers, 2d ed., sec. 580; Quimby v. Vanderbilt, 17 N. Y. 306; 72 Am. Dec. 469; Baltimore etc. R. R. Co. v. Campbell, 36 Ohio St. 647; 38 Am. Rep. 617.

When a passenger has bought and been given a ticket unlimited upon its face, evidence of rules or regulations of the carrier, tending to defeat the apparent right conferred by the ticket, is not admissible, if the passenger was not informed of them. And it has often been held that a passenger is not bound by limitations or conditions printed on the back of his ticket, which he did not see nor know of. And so, also, if any attempt at imposition or deception appears, or any device be resorted to, calculated to mislead the passenger or shipper, or keep from his notice any matter of the printed or written indorsements on the receipt or ticket which are intended to affect the liability of the carrier, they will not avail the latter, if they have been overlooked by the former: Hutchinson on Carriers, 2d ed. secs. 245, 580; Pennsylvania R. R. Co. v. Spicker, 105 Pa. St. 142; Maroney v. Old Colony etc. Ry. Co., 106 Mass. 153; 8 Am. Rep. 305; Brown v. Eastern R. R. Co., 11 Cush. 97; Malone v. Boston etc. R. R. Corp., 12 Gray, 388; 74 Am. Dec. 598; Henderson Steam Packet Co. v. Stevenson, L. R. 2 Sc. & D. App. 470; Grand Trunk Ry. Co. v. Stevens, 95 U. S. 655; Rosenfeld v. Peoria etc. Ry. Co., 103 Ind. 121; 53 Am. Rep. 500.

On the other hand, when a passenger ticket is free from anything calculated to mislead or deceive the person buying it, and professes to, and does, set out a special contract between the

carrier and passenger, so legibly and plainly that it will be carelessness on the part of the latter to overlook it, there can be no good reason why such a "contract ticket" should not be held conclusive upon the passenger, as bills of lading or the receipts of the common carrier are ¹²³ upon the shipper or bailor of goods. In such a case, the passenger could not be heard to say that he did not read the special contract contained in his ticket. He would be expected to read it, and, if he had the opportunity to read it, and failed to do so, he would be bound by its stipulations nevertheless: *Pennington v. Philadelphia etc. R. R. Co.*, 62 Md. 95; *Hill v. Syracuse etc. R. R. Co.*, 63 N. Y. 101; *Lillis v. St. Louis etc. Ry. Co.*, 64 Mo. 464; 27 Am. Rep. 255; *Downs v. New York etc. R. R. Co.*, 36 Conn. 287; 4 Am. Rep. 77; *Sherman v. Chicago etc. R. R. Co.*, 40 Iowa, 45; *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553; 25 Am. St. Rep. 660; *Black v. Wabash etc. Ry. Co.*, 111 Ill. 351; 53 Am. Rep. 628; *Jones v. Cincinnati etc. R. R. Co.*, 89 Ala. 376; *Germania etc. Ins. Co. v. Memphis etc. R. R. Co.*, 72 N. Y. 90; 28 Am. Rep. 113; *Kirkland v. Dinsmore*, 62 N. Y. 171; 20 Am. Rep. 475; *Western Ry. Co. v. Harwell*, 91 Ala. 340; *McFadden v. Missouri etc. Ry. Co.*, 92 Mo. 343; 1 Am. St. Rep. 721; *St. Louis etc. Ry. Co. v. Weekly*, 50 Ark. 397; 7 Am. St. Rep. 104; *Hutchinson on Carriers*, 2d ed., secs. 240, 245, 581.

The contract between the carrier and the passenger need not be written. A verbal contract is as obligatory as a written one, when established. The only difference is in the manner and in the certainty of the proof. The fundamental idea of a contract involves the meeting of the minds of the parties, and requires a mutuality of assent, but the proof of the agreement, if otherwise satisfactory, need not be written. Where, however, the contract is not in writing, the proof must be clear of assent to the terms proposed by the carrier; for the law, having imposed an important duty upon the carrier, upon grounds of public policy, will not permit it to divest itself of its responsibilities, and throw the loss upon the employer, where the proof that the latter has so agreed is doubtful: *Illinois etc. R. R. Co. v. Morrison*, 19 Ill. 136; *Gould v. Hill*, 2 Hill, 623; *Roberts v. Riley*, 15 La. Ann. 103; 77 Am. Dec. 183; *Hutchinson on Carriers*, 2d ed., sec. 242.

The terms and conditions of the ticket in the case at bar, so far as we can judge from the record, were all plainly set out on the face of the ticket, and contained over three hundred ¹²⁴ words, and, as we have already shown, the signature of the ap-

pellee is attached to the contract. We speak of this, because it is the fact. We do not say that her signature was necessary: See *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553; 25 Am. St. Rep. 660; *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365, and cases there cited; *Hutchinson on Carriers*, 2d ed., 240 (243).

The liability of the common carrier is, by law, an unusual and extraordinary one. The common carrier is, by law, regarded as a practical insurer of the goods against all losses of whatever kind, with the exception of those arising from what is known as the act of God, and those caused by the public enemy, to which, in modern times, have been added those arising from the act of the public authority, those arising from the act of the shipper, and those arising from the inherent nature of the goods. And it is now well settled that, in the carriage of a passenger's baggage, the carrier incurs the full responsibility of the common carrier of goods.

The rigorous accountability to which common carriers of goods and baggage have been held as against all losses, save of the kind we have named, has been relaxed so far as to allow that liability to be qualified to some extent by contract between the carrier and the employer.

Whether the carrier could, by contract, exempt itself from liability for losses arising from its own negligence, was for some time a question not well settled. The great weight of authority in this country now is in favor of excluding negligence as an element of contract between the carrier and the employer, and of holding the former to a rigid responsibility for any degree of negligence, without the power by contract to divest itself of it: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Bartlett v. Pittsburgh etc. Ry. Co.*, 94 Ind. 281; *Adams Exp. Co. v. Harris*, 120 Ind. 73; 16 Am. St. Rep. 315; *Louisville etc. Ry. Co. v. Faylor*, 126 Ind. 126; *School District etc. v. Boston etc. R. R. Co.*, 102 Mass. 552; 3 Am. Rep. 502; *Chicago etc. Ry. Co. v. Chapman*, 133 Ill. 96; 23 Am. St. Rep. 587; *American¹²⁵ Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394; 8 Am. Rep. 268; *Willis v. Grand Trunk etc. Ry. Co.*, 62 Me. 488; *Jacobus v. St. Paul etc. Ry. Co.*, 20 Minn. 125; 18 Am. Rep. 360; *Rose v. Des Moines etc. R. R. Co.*, 39 Iowa, 246; *Southern etc. Ry. Co. v. Maddox*, 75 Tex. 300; *Kansas etc. Ry. Co. v. Reynolds*, 17 Kan. 251; *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *Berry v. Cooper*, 28 Ga. 543; 2 Am. & Eng. Ency. of Law, 822.

The rule which we have thus referred to applies also to contracts limiting the liability of the carrier to a certain sum in case of loss, unless that sum is agreed upon as the value of

the goods or baggage, and the charges or rates of freight are ascertained and fixed upon the basis of such agreed valuation. In such a case, the weight of authority seems to be, that the shipper would be estopped from afterward alleging that the value was more (even if there should be loss by the negligence of the carrier), for there would be no justice in allowing the shipper to be paid a larger value than that deliberately agreed upon for an article which he had induced the carrier to take at a rate lower than would otherwise have been charged: *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331; *Phoenix Ins. Co. v. Erie etc. Transp. Co.*, 117 U. S. 322; *Adams Exp. Co. v. Harris*, 120 Ind. 73; 16 Am. St. Rep. 315; *Chicago etc. R. R. Co. v. Abels*, 60 Miss. 1017; *Alabama etc. R. R. Co. v. Little*, 71 Ala. 611; *Moulton v. St. Paul etc. Ry. Co.*, 31 Minn. 85; 47 Am. Rep. 781; *Kansas City etc. R. R. Co. v. Simpson*, 30 Kan. 645; 46 Am. Rep. 104; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Louisville etc. Ry. Co. v. Wynn*, 88 Tenn. 320; *Gorgan v. Adams Exp. Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *American Exp. Co. v. Sands*, 55 Pa. St. 140; *Hutchinson on Carriers*, sec. 250.

In New York, the rule is different from that which prevails in most of the states. In that state, while the decisions have shown some individual differences among the judges, the law is clearly settled that a carrier may, by means of a plain and unmistakable special contract, exempt itself ¹²⁶ from liability for losses arising from any degree of negligence on its part in any case. The question seems to be, as yet, an open one in California, Delaware, Florida, Nevada, Oregon, and Rhode Island.

The contract in the case at bar does not declare the value of the baggage to be one hundred dollars. It does not amount to a clear and unequivocal agreement that one hundred dollars shall be treated as the value of the baggage. Nor is it in any way shown that there was any special consideration in the way of reduced rates or charges, inducing the appellee to make the contract. If, upon these points, there be any doubt, the appellee would be given the benefit of the doubt. The contract should be construed most strongly against the carrier. Limitations and restrictions upon the liability of common carriers are taken most strongly against them.

The delivery of the trunk to the appellant with the lost articles in it, all in good condition for transportation, and their value, are undisputed. For the failure to deliver, upon the demand of the appellee, the lost articles, at the point of destina-

tion, no excuse or explanation whatever was offered by the appellant.

If a carrier, in a case like this, where the exemption provided for by contract is not for loss or damage from a particular cause, but as to amount of loss only, will not account, nor attempt to account, for a refusal or failure to deliver the property which it undertook to safely carry, the presumption is not violent that there has been negligence on the part of the carrier, if not wrongful detention and conversion. In our opinion, the jury had the right, upon this state of facts, to infer negligence on the part of the appellant, whatever may be the rule as to the onus probandi, in cases where the loss or damage has resulted from a cause excepted by contract between the carrier and employer: *American Exp. Co. v. Sands*, 55 Pa. St. 140; *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *Steele v. Townsend*, 37 Ala. 247; 79 Am. Dec. 49; *Adams Exp. Co. v. Harris*, 120 Ind. 73; 16 Am. St. Rep. 315; *Berry v. Cooper*, 28 Ga. 543; *Chicago etc. R. R. Co. v. Moss*, 60 Miss. 1003; 45 Am. Rep. 428; *Gaines v. Union Transp. etc. Co.*, 28 Ohio St. 418; *Slater v. South Carolina Ry. Co.*, 29 S. C. 96; *Missouri etc. Ry. Co. v. China Mfg. Co.*, 79 Tex. 26; *Brown v. Adams Exp. Co.*, 15 W. Va. 812; *Shriver v. Sioux City etc. Ry. Co.*, 24 Minn. 506; 31 Am. Rep. 353; *Chicago etc. R. R. Co. v. Manning*, 23 Neb. 552; 2 Greenleaf on Evidence, sec. 219; Story on Railroads, sec. 529; Hutchinson on Carriers, sec. 764; Redfield on Negligence, sec. 526.

The appellant complains of instructions numbered 3 and 4. The third instruction was erroneous in this: It gave the jury to understand that it was of little importance whether the appellee omitted to read the contract to which she had signed her name, provided the appellant had not called her attention specially to its terms. We do not think the duty of the appellee to read the contract can be waived or laid aside so lightly. It was her duty to read the contract, if she had the opportunity of doing so, and if no fraud, imposition, or deception was practiced to prevent her from reading it.

The fourth instruction, in some respects, as applied to the facts of the case, was also erroneous, but the verdict of the jury is right upon the evidence, and, therefore, the judgment should not be reversed because of error in the instructions: *Ledford v. Ledford*, 95 Ind. 283; *Stockwell v. Brant*, 97 Ind. 474; *Woods v. Board of Commrs.*, 128 Ind. 289; *Garrigan v. Dickey*, 1 Ind. App. 421; Rev. Stats. 1881, sec. 658.

The judgment is affirmed, with costs.

CARRIERS—LIMITING LIABILITY FOR BAGGAGE.—This subject is discussed in the extended note to *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 721-723.

CARRIERS—DUTY OF PASSENGERS TO INFORM THEMSELVES AS TO CONTENTS OF TICKET.—One accepting a ticket from a carrier is bound by the conditions therein, though she did not and could not read it. It was her duty to ascertain its contents if she cared to know her rights: *O'Regan v. Cunard S. S. Co.*, 160 Mass. 356; 39 Am. St. Rep. 434, and note with the cases collected. See, also, the extended note to *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 721-723.

FOGLEMAN v. SHIVELY.

[4 INDIANA APPEALS, 197.]

ENTIRETIES—GARNISHMENT.—If land owned by husband and wife by entireties is sold by them, the husband's half of the proceeds of the sale, though remaining undivided, is subject to garnishment for the payment of his separate debts.

S. Stansifer and C. S. Baker, for the appellant.

M. Hacker, W. T. Strickland, and C. F. Remy, for the appellees.

¹⁹⁷ BLACK, J. The appellant, on the 3d of May, 1887, filed his complaint and affidavit in attachment against the appellee Lewis Shively, a nonresident, the amount of the appellant's claim stated in the affidavit being seven hundred and seventy-five dollars. At the same time, he instituted proceedings in garnishment against the appellee Walter J. Quick, charging him in the affidavit with having the control or agency of certain money, property, ¹⁹⁸ effects, or credits of said Lewis Shively, which the sheriff could not attach by virtue of the order of attachment. The appellee Lewis Shively was defaulted.

The only question presented and argued in this court relates to the action of the court in overruling the appellant's demurrer to the fifth paragraph of the answer of the garnishee.

In that paragraph it was alleged that, at the time of the service of the writ of garnishment on said Quick, he had in his possession one promissory note, dated May 1, 1887, due one year after date, for the sum of eight hundred dollars, drawn payable to the garnishee at the First National Bank of Columbus, Indiana, and executed by C. F. Remy and C. J. Remy, and indorsed by the garnishee to the appellee Lewis Shively, and one bill of exchange, dated May 3, 1887, drawn by said bank on the Third National Bank of New York in the sum of nine hundred and forty-six dollars and forty cents, payable to the appellee Lewis Shively; that the money evidenced by said note and bill was

the proceeds of certain real estate situated in this state, which was held by said Lewis Shively and his wife, Amy Shively, as tenants by entireties, said real estate having been conveyed to them as husband and wife; that said garnishee had been employed by said Lewis Shively and Amy Shively as their agent to sell said real estate for them; that, in pursuance of his employment as such agent, he sold said real estate and received the sum of nine hundred and forty-six dollars and forty-three cents in cash, with which he purchased said bill of exchange at the First National Bank of Columbus, Indiana, for the purpose of transferring said money to said Lewis and Amy Shively at Los Angeles, California, where said Lewis and Amy Shively resided, and said garnishee having been notified by said Lewis and Amy Shively that said Amy Shively was absent from California, and that the money could not be procured on said bill without her indorsement thereon, he had the same drawn payable to Lewis Shively by their direction; that for the same reason he had said note drawn to himself, ¹⁹⁹ and then indorsed the same to Lewis Shively; that, by agreement of the parties to this suit, the garnishee permitted the makers to pay off said note while in his hands, and that he holds money on said note in lieu thereof; "that the money and bill in his hands are the proceeds of the sale of said real estate as above stated, and that the same was garnished in his hands before it had been paid over to Lewis or Amy Shively, or either of them, or before any division had been made of said money between said Lewis and Amy Shively; and he says that said Lewis and Amy Shively are still living together as husband and wife, and still hold said money by the entireties, and that the same is not subject in any way to be attached or garnished for the debt of said Lewis Shively."

The answer shows that the bill of exchange purchased by the agent with the cash received by him in part payment for the real estate was drawn payable to the husband, and that the note representing the remainder of the proceeds of the sale was made payable to the agent, and by him was indorsed to the husband. For what period it was expected the wife would remain absent from California is not shown. Her absence may not have furnished so plausible a reason for indorsing the note (due in one year) to the husband as for causing the bill of exchange to be drawn payable to him. We assume, however, that it appears sufficiently that all that the agent had done, relating to the proceeds of the sale, was done to transfer the proceeds to the husband and wife, and that, at the time of the service of the writ of garnishment, the agent held the proceeds for both the

husband and the wife, no part thereof having been paid over to either of them, and no division having been made between them.

When husband and wife receive real estate by the same conveyance, they hold it as tenants by entireties. Under the fiction of the unity of husband and wife, they do not hold by moieties, but both and each hold the entirety. Neither can sever the tenancy. Upon the death of either, during ²⁰⁰ coverture, the survivor does not take by the *jus accrescendi* of joint tenants, but continues to hold the whole by virtue of the original estate.

At common law, during the coverture, the husband had his estate *jure uxoris*; he was entitled to the use and control of the property, and the wife had no control over it. The husband could lease, convey, or mortgage it at his pleasure, and it might be taken on execution against him; but upon his death, leaving the wife surviving, it went to her unaffected by his acts: *Den v. Hardenbergh*, 10 N. J. L. 42; 18 Am. Dec. 371; *Hemingway v. Scales*, 42 Miss. 1; 2 Am. Rep. 586; 97 Am. Dec. 425; *Buttler v. Rosenblath*, 42 N. J. Eq. 651; 59 Am. Rep. 52; 28 Alb. L. J. 87; *Freeman on Executions*, 186.

This peculiar tenancy is based upon the marital unity. In case of the absolute divorce of the tenants by entireties, they become either tenants in common or joint tenants: *Lash v. Lash*, 58 Ind. 526.

Our statute provides that conveyances and devises of lands, or of any interest therein, made to two or more persons, shall be construed to create estates in common, and not in joint tenancy, unless the contrary intent be indicated, except conveyances to husband and wife, and thereby expressly indicates the purpose of the legislature not to abolish estates by entireties in lands: *Rev. Stats. 1881, secs. 2922, 2923*; *Bevins v. Cline*, 21 Ind. 37; *Davis v. Olark*, 26 Ind. 424; 89 Am. Dec. 471; *Jones v. Chandler*, 40 Ind. 588; *Hulett v. Inlow*, 57 Ind. 412; 26 Am. Rep. 64; *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210; *Dodge v. Kinzy*, 101 Ind. 102.

In *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471, the question was presented, whether real estate held by husband and wife as tenants by entireties could be subjected to sale on execution against the husband. It was held that whatever was the rule in this regard at common law, the matter was controlled by our statutes, reference being made to the statute which went in force May 6, 1853 (*Rev. Stats. 1881, sec. 5116*), providing that "no lands of any married woman shall be liable for the

201 debts of her husband; but such lands, and the profits therefrom, shall be her separate property, as fully as if she was unmarried; provided, that such wife shall have no power to encumber or convey such lands, except by deed in which her husband shall join," and the statute in force since the same date (Rev. Stats. 1881, sec. 5128), providing that "the separate deed of the husband shall convey no interest in the wife's lands." It was held that no act or conveyance of the husband, or sale on execution against him, could affect or divest the seisin or use of the wife: See, also, *Chandler v. Cheney*, 37 Ind. 391; *Morrison v. Seybold*, 92 Ind. 298.

In *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210, which was an action to enjoin the sale, on execution against the husband, of land conveyed to the husband and wife, it was held that the legislature of 1881, respecting the rights of married women, did not abolish estates by entireties. And in *Dodge v. Kinzy*, 101 Ind. 102, decided in 1884, it was held that there had not been any repeal of the common-law rule governing conveyances of real estate to husband and wife.

In *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254, it was decided that a crop raised by a husband on land held by him and his wife as tenants by entireties was not subject to levy and sale on an execution against the husband. The court referred to previous decisions, that the land was not subject to sale on execution against the husband, and that he could not, by his conveyance or mortgage, deprive the wife of the joint enjoyment during their joint lives, or the right of survivorship, and that the rents and profits of land belonging to a married woman cannot be sold on execution against her husband, without her consent. It was there said: "We now decide that a crop, raised on land held by husband and wife by entireties, is held by them in the same manner, and subject to the same law, as the land itself; and such crop is, therefore, not subject to levy and sale on an execution against the husband."

The effect of this decision is, that the wife is entitled to 202 the enjoyment of the land while it is held by her and her husband as tenants by entireties, and that the taking of the crop, without her consent for her husband's debt, would be an invasion of such right—an interference with her rights as a tenant of the entirety. The decision does not reach the case of a voluntary sale and conveyance of the land by the husband and wife for money or other personal property. By such a sale and conveyance, the husband and wife cease to have any estate in the land, and it is not necessary

to treat the proceeds of the sale as being held by them in the same manner, and subject to the same law, in order to secure to either of them the enjoyment of the land. Neither is entitled longer to enjoy the land as such. Having lost their estate in the land, not involuntarily or by any proceeding in invitum, but by their voluntary conveyance, the personalty received therefor must be regarded, not as land, but as personal property.

It has sometimes been asserted, and again denied, that, at common law, husband and wife may hold personal property as tenants by entireties. We will not take space to review the cases referred to by text-writers in their discussions upon this subject.

At common law, the wife's personal property in possession, whether owned by her at marriage or received during coverture, became the property of the husband absolutely. This was true of all her personalty in possession, whether held by her or by another not adversely to her.

In *Mahoney v. Bland*, 14 Ind. 176, it was held that, at common law, where real estate of the wife was sold by the husband and wife, the money or personal property received therefrom by the husband vested absolutely in him. This rule, it was held, was not changed by our statute of 1853 providing that the personal property of the wife held by her at the time of her marriage, or acquired during coverture by descent, devise, or gift should remain her own property to ²⁰³ the same extent and under the same rules as her real estate so remains: See, also, *Lichtenberger v. Graham*, 50 Ind. 288.

In *Farmers' etc. Bank v. Gregory*, 49 Barb. 155, it was decided that where real estate held by husband and wife as tenants by entireties was voluntarily converted by them into money, undoubtedly the money belonged to the husband exclusively by virtue of his marital rights.

The husband, at common law, had the right to reduce the wife's choses in action to possession, at any time during coverture. When so reduced, he held the property so brought into possession as his own absolutely. But, if this right to reduce to possession were not exercised during coverture, it ceased at the termination of the marital union, and the choses in action survived to the wife in her own right.

There are many cases in which the wife's right of survivorship has been recognized in choses in action payable to husband and wife. At common law, the wife's interest in a chose in action payable to her and her husband was liable to be destroyed, and her right of survivorship was liable to be defeated by the

husband during coverture. A like power did not exist in relation to her estate in land held by her and her husband as tenants by entireties. Neither could sever the estate or defeat the other's right of ownership. In *Coppin v. ———*, 2 P. Wms. 496, a bond given to husband and wife during coverture, on the husband's death first, it was said, would survive to the wife, "as all other joint choses in action do, though it is true, in this case, the husband may disagree to the wife's right to it, and bring the action on the bond in his own name only, but till such disagreement the right to the bond is in both the husband and the wife, and shall survive."

A note made payable to husband and wife survived to the wife, because it had not been reduced to possession by the husband: *McMillan v. Mason*, 5 Cold. 263; 98 Am. Dec. 401.

A promissory note, or other evidence of debt, made payable ²⁰⁴ to husband and wife, and not collected by him in his lifetime, it was held, upon the death of the husband, would survive to the wife, and she would take the proceeds, unless the interest of creditors was affected: *Johnson v. Lusk*, 6 Cold. 113; 98 Am. Dec. 445.

"In such case, the form of the security implies the design of the husband to benefit the wife; and the law will give effect to this intention, where the interest of creditors is not affected": *Johnson v. Lusk*, 6 Cold. 113; 98 Am. Dec. 445. See, also *Wilder v. Aldrich*, 2 R. I. 518.

Perhaps husband and wife have sometimes been spoken of as tenants by entireties of such personal property with the intention, by such designation, to reconcile the existence, during coverture, of the like interest of both (though so subject to the husband's power) with the idea of marital unity. We are not so much concerned with a name as with the true interests and rights of the parties.

In *Abshire v. State*, 53 Ind. 64, promissory notes made payable to husband and wife had been given in 1852 as consideration for the wife's separate real estate then sold by them. The wife died in 1856, leaving the husband and children surviving, some of the notes remaining unpaid. It was held that the surviving joint payee, the husband, took the notes by survivorship. The doctrine of survivorship, in such a case, was spoken of as being kindred to that of estates by entireties, which it was said do not exist in reference to personal property. It was said that the real estate, when sold voluntarily with her consent, became personalty; that the transmutation of her sep-

arate real estate into personalty divested her of her separate estate therein. The court did not advert to the question as to the effect of the execution of the notes prior to the enactment of the statute of 1853 relating to the personal property of married women, but said that as the notes did not belong to her at the time of her marriage, and were not received by devise, descent, or gift during coverture, she could not hold them as her separate ²⁰⁶ personal property, under the statute of 1853, which it was held left in force the common-law rule in reference to personal property not acquired in one of the modes indicated in the statute.

In *Ireland v. Webber*, 27 Ind. 256, decided in 1866, it was held that the husband would not become the owner of the personal proceeds of the sale of the wife's separate real estate without the possession of the husband, with intention on his part to claim the property as his own, and the wife's consent thereto, either express or implied.

In 1881, a statute was enacted, the first section of which is as follows (Rev. Stats. 1881, sec. 5117): "All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided."

The second section (Rev. Stats. 1881, sec. 5117 provides: "A married woman may take, acquire, and hold property, real or personal, by conveyance, gift, devise, or descent, or by purchase, with her separate means or money; and the same, together with all the rents, issues, income, and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were unmarried. And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange, and convey her personal property; and she may also, in like manner, make any contracts with reference to the same; but she shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance, or mortgage; provided, however, that she shall be bound by an estoppel in pais, like any other person."

There is no provision of the statute altering the effect of the two sections above quoted, so far as they are applicable to the facts of this case. Section 5117, above quoted, is not a limitation upon the general power to make contracts concerning her personal property, conferred by said section ²⁰⁶ 5115: See *Rosa v. Prather*, 103 Ind. 191; *Arnold v. Engleman*, 103 Ind. 512.

All common-law disability of a married woman to acquire and

to dispose of personal property, and to make contracts with reference to her personal property, so far as such disability could have affected such a case as this, is abolished.

By section 254 of the Revised Statutes of 1881, a married woman may sue alone, when the action concerns her separate property, or when the action is between herself and her husband.

Certainly the legal existence of the wife, separate from that of her husband, is recognized in respect to her personal property.

There is no reason, based upon the idea of marital unity, why she and her husband may not hold personal property in possession or choses in action separately or together as if they were not married.

Where possession of the personal property of the husband and wife is taken by the husband, he should be presumed to take for a purpose consistent with the wife's interest, and should be regarded as holding the property for her as well as for himself. By agreement with the wife, he may take it as his own, and use it accordingly.

We have assumed in this case that it is sufficiently shown that the note and bill represent the proceeds of the sale still regarded by the husband and wife as the property of both. We think that the facts, that the owners of this personal property are husband and wife, and that it represents the still undivided proceeds of real estate owned by them as tenants by entireties, do not affect the right of the appellant. The interest of the wife, who is not a party to the proceedings in attachment, is not like the interest of a partner in a debt due to the firm. The note and bill were in the name of the husband and in the possession of the agent. The interest of the wife is definitely shown, being a moiety of the proceeds of the sale of the land. Our statute (Rev. Stats. 1881, sec. 931) provides that any person having property of the attachment defendant of any description in his possession or ²⁰⁷ under his control, which the sheriff cannot attach by virtue of the order of attachment, or being indebted to the attachment defendant, or having the control or agency of any property, moneys, credits, or effects, may be summoned as garnishee.

We are of the opinion that the interest of the husband might be subjected to the payment of his separate indebtedness under the proceedings in attachment and garnishment.

The judgment is reversed, and the cause is remanded, with instructions to sustain the appellant's demurrer to the fifth paragraph of the answer of the appellee Walter J. Quick.

ENTIRETIES—EXECUTION.—A judgment lien against a husband does not extend to his contingent interest in an estate held by himself and his wife by the entireties: *Bruce v. Nicholson*, 100 N. C. 202; 26 Am. St. Rep. 562, and note. A husband has no interest either in the fee or in the usufruct of an estate by the entireties subject to execution in payment of his sole debts: *Corinth v. Emery*, 63 Vt. 505; 25 Am. St. Rep. 780; but see *Cole Mfg. Co. v. Collier*, 95 Tenn. 115; 49 Am. St. Rep. 921. See, also, the extended note to *Den v. Hardenbergh*, 18 Am. Dec. 586.

FIRST NATIONAL BANK OF CRAWFORDSVILLE v. FIRST NATIONAL BANK OF LAFAYETTE.

[4 INDIANA APPEALS, 355.]

BANKS AND BANKING—FORGED CHECKS.—A bank that pays to another a forged order, indorsed in blank by the forger, received and indorsed by the first bank to the paying bank "for collection," may recover the money back, provided the bank paid is in no worse position than if payment of the order had been refused by the correspondent bank. Delay by the latter bank in giving notice of the forgery is immaterial, unless the bank paid is thus placed in a worse position than if it had received notice earlier.

BANKS AND BANKING—FORGED CHECKS.—In the absence of actual fault or negligence on the part of the drawer, his constructive fault in not knowing the signature of the drawer, and detecting a forgery, does not preclude his recovery from one who has received the money with knowledge of the forgery, or who took the check under circumstances of suspicion, without proper precautions, or whose conduct has been such as to mislead the drawer, or to induce him to pay the check, without the usual scrutiny or other precautions against mistake or fraud.

BANKS AND BANKING—FORGED CHECKS.—To entitle the holder to retain money obtained through mistake, upon a forged check, he must be able to put the drawer alone in the wrong, and must be able truthfully to assert that he put the whole responsibility upon the drawer, and relied upon him to decide; and that the mistake arising from his negligence cannot be corrected without placing the holder in a worse position than if payment had been refused.

J. E. Humphries, G. W. Paul, W. W. Thornton, W. E. Humphrey, and W. M. Reeves, for the appellant.

J. R. Coffroth and T. A. Stuart, for the appellee.

³⁵⁵ **NEW, J.** This action was commenced in the Tippecanoe circuit court, and the venue was changed to the Carroll circuit court.

The appellant was the plaintiff below. The action is to recover money alleged to have been paid by the appellant to the appellee on a forged instrument of writing.

The complaint contains two paragraphs. The first is as follows, the caption omitted:

³⁵⁶ "The plaintiff complains of the defendant, and says that on the 4th of January, 1884, the defendant obtained from the

plaintiff the sum of three hundred and forty-nine dollars and ninety-two cents, by means of the following forged, fictitious, and counterfeit writing, to wit:

\$ 25 92	Office of Township Trustee,)
324 00	Franklin School Township,
	Montgomery County, September 1st, 1882.)
\$349 92	

"This certifies that there is due from this township to A. S. Griswold, or order, three hundred and twenty-four dollars, payable out of the special school fund, January 1st, 1884, with interest at 6 per cent annum, payable at First National Bank, Crawfordsville, Ind.

CHAS. JOHNSTON,

"Trustee Franklin School Township."

"Which said fictitious and forged writing said defendant indorsed and presented to the plaintiff at its bankinghouse, in Crawfordsville, Indiana, and received payment thereof in said sum above named from the plaintiff.

"The plaintiff further avers that said Charles Johnston was, September 1, 1882, trustee of Franklin school township, in Montgomery county, Indiana, and was, on January 4, 1884, a customer of the plaintiff, and had his funds and moneys deposited with the plaintiff, and had in the plaintiff's bank more than money enough to pay the aforesaid writing. Said defendant presented, and caused to be presented, to the plaintiff, at its bankinghouse aforesaid, said writing, with the following indorsements on the back thereof, to wit: 'A. S. Griswold. Pay to the order of B. Wasson, C., for collection for acct. of the Indiana National Bank, Lafayette, Ind. J. C. Brockenbrough, cashier'; and, upon the faith of said indorsement of the defendant, and agreement with said Johnston, that said Johnston instructed plaintiff to pay off any note or order or warrant given by him as trustee, and that whenever he was in the city he would pay to plaintiff ³⁵⁷ the money so advanced. The plaintiff, supposing the said writing and indorsement to be genuine, paid and took up said writing, or note, for the accommodation of said Charles Johnston, as trustee, and paid said sum of money, to wit, three hundred and forty-nine dollars and ninety-two cents, to the Citizens' National Bank, of Crawfordsville, Indiana, who held said writing or note for collection by virtue of said indorsement to said B. Wasson, who was at the time of said indorsement, to wit, prior to January 4, 1884, and now is, the cashier of said Citizens' National Bank; and said Citizens' National Bank, as the collecting agent of the defendant, received said money so paid by the

plaintiff, and paid the same to the defendant, in whose possession it now is, said defendant claiming the same as its own money and property; that the plaintiff did not know said instrument was a forgery at the time it was paid, and, as soon as it learned the fact, it notified the defendant.

"The plaintiff further alleges that, previous to the bringing of this action, to wit, on January 31, 1884, it, the plaintiff, demanded said money, to wit, three hundred and forty-nine dollars and ninety-two cents, of said defendant, at the same time and place, presenting the writing, or notes, as aforesaid set out, at its bankinghouse in Lafayette, Indiana, during banking hours, together with an affidavit of said Charles Johnston, such trustee, that said writing or note was, and is, a forgery, and was never executed by him; but the defendant refused to pay back said sum, or any other amount, or any part thereof. At the time of making said demand, said plaintiff tendered back to the defendant said forged writing or note, then and there making it acquainted and informing it of the aforesaid facts.

"At the time said note was presented to the plaintiff for payment, it, the plaintiff, supposed said writing or note was a valid obligation duly signed and executed by the said Charles Johnston, and relying upon that supposition, and further relying upon the defendant's indorsement on said writing or note, then giving it currency and credit as a valid and subsisting obligation, it, the plaintiff, paid said sum of ³⁵⁵ money to the defendant, or to its collecting agent, as aforesaid stated.

"Said writing or note is, in fact, counterfeit, false, forged, and spurious, and of no value whatever, and said Charles Johnston refuses to accept the same, or to extend to the plaintiff any money or credit by reason of said payment.

"Wherefore, on account of the aforesaid reason and facts, the plaintiff says said defendant is indebted to the plaintiff in the sum of three hundred and forty-nine dollars and ninety-two cents for money had and received by the defendant for the use and benefit of the plaintiff, which sum is due and unpaid," etc.

The second paragraph is in form the common count for money had and received.

The answer to the complaint is in two paragraphs, the first being a general denial.

The second paragraph is as follows: "And for a further answer to the first paragraph of said complaint, the defendant says: That on the — day of June, 1883, the said A. S. Griswold, he being the same person who is mentioned in said complaint as the payee of said alleged certificate of indebtedness

was a person of good standing for integrity at the city of Lafayette, in the state of Indiana, and had been doing business thereat, and at the time aforesaid was introduced to the defendant as such by a gentleman of social and business standing and respect in said community, and in whom the defendant had full confidence; that at and before said time this defendant was a national banking association at said city of Lafayette, pursuant to the act of Congress for the organization of national banks, and was engaged in the discounting of notes, bills, and other evidences of indebtedness, and also in a general banking business.

"That at the time aforesaid, and after the introduction aforesaid, the said Griswold offered to this defendant the certificate of indebtedness described in the complaint for discount, and asked the defendant to discount the same for value; that this defendant, believing said certificate to be ³⁵⁰ genuine, and in all respects good and valid, and having theretofore purchased similar certificates, and having always found them to be valid, did purchase from said Griswold said certificate described in the complaint and did pay him therefor the sum of three hundred and twenty-four dollars, and thereupon said Griswold did indorse said certificate to this defendant by writing his name across the back thereof, and did deliver the same to this defendant; that, at said time, said Charles Johnston, the apparent maker of said certificate, resided in the adjoining county of Montgomery, and his handwriting was unknown to this defendant.

"That at the maturity of said certificate, the defendant, still believing that said certificate was genuine and valid, sent the same for collection to its correspondent and agent, the Citizens' National Bank of Crawfordsville, located in said county of Montgomery, and indorsed the same for collection; that on the day of the maturity of said certificate of indebtedness, to wit, on the fourth day of January, 1884, the said Citizens' National Bank, supposing the same to be genuine, presented said certificate at the bankinghouse of said plaintiff, being the same place at which it was made payable, and said plaintiff thereupon paid the same to said Citizens' Bank, and it afterward paid the same to this defendant.

"That afterward, on the thirty-first day of January, 1884, and not before, said plaintiff notified this defendant that said certificate was a forgery, and that never before had this defendant any knowledge, information, or suspicion that said certificate was not genuine or invalid for any cause."

To this paragraph of the answer a reply was filed of two para-

graphs, the first of which was a general denial. The second paragraph, in its leading averments, is not unlike the first paragraph of the complaint. We do not find it necessary to set it out.

The cause was tried by the court, and, at the request of the appellant, a special finding of facts was made, with statement ³⁰⁰ of conclusions of law, the latter being in favor of the appellee and excepted to by the appellant.

Judgment was rendered in the appellee's favor for costs.

The appellant assigns error upon the overruling of the demurrer to the second paragraph of the answer and upon the conclusions of law.

The rule, as generally stated in the decided cases, is, that a bank, in accepting and paying a check or paper presented to it, is held to know the signature of the drawer, and is not at liberty afterward, in a controversy between it and an innocent holder, to dispute the drawer's signature. And, therefore, if the signature of the drawer is, on a subsequent day, discovered to be a forgery, the bank cannot compel the holder to whom the payment was made to restore the money, unless the holder be in some way implicated in fault. This rule is founded upon the supposed negligence of the bank in failing, by an examination of the signature, when the paper is presented, to detect the forgery and refuse payment. The bank is presumed to know the handwriting of the drawer, and, therefore, as between them, the bank must, because of its imputed negligence, bear the loss, if the holder was innocent of contribution to this mistake: *Price v. Neal*, 3 Burr. 1354; *United States Bank v. Bank of Georgia*, 10 Wheat. 333; *Smith v. Mercer*, 6 Taunt. 76; *Bank of Gloucester v. Salem Bank*, 17 Mass. 33; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; 7 Am. Rep. 310; *National Bank of Commerce v. National etc. Assn.*, 55 N. Y. 211; 14 Am. Rep. 232; *White v. Continental etc. Bank*, 64 N. Y. 316; 21 Am. Rep. 612; *Redington v. Woods*, 45 Cal. 406; 13 Am. Rep. 190; *Bernheimer v. Marshall*, 2 Minn. 78; 72 Am. Dec. 79; *Ellis v. Ohio etc. Co.*, 4 Ohio St. 628; 64 Am. Dec. 610; *Johnston v. Commercial Bank*, 27 W. Va. 343; 55 Am. Rep. 315; *Rouvant v. San Antonio Nat. Bank*, 63 Tex. 610; *First Nat. Bank v. Ricker*, 71 Ill. 439; 22 Am. Rep. 104; *Levy v. Bank of United States*, 4 Dall. 234.

While the rule will generally be found thus stated, it is ³⁰¹ very manifest that the courts have shown a steadily increasing

disinclination to extend, by analogy, the doctrine laid down in *Price v. Neal*, 3 Burr. 1354, and the cases following it, to other cases resting upon facts substantially different. Indeed, the rule, as we have given it, and as it is generally found to be stated, has been vigorously assailed by standard authors, as a rule too favorable to the holder, not the most fair, nor best calculated to effectuate justice between the drawee and the drawer: 2 Daniel on Negotiable Instruments, 4th ed., secs. 1361, 1362; Chitty on Bills and Notes, 13th Am. ed., 431, 485; 2 Morse on Banks and Banking, 3d ed., secs. 464-466.

In the case at bar, the forged instrument, as appears by the answer, was put in circulation in the first instance by Griswold, the forger, he indorsing it to the appellee. For the purpose of obtaining the money on it, the appellee, after indorsing it, caused it at maturity to be presented to the appellant, and received the money on it.

The responsibility of the bank, under the rule we have stated, is based upon presumption alone, and is decisive only when the party receiving the money has in no way contributed to or promoted the mistake or fraud.

In the case of *National Bank of North America v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349, it is said: "In the absence of actual fault or negligence on the part of the drawee, his constructive fault, in not knowing the signature of the drawer and detecting the forgery, will not preclude his recovery from one who has received the money with knowledge of the forgery, or who took the check, under circumstances of suspicion, without proper precautions, or whose conduct has been such as to mislead the drawee, or to induce him to pay the check without the usual scrutiny or other precautions against mistake or fraud. These exceptions are implied by the very terms in which the general rule is ordinarily stated. The case of *Ellis v. Ohio etc. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610, is an express decision to that effect, and contains ³⁶³ an able and thorough discussion of the subject. We are aware of no case in which the principle that the drawee is bound to know the signature of the drawer of a bill or check, which he undertakes to pay, has been held to be decisive in favor of a payee of a forged bill or check to which he has himself given credit by his indorsement": See also, *McKleroy v. Southern Bank of Kentucky*, 14 La. Ann. 458; 74 Am. Dec. 438; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Rouvant v. San Antonio Nat. Bank*, 63 Tex. 610.

The appellee's indorsement upon the instrument, whatever

may have been the purpose of that indorsement, would tend to divert the appellant from inquiry and scrutiny, for it gave to the paper the appearance of a genuine transaction. The names of Griswold and the appellant on the back of the paper would apparently be inconsistent with any suspicion of a forgery of Johnston's name. The appellee was a bank doing business in an adjoining county. Its indorsement, following that of Griswold, would hardly fail to inspire confidence in the genuineness of the paper—as vouching for it.

It is not shown by the answer that to allow a recovery by the appellant will place the appellee in a worse position than if payment had been refused. In *Ellis v. Ohio etc. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610, it is said: "To entitle the holder to retain money obtained by mistake, upon a forged instrument, he must occupy the vantage ground, by putting the drawee alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawee, and relied upon him to decide, and that the mistake arising from his negligence cannot now be corrected without placing the holder in a worse position than though payment had been refused."

The view that the drawee should be allowed to recover the money, if the position of the holder has remained unchanged, is advocated by Daniel and Morse in the references we have already given: See, also, *Merchants' Nat. Bank v. National Bank of the Commonwealth*, 139 Mass. 513.

³⁶³ But however this may be, we cannot say that the appellee's indorsement of the forged instrument did not, in some degree, induce the payment of the money.

We do not think the allegation in the answer, that the paper was indorsed by the appellee "for collection," can materially affect the question of laches.

In the case of *National Bank of North America v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349, the indorsement was for collection: See, also, *Star etc. Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442.

It is averred in the answer that the payment was made by the appellant to the appellee on the 4th of January, 1884, and that the latter was not informed, nor did it have knowledge, of the forgery until the twenty-fourth day of said month. Notice and demand for restitution should be within a reasonable time. What is a reasonable time depends upon the circumstances of the case. Mere space of time is not important, unless it be made to clearly appear that the holder will be put to more liability, trouble, or

expense by a restitution then, than if notice had been received earlier. In the present case, the appellee had no indorser behind it but the forger, and, so far as can be known from the answer, any remedy which the appellee may have had against him remains unimpaired.

The forged instrument paid off by the appellant was not negotiable according to the law merchant, although it purported to be payable at a bank: *State v. Hawes*, 112 Ind. 323. Such paper cannot be said to be taken, or to circulate, on the intrinsic credit of the instrument itself. This fact, as it seems to us, is not without some weight upon the question of promptness in giving notice. It is alleged in the complaint that the appellee was notified by the appellant of the forgery as soon as it learned the fact. We would not be justified in holding that the averment in the answer respecting notice is a good defense to the complaint: See 2 Daniel on Negotiable Instruments, 4th ed., sec. 1372; 2 Morse on Banks and Banking, 3d ed., sec. 488; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Rouvant v. San Antonio Nat. Bank*, 63 Tex. 610; *Ellis v. Ohio etc. Co.*, 4 Ohio St. 628; 64 Am. Dec. 610; *Union Nat. Bank of Chicago v. Baldenwick*, 45 Ill. 375.

The demurrer to the second paragraph of the answer should have been sustained. Having reached this conclusion, the special finding does not require attention.

The judgment is reversed, with costs.

BANKS—RIGHT TO RECOVER MONEY PAID ON FORGED OR ALTERED CHECK.—If a payee named in a check indorses it to a bank other than the one on which it was drawn, and receives the amount thereof, he is liable in an action of assumpsit for the moneys so received if the check has been forged, or, though genuine when issued, it has been altered by changing the name of the payee and by raising the amount: *Birmingham Nat. Bank v. Bradley*, 103 Ala. 109; 49 Am. St. Rep. 17, and note. If a bank to which drafts are confided for collection transmits them to another bank at the place where they are payable, and receives from the latter drafts, the amount of which it pays over to its customer, and such drafts, being immediately forwarded for collection, are dishonored, the moneys so paid may be recovered from the customer receiving them: *Waterloo Milling Co. v. Kuenster*, 158 Ill. 259; 49 Am. St. Rep. 156, and note. See, also, the extended note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 893.

COCHRAN v. WARD.

[5 INDIANA APPEALS, 89.]

CONTRACTS.—THE STATUTE OF FRAUDS does not render an agreement absolutely void, but simply withholds the power of enforcement, and prevents the collection of damages for nonperformance.

CONFLICT OF LAWS—CONTRACTS—LEX FORI—REMEDY. The law of the place where a contract is made, including that applicable to the remedy, so far as it affects the validity or obligation of the contract, is as much a part of it as if expressly referred to or incorporated in its terms; and, if the contract is voidable there, it is voidable everywhere. This does not conflict with the general rule that in matter of procedure the *lex fori* controls, as "procedure," in this connection, applies to the nature of the action, as whether it shall be covenant, assumpsit, debt, etc., to the rules of pleading and evidence, the order and manner of trial, the nature and effect of process, and perhaps, to all other matters of remedy only, which are not incorporated into the contract as affecting its nature and obligatory character.

CONFLICT OF LAWS—STATUTE OF FRAUDS.—An agreement voidable by the statute of frauds in the state in which it was made cannot be enforced in another state, though, had it been made in the latter state, it would have been valid and enforceable therein.

EVIDENCE—PROOF OF LAW OF ANOTHER STATE.—Under a statute authorizing it, the law of another state may be proved by reading it from the statute book of that state, which purports to have been printed by authority.

LANDLORD AND TENANT—LEASE—STATUTE OF FRAUDS—PART PERFORMANCE.—The occupancy, by a lessee under a parol lease, of a part of the land demised, and payment of rent for such part, do not amount to such part performance as will arrest the operation of the statute of frauds, and give the lessee a right to the remainder of the land.

EVIDENCE—FOREIGN STATUTE—PRESUMPTION.—After the existence of a foreign statute has been proved, it will be presumed to remain in force.

W. A. Cullop, C. B. Kessinger, J. T. Beasley, and A. B. Williams, for the appellant.

J. S. Bays and S. J. Gee, for the appellee.

•• **CRUMPACKER, J.** This action was commenced by Cochran against Ward, to recover damages for the breach of a parol lease for lands in the state of Illinois. The complaint alleges, in substance, that the defendant was the owner and in possession of a tract of four hundred acres of farm land situated in Lawrence county, in the state of Illinois, and, on the twentieth day of April, 1888, said defendant rented said land to the plaintiff for the term of one year, beginning on the first day of July, 1888, and agreed to surrender the possession thereof to the plaintiff on that day; that plaintiff was to yield and pay a specified share of the crop as rental, that plaintiff relied upon said agreement, and failed to procure other land to cultivate until it was too late in the season

to obtain any, and stood ready and willing to perform said lease, but the defendant wrongfully refused to surrender the possession of said premises as he had agreed, and refused to permit plaintiff to cultivate said land, but rented a great portion of it to another, whereby plaintiff was thrown out of employment, and lost the benefit of said lease, to his damage, etc.

An answer of five paragraphs was filed to the complaint, the first of which was a general denial. The fifth alleged that the agreement sued upon was in parol, and that it was made in the state of Illinois, where the defendant lived and the real estate was situate, and that, under the Illinois statute of frauds, the agreement was not enforceable. A copy of sections 1 and 2 of the statute was pleaded with this paragraph. They are as follows:

"Section 1. Be it enacted by the people of the state of ⁹¹ Illinois, represented in the general assembly, that no action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

"Sec. 2. No action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing signed by such party. This section shall not apply to sales upon execution, or by any officer or person pursuant to a decree or order of any court of record in this state."

The issues were closed by reply, and the cause tried by a jury, and resulted in a verdict for the plaintiff. At the request of the defendant, the court submitted interrogatories to the jury, which they answered and the court gave judgment in favor of the defendant upon the interrogatories, notwithstanding the general verdict.

A number of questions relative to the rulings of the court in making the issues were reserved by counsel for appellant, but the issues of fact out of which such questions arose having been all decided in appellant's favor by the jury, we cannot regard such questions as material under section 658 of the Revised Statutes of 1881.

²² The controlling question in the case relates to the action of the court in awarding appellee judgment upon the special findings.

The jury found, in answer to the interrogatories, that the agreement was by parol, and was completed in the state of Illinois on the twentieth day of April, 1888, and purported to lease the real estate described in the complaint for one year from the first day of July, 1888; that said real estate was in the state of Illinois, and the agreement was to have been performed in that state. They also found the first section of the Illinois statute, as set out with the answer, to have been in force at the time the agreement was made.

It is admitted by both parties in the argument that under the law in Illinois a parol agreement to lease real estate for the term of a year, to begin at some definite time in the future, comes within the provisions of section 1 of the Illinois statute, and, consequently, is not enforceable. So, tested by the Illinois law, the agreement in suit in the case before us is voidable, and damages could not be recovered for its breach: *Wheeler v. Frankenthal*, 78 Ill. 124; *Comstock v. Ward*, 22 Ill. 248; *Olt v. Lohmes*, 19 Ill. 576.

The fifth clause of section 1 of our statute of "frauds and perjuries" (Rev. Stats. 1881, sec. 4904) provides that no action shall be brought "upon any agreement that is not to be performed within one year from the making thereof," unless in writing, etc. This is substantially the same as the Illinois provision, and is taken from the English statute of 29 Charles II., chapter 3. But our statute permits parol leases for a term not exceeding three years, and it is the settled law of this state that the clause above quoted has no reference to contracts relating to real estate: *Railsback v. Walke*, 81 Ind. 409; *Baynes v. Chastain*, 68 Ind. 376; *Fall v. Hazelrigg*, 45 Ind. 576; 15 Am. Rep. 278.

So, it is seen, that the agreement in controversy is not repugnant to any provision of the statute of this state, and must be held good if the laws of this state are applicable.

²³ With considerable force and ingenuity, counsel for appellant contend that the statute of frauds relates entirely to the remedy and procedure, and that the rule is universal that the

lex fori always controls in such matters. This doctrine was announced by the courts as applicable to personal contracts, in *Leroux v. Brown*, 12 Com. B. 801, and *Downer v. Chesebrough*, 36 Conn. 39; 4 Am. Rep. 29.

It seems to be generally admitted that the statute of frauds does not render an agreement absolutely void, but simply withholds the power of enforcement, and prevents the collection of damages for nonperformance. The rule in Indiana and Illinois is the same in this respect: *Lowman v. Sheets*, 124 Ind. 416; *Schierman v. Beckett*, 88 Ind. 52; *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279; *Morris v. Goodwin*, 1 Ind. App. 481; *Wheeler v. Frankenthal*, 78 Ill. 124; *Collins v. Thayer*, 74 Ill. 138; *Chicago etc. Co. v. Davis etc. Co.* (Ill., Oct. 31, 1890), 25 N. E. Rep. 669. A contract made in another state, and which is void under the laws of that state, will not be enforced in this state even though it would have been good if made here: *Keiwert v. Meyer*, 62 Ind. 587; 30 Am. Rep. 206.

But it is claimed that the rule applied to contracts relating to real estate is different from that applied to personal contracts, and that the former are governed by the *loci rei sitae*. There can be no doubt of the correctness of this rule, in so far as it relates to questions of construction, title, covenants real, mode and formality of execution, and all things else which the laws of the situs impress upon the nature of the property and the character of the tenure and mode of transmission. But where a conveyance is executed in this state, between citizens of this state, for lands in another state, in so far as it treats of covenants which never attach to the soil, but are essentially personal, the laws of this state control: *Jackson v. Green*, 112 Ind. 341; *Bethell v. Bethell*, 92 Ind. 318; *Fisher v. Parry*, 68 Ind. 465; *Craig v. Donovan*, 63 Ind. 513.

But it is insisted that as to mere matters of procedure, ⁹⁴ every forum must apply its own laws and rules, regardless of the character of the action, and, to a certain extent, we think this must be true.

In the case before us, however, under the findings of the jury, the place of the contract and the situs are the same, and the judgment of the trial court must be upheld, unless we regard the statute of frauds as relating merely to the procedure, and not as affecting the obligatory character of the agreement.

It is impossible to consider a contract separately from the remedy given by the law for its enforcement, because it is this that supplies it with legal vitality. The law is an essential factor in every contract, and is presumed to be considered by the parties

in their deliberations. If the law of the place stamps upon an agreement the quality that it shall be voidable, and that its performance shall be a pure matter of conscience or grace with the parties, that quality becomes a part of the substance of the agreement, and characterizes it wherever it may be. A right without a remedy for its enforcement is a mere fiction. Thus it is said by Swayne, J., for the court in *Edwards v. Kearzey*, 96 U. S. 595: "It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement."

At another place in the opinion the learned judge said: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than its means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in view of the law, ceases to be, and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy⁹⁵ are inseparable. 'Want of right and want of remedy are the same thing.'"

There can be no doubt, we think, that to the extent that the remedy affects the validity and obligation of a contract, it is imported into, and becomes an essential part of, it, and characterizes it wherever it is the subject matter of litigation.

The Illinois statute of frauds became part of the agreement in suit, and the provision that no action should be maintained for damages for the breach of the agreement became as much a part of its character and substance as if specifically incorporated therein. The right to defend against a contract growing out of any of its inherent qualities becomes vested, and a right of property, as much as the right to enforce any other beneficial provision: *Pritchard v. Norton*, 106 U. S. 124; *Cooley's Constitutional Limitations*, 362 (369).

This doctrine does not conflict with the general rule that in matters of procedure the *lex fori* controls. "Procedure," in this connection, applies to the nature of the action, as whether it shall be covenant, assumpsit, debt, etc., to the rules of pleading and evidence, the order and manner of trial, and the nature and effect of process, and perhaps to all other matters of remedy only, which are not incorporated into the contract as affecting its nature and obligatory character.

The case of *Leroux v. Brown*, 2 Com. B. 801, holding a different doctrine, was questioned in a later English case, and is criticised by a recent English writer: *Gibson v. Holland*, L. R. 1 Com. P. 1; *Maxwell on Statutes*, 2d ed., 180.

The case of *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29, decides only that the *lex fori* should supply the rules of evidence.

In the case of *Low v. Andrews*, 1 Story, 38, it was held that a contract for the sale of goods in France, if valid there, would be enforced in this country, though within the statute of frauds here.

In *Scudder v. Bank*, 91 U. S. 406, it was held that, in an action upon a parol acceptance of a bill of exchange to be performed in Missouri, the statute of frauds of the place of the contract should control, as it affected the formality necessary to create a legal obligation.

The case of *Kling v. Fries*, 33 Mich. 276, was an action in Michigan, upon a contract for the sale of goods in Ohio. It was held that the Ohio statute of frauds applied.

The case of *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331, was an action in Missouri, upon a contract for the sale of wheat, to be delivered in the state of Illinois. It was decided that the Illinois statute of frauds obtained.

The case of *Anderson v. May*, 10 Heisk. 84, was an action in Tennessee, upon a lease for lands in Arkansas. The court decided that the statute of frauds of the latter state should be allowed to control the contract.

Denny v. Williams, 5 Allen, 1, was an action in Massachusetts, upon a contract for the sale of wool in New York, and the defendant set up the New York statute of frauds. The court held the answer good, saying: "As the contract was made in the city of New York, and was to be performed there, the laws of the state of New York must govern us in respect to its construction and performance."

The supreme court of Louisiana, in *Vidal v. Thompson*, 11 Mart. (La.) 23, said: "An instrument, as to its form and formalities attending its execution, must be tested by the laws of the place where it was made."

In the case of *Pickering v. Fisk*, 6 Vt. 102, the court used this language: "As to the requisites of a valid contract, the mode of authentication, the forms and ceremonies required, and, in general, as to everything which is necessary to perfect or consummate the contract, the *lex loci contractus* governs, though with respect to conveyances, or other contracts relating to real estate,

the statutory regulations of the place where such estate is situate must be observed."

The same principle was applied in the following cases: *Hallgarten v. Oldham*, 135 Mass. 1; 46 Am. Rep. 433; *Dacosta v. Davis*, 24 N. J. L. 319; *Gross v. Jordan*, 83 Me. 380; *Butters v. Glass*, 31 ⁹⁷ U. C. Q. B. 379; *Van Reimsdyke v. Kane*, 1 Gall. 630; *Baltimore etc. R. R. Co. v. Glenn*, 28 Md. 287; 92 Am. Dec. 688; *Fox v. Matthews*, 33 Miss. 433; *Young v. Pearson*, 1 Cal. 448; *Wilcox etc. Co. v. Green*, 72 N. Y. 17.

There is no analogy between cases like the one before us and cases in which the bar of prescription has become complete against a demand. In the latter, it is a question of presumptive payment or extinguishment, and such presumption, while evidential, is made conclusive, as a measure of public policy, while in the former it is a question whether there ever was a legal liability.

It should be kept in mind in this case that the controversy is between the *lex fori* upon the one hand, and the *lex loci contractus* and the *lex rei sitae* upon the other; consequently, we have maintained no distinctions between the latter, nor between actions real and personal.

There was no error in awarding appellee judgment upon the special findings.

Nor was there any error in permitting the law to be read from the statute book purporting to have been printed by authority. This is authorized by section 457 of the Revised Statutes of 1881.

The judgment is affirmed.

ON PETITION FOR A REHEARING.

CRUMPACKER, J. We are urged, in a very earnest and exhaustive brief in support of a petition for a rehearing, to reconsider the questions decided in the original opinion, but, after due consideration of the reasons advanced by counsel, our convictions remain unchanged. There are questions presented by the record, however, which were overlooked in the original opinion, and a rehearing is asked upon this ground also. The first of these questions has reference to the action of the court in sustaining a demurrer to a special paragraph of reply, which alleged, in substance, that appellant went ⁹⁸ into possession of nearly half the land in question, raised a crop thereon, and delivered to the appellee his share of such crop as rental, but appellee refused to surrender possession of the balance of the land, and for this refusal damages are claimed. It is insisted

that this paragraph of reply showed such a part performance of the contract as to take it out of the Illinois statute of frauds.

It is not generally settled whether, in any case, part performance of a parol lease will take it out of the operation of the statute. The supreme court of this state, in the case of *Wolke v. Fleming*, 103 Ind. 105, 53 Am. Rep. 495, said: "It is difficult to conceive any reason why the doctrine of part performance does not apply to a lease," yet the court admitted there was some conflict of opinion upon the question, and expressly declined to take any authoritative stand respecting it, because not compelled to do so in the decision of that case. Whatever the rule may be generally, the current of authority, both in this country and England, declares that the mere taking possession by the lessee and the payment of rent do not amount to such part performance as will arrest the operation of the statute.

The English rule is, that a parol lease in contravention of the provisions of the statute, under which possession is taken, creates a tenancy at will, and payment of rent thereunder converts it into a tenancy from month to month or year to year, according as the rental period may be indicated by the payments: *Clayton v. Blakey*, 8 Term Rep. 3; *Browne on the Statute of Frauds*, sec. 38.

In many of the states in this country, the English rule is adopted, while in others the only tenancy created under such circumstances is one from year to year, the contract controlling the rights and obligations of the parties in all particulars, except as to duration: *Warner v. Hale*, 65 Ill. 395; *Wheeler v. Frankenthal*, 78 Ill. 124; *Creighton v. Sanders*, 89 Ill. 543; *Brownell v. Welch*, 91 Ill. 523; *Drake v. Newton*, 23 N. J. L. 111; *Scotten v. Brown*, 4 Harr. 324; ²⁹ *Cody v. Quarterman*, 12 Ga. 386; *Evans v. Winona Lumber Co.*, 30 Minn. 515; *Laughran v. Smith*, 75 N. Y. 205; *Morrill v. Mackman*, 24 Mich. 279; 9 Am. Rep. 124; *Dumn v. Rothermel*, 112 Pa. St. 272; *Morehead v. Watkins*, 5 B. Mon. 228; *Koplit v. Gustavus*, 48 Wis. 48.

Under the statutes of this state, tenancies at will can only be created by express contract, and all general tenancies in which the premises are occupied with the consent of the owner, either express or implied, are tenancies from year to year: Rev. Stats. 1881, sec. 5208. When one takes possession of real estate under a nonenforceable lease, his possession is with the consent of the landlord; consequently, a tenancy from year to year is created: *Railsback v. Walke*, 81 Ind. 409; *Nash v. Berkmeir*, 83 Ind. 536.

In all the cases above cited, the underlying principle is, that while the lease confers no enforceable right upon the lessee, yet his possession thereunder is with the consent of the landlord, and

such consent characterizes the situation of the occupant as that of a tenant and not a trespasser.

It is clear, upon familiar principles of law, that the rights of the tenant under such circumstances extend only to the premises actually occupied by him. In the case in judgment, appellant occupied a portion of the premises, and paid rent only for that portion. This occupancy and payment of rent gave him no right to the balance of the premises, nor did he have any right thereto under the contract; consequently, the special paragraph of reply was demurrable.

It is next insisted that the court erred in instructing the jury upon the effect of the evidence proving the Illinois statute. This statute was read to the jury from a book purporting to have been published by the authority of the state of Illinois in the year 1874, and the court instructed that proof of the enactment or existence of the statute in 1874 was presumptive evidence that it was yet in force at the time the contract was made, to wit, April, 1888, but that such presumption was not conclusive and would yield to countervailing ¹⁰⁰ evidence. It is contended by counsel for appellant that it was incumbent upon the appellee to show affirmatively that the statute was still in force at the date of the contract. The courts are warranted in reposing confidence in the permanence and stability of the laws of foreign states, to the extent that when a foreign statute is proven to have existed, it will be presumed to remain in force, in the absence of evidence showing its repeal.

Other questions discussed by counsel must, in view of the special findings, be regarded as immaterial.

The petition is overruled.

CONTRACTS—STATUTE OF FRAUDS.—A contract within the statute of frauds is not absolutely void, but it cannot be enforced: *McCampbell v. McCampbell*, 5 Litt. 92; 15 Am. Dec. 48; *Stone v. Dennison*, 13 Pick. 1; 23 Am. Dec. 654.

CONFLICT OF LAWS—LEX LOCI AND LEX FORI—REMEDY.—The laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to, or incorporated in, its terms. This rule embraces those laws which affect its validity, construction, discharge, and enforcement: *Miller v. Wilson*, 146 Ill. 523; 87 Am. St. Rep. 186, and note. Another rule is that the law of the place of performance governs as to the enforcement of contracts: *Note to Waverly Nat. Bank v. Hall*, 30 Am. St. Rep. 828. But, of course, the law of the place, and the place of making the contract, may both apply to it, if it is to be performed where it is made. All matters pertaining to the remedy on a contract, and to the proper course of enforcing it, are determinable by the law of the place where suit is brought: *Seay v. Palmer*, 93 Ala. 381; 30 Am. St. Rep. 57; *Ruhe v. Buck*, 124 Mo. 178; 46 Am. St. Rep. 439. Contracts void where made and to be performed cannot be enforced in another state: *Buck-*

ley v. Humason, 50 Minn. 195; 36 Am. St. Rep. 637; Bank of Commerce v. Fuqua, 11 Mont. 285; 28 Am. St. Rep. 461, and note.

CONFLICT OF LAWS—PAROL LEASE, ENFORCEMENT OF.—If a lease is void in the place in which it was made, and cannot support an action there, it is equally void and incapable of supporting an action elsewhere: Holderman v. Pond, 45 Kan. 410; 23 Am. St. Rep. 734.

STATUTE OF FRAUDS—PAROL LEASES.—A parol agreement for a lease is void, if for one year and the term is to commence at some future day: Crommelin v. Thiess, 31 Ala. 412; 70 Am. Dec. 499. Contra, Young v. Dake, 5 N. Y. 463; 55 Am. Dec. 356. The majority of cases decide that an oral lease, or agreement for a lease, to be made for a year, or for a longer term, such term to begin at a future day, is void, and cannot be enforced on either side: See monographic note to Wallace v. Scoggins, 17 Am. St. Rep. 753, on effect of parol lease for more than one year, which also shows what acts of part performance will take such a lease out of the operation of the statute of frauds.

EVIDENCE—LAWS OF ANOTHER STATE, PROOF OF, AND PRESUMPTION.—The statutes of another state, printed in compiled form, by authority of a statute thereof, are admissible in evidence without further proof, though published by a private person under authority of such statute: Falls v. United States etc. Bldg. Co., 97 Ala. 417; 38 Am. St. Rep. 194. There is a presumption that a fact once proved still exists, and the presumption stands until overcome by proof: Table Mountain etc. Min. Co. v. Waller's etc. Min. Co., 4 Nev. 218; 97 Am. Dec. 526, and note.

BRIGGS v. KLOSSE.

[5 INDIANA APPEALS, 129.]

PARTY-WALLS.—THE RIGHT OF SUPPORT by a party-wall situated in part upon each of two adjoining parcels of land owned by different persons is an easement, a grant of which may be implied from its enjoyment for the period of prescription.

PARTY-WALLS—LIABILITY FOR REMOVAL OF SUPPORT. If the support of a party-wall, one-half of which is on the land of each of two adjoining owners, has been enjoyed by one of them for the period of prescription, he holds under an implied grant, and is entitled to his right of lateral support, and the other owner cannot, in making improvements upon his own land, remove the support of the wall without being liable in damages for resulting injuries to the other owner, unless the latter has consented to such removal. No degree of care or diligence will relieve him from liability, and he is liable, though he let a contract for the work to a third person, exercising an independent employment, where the digging, which caused the injury, was a necessary incident of the work which the owner ordered the contractor to do, and not merely collateral thereto.

PLEADING—DEPARTURE—OBJECTION AFTER VERDICT. If a special paragraph of reply contains any matter making the reply a departure, the pleading cannot, after verdict, be objected to for such a reason in connection with the question as to the sufficiency of the evidence presented by the motion for a new trial.

J. V. Kelso and C. D. Kelso, for the appellant.

C. L. Jewett and H. E. Jewett, for the appellee.

¹²⁹ BLACK, J. The appellee sued the appellant, the complaint being in two paragraphs. In the first paragraph it was al-

leged, in substance, that on the 1st of October, 1890, and on divers other days between that day and the bringing of this action, the appellant wrongfully and unlawfully, without leave, entered upon certain described real estate in the city of New Albany, of which the appellee was the owner and lawfully in possession, and did cut, dig, and undermine the walls of the house on appellee's said real estate, and did break, injure, and deface the walls, and did break, injure, and destroy the plastering and paper on the walls of said building, to the appellee's damage, etc.

¹³⁰ In the second paragraph, it was alleged, in substance, that on the 1st of October, 1890, the appellee was the owner and lawfully in possession of certain real estate in said city, being a described portion of a certain lot; that the appellant was the owner and in possession of a part of said lot, adjoining on the south the appellee's said part thereof, and extending along the entire south line of appellee's said real estate; "that there was and is a party-wall between the building of plaintiff and of said defendant; that said wall is built one-half upon the ground of this plaintiff and one-half upon the ground of said defendant, and is owned by plaintiff and defendant jointly; that, on said day, the defendant carelessly, negligently, and without leave, dug down and around the foundation of said party-wall and undermined the same, thereby causing the said party-wall to move from its foundation and to settle down, to break, crack, and become insecure and unsafe, and thereby causing the partitions of plaintiff's said building to settle and sink down, and to break and destroy the plastering and paper upon the walls of the plaintiff's building, and to cause plaintiff's building to so settle and sink down as to throw the plaintiff's doors and partition walls out of position, rendering said doors unfit for use, and thereby injuring the plaintiff's building in the sum of two thousand dollars, to the plaintiff's damage in the sum of two thousand dollars; that said injuries were sustained without fault or negligence on the part of the plaintiff, but solely because of the negligence of defendant aforesaid. Wherefore," etc.

A demurrer to the second paragraph of complaint having been overruled, the appellant answered the first paragraph by a general denial. A second paragraph of answer was filed, which afterward was withdrawn.

By a third paragraph of answer, addressed to the second paragraph of complaint, the appellant admitted that the appellee was the owner of the premises described as hers in the second paragraph of complaint, and that the appellant was ¹³¹ the owner of the premises south of and adjacent to the appellee's said prem-

ises; and it was alleged that, on or about the 1st of October, 1890, the appellant contracted with William W. Plumer and three other persons named, who were doing business under the firm name of Plumer & Co., to place a system of waterpipe in appellant's said premises; that said members of said firm of Plumer & Co. were skillful, reliable, and competent plumbers and mechanics, and, by the terms of said contract, said firm was to have, and did have, and exercise exclusive control and direction in placing and constructing said system of waterpipes to its completion; that neither the appellant, nor any agent, servant, or person in his employ, or under his direction or control, had any charge or management thereof; that the acts, deeds, matters, and things alleged to have been the cause of the injuries and damages to appellee's wall and building were in no respect the acts of the appellant, or of his servants or agents, or of any person in his employ, but, on the contrary, were caused by said firm's digging a trench in appellant's cellar, for the purpose of placing the lead pipes of said system of waterpipes therein to prevent freezing.

To this paragraph of answer the appellee replied by general denial and by a second paragraph alleging, in substance, that the wall in question was a party-wall of the appellee and the appellant; that one-half of said party-wall was, and for more than twenty years before the grievances in the complaint mentioned had been, the property of the appellee and her grantors; that said wall was an ancient wall, and for more than twenty years had been supported as such by the earth and lands of the appellant, the digging away and removal of which caused the injuries in the complaint set out; that the appellant dug away and removed the earth supporting said wall, and thereby caused it to break and fall away, without any notice whatever to appellee; that the appellant intended so to dig away the earth or weaken the support of said wall, and without giving any opportunity to the appellee¹³² to protect said wall or her domicile, of which said party-wall formed a part, from the effects and injuries which followed the removal of the earth and support aforesaid.

There was a general verdict for the appellee for three hundred and fifteen dollars. The appellant's motion for a new trial was overruled, and judgment was rendered on the verdict.

The overruling of the demurrer to the second paragraph of the complaint and the overruling of the motion for a new trial are assigned as errors.

The question here presented is not one involving the natural right of lateral support of land, or one involving the question as to want of due care and skill in the making of an excavation,

whereby a building situated wholly upon the adjoining land of the complaining party has been damaged by reason of the removal of its support: See *Block v. Haseltine*, 3 Ind. App. 491.

The injury in question was the removal of support of a party-wall. There was a single wall, one-half on the land of the appellant, the other half on the land of the appellee. It was alleged in the second paragraph of the complaint to be a party-wall between the buildings, and that it was owned by the parties jointly. It was alleged in that paragraph that the appellant carelessly and negligently, and without leave, dug down, etc., and undermined the wall, etc., and that the injuries complained of were sustained without fault or negligence on the part of the appellee, but solely because of the alleged negligence of the appellant.

The third paragraph of answer, the only answer to the second paragraph of the complaint, admitted the ownership of the adjoining premises by the appellee and the appellant, respectively, alleged the doing of the work in question by an independent contractor, and did not otherwise controvert the second paragraph of complaint.

If the special paragraph of reply contained any matter which made the reply a departure, the pleading could not, ¹⁸³ after verdict, be objected to for such a reason, in connection with the question as to the sufficiency of the evidence presented by the motion for a new trial: *Beard v. Hand*, 88 Ind. 183.

It does not appear, either in the pleadings or in the evidence, by whom the wall in question was erected, or under what circumstances; whether the two houses, with the single wall between them, were erected by one person, owning the two parcels of land, or by two persons, each owning one of the parcels of land, or whether or not both houses were erected at the same time. The evidence showed that it was a single wall, one-half on the land of each of the parties, and that it had been enjoyed as a party-wall by the appellee for more than twenty years.

The owner of land, in the construction of a house thereon, may make an excavation and lay a foundation and construct thereon a wall immediately adjacent to the boundary line of his land without a grant from the proprietor of the adjoining land, and without regard to his wishes. The owner of the house so erected will have a right to the support of the soil on which his foundation rests, but, in the absence of a grant, will not have a right also to have the lateral support of the house maintained, though the proprietor of the adjoining land will be liable for injury negligently done to such house in excavating his own land.

Inasmuch as the lateral support of a house cannot be obtained

and enjoyed without a grant, the presumption of the right to the continuance of the enjoyment of lateral support of a house from adjacent land as an easement, because such support has been enjoyed for the period of prescription, has been doubted and denied: *Dodd v. Holme*, 1 Ad. & E. 493; *Humphries v. Brogden*, 12 Ad. & E., N. S., 739; *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Richart v. Scott*, 7 Watts, 460; 32 Am. Dec. 779; *Mitchell v. Mayor etc.*, 49 Ga. 19; 15 Am. Rep. 669; *Wharton on Negligence*, sec. 929; *Wood on Nuisances*, sec. 200.

This case does not require us to decide that question.

¹⁸⁴ The right of support by a party-wall situated in part upon each of two adjoining parcels of land owned by different persons is an easement, a grant of which may be implied from its enjoyment for the period of prescription.

In *Washburn on Easements and Servitudes*, fourth edition, 605, it is said: "But the mere circumstance that a wall stands between two contiguous buildings, and the timbers of the one are supported upon one side of the wall and those of the other upon the other side, will not necessarily make the owners tenants in common of the wall. It may have been built by the parties so as to stand one-half upon the land of each. But it does not, thereby, make them tenants or owners thereof in common. Each would still own his half in severalty, though each may make use of it for the purposes of the support of his building erected upon or against it. But if such joint use of such wall were continued for twenty years, each acquires such a right, in common with the other, to enjoy the use and benefit of it, that it becomes thereby properly a party-wall, and neither could remove it or render it insufficient to support the building of the other upon it. . . . So, if one proprietor erect two adjoining houses, with a wall between them for the purpose of supporting both buildings, and the same is necessary for that purpose, and he then conveys one of these dwellings by metes and bounds, by a line running through the center of this wall, the grant will not only carry what was within the limits described, but pass, as an easement appurtenant to the grant, a right of support of the house by the entire wall, as well that not included as that within the limits mentioned in the deed."

If such a proprietor part with the several houses at different times, the possessors still enjoy the right to mutual support: *Richards v. Rose*, 9 Ex. 218. Each grantee acquires an easement of supporting his building by means of the half of the wall belonging to his neighbor: *Partridge v. Gilbert*, 15 N. Y. 601; 69 Am. Dec. 632.

In *Cooley on Torts*, 373, it is said: "At the common law, ¹³⁸ no person was under obligation to unite with his neighbor in building a party-wall, or even to furnish his proportion of the land for it to stand upon; but an erection might be made a party-wall by agreement, and, if one person allowed another to make use of his wall for the support of a building, and to continue the use for twenty years, the grant of a right to do so was presumed, and the wall became a party-wall by prescription": See *Eno v. Del Vecchio*, 4 Duer, 53; *Webster v. Stevens*, 5 Duer, 553; *Dowling v. Hennings*, 20 Md. 179; 83 Am. Dec. 545.

In *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545, it was said: "Although land covered by party-wall remains the several property of the owner of each half, yet the title of each owner is qualified by the easement to which the other is entitled"; and that the party making an addition to the height of the party-wall does it at his peril, and, if injury results, he is liable for all damages. "He must insure the safety of the operation." "The wall is devoted to the purpose of being used for the common benefit of both tenements." "The party making the change, when not required for purposes of repair, is absolutely responsible for any damage which it occasions."

Where adjoining proprietors have a mutual easement in a party-wall for the support of their buildings, any act of one party that injuriously affects the other is a nuisance, and actionable as such: *Wood on Nuisances*, secs. 212, 230.

In *Eno v. Del Vecchio*, 4 Duer, 52, and *Eno v. Del Vecchio*, 6 Duer, 17, it was held that neither owner of an easement in a party-wall can lawfully remove it or interfere with it, without the consent of the other owner, so as to injure the other's building, and that if he do so, for the purpose of making improvements within the limits of his own lot, he is liable for the injury; that no degree of care or diligence in the performance of the work will relieve him from liability for the injury caused by making such improvements; that he must make them at his peril; and that he cannot protect ¹³⁹ himself by making a contract for the work with a third person, exercising an independent employment.

"Where such easement of support exists, neither owner or occupant of one freehold can interfere with the wall to the detriment of the other, without his assent": *Webster v. Stevens*, 5 Duer, 553; *Dowling v. Hennings*, 20 Md. 179; 83 Am. Dec. 545.

In *Richards v. Rose*, 9 Ex. 218, the action was to recover compensation for damage done to the plaintiff's house by the disturbance of its foundation, in the making of a drain by the

defendant, to form a connection between his adjoining house and a public sewer. The first count of the declaration alleged that the plaintiff was entitled to have his house supported by the land and premises of the defendant adjoining thereto, and that the defendant wrongfully and unlawfully dug, etc., and took away part of the defendant's land, and thereby deprived the plaintiff's house of the support to which it was lawfully entitled, whereby, etc. The second count charged the defendant with having negligently, etc., dug the drain, whereby, etc. The defendant pleaded: 1. Not guilty to the whole declaration; and 2. To the first count, that the plaintiff was not entitled to have her house supported by the defendant's land and premises adjoining thereto. The verdict was for the plaintiff. A motion for a rule to set aside the verdict was refused, the principal question discussed and decided being whether the plaintiff had the right to the support of the defendant's house.

In *Stevenson v. Wallace*, 27 Gratt. 77, it was said: "When the owner of land acquires the easement of support, it would seem that his natural right of support in respect to the soil is enlarged, so as to embrace the buildings which he may erect on his land, and invest him with the same right of support in respect of his buildings that he has *ex jure naturæ* in respect to the soil."

Whether the decision in that case, that the plaintiff was entitled to the easement of support for her building, was correct under the facts we do not now inquire.

187 The statement in the opinion of the court, that if the plaintiff was entitled to the support of her building by the foundation wall and land of the defendant, the latter could not withdraw the support without being liable in damages for the injury which accrued to the plaintiff thereby, seems to be sustained by the authorities upon this subject. The trial court in that case had instructed the jury, in effect, that if the defendant contracted with an experienced and competent excavator, of good standing in his business, to make the excavations complained of upon the defendant's lot, and gave notice thereof to the plaintiff in time to enable her to adopt precautions for the protection of her adjoining building, or if she had such knowledge in such time, the defendant would not be liable for damage to plaintiff's premises, resulting in consequence of negligence or unskillfulness in the making of such excavations, by reason of leaving insufficient support to the plaintiff's premises, or otherwise. Speaking of this instruction, the court said that a fatal objection to it was, that it ignored the plaintiff's easement of support, "and holds that the defendant would not be liable in damages for any injury

to the plaintiff's building, which was caused by the negligence or unskillfulness of the excavator in removing the supports, which involves the absurdity, that though the defendant was responsible for injury to the plaintiff's building by removing the supports (she being entitled to them), though every care and precaution were used to prevent injury, he would not be liable for the injury if the supports were negligently removed by the excavator whom he employed to remove them."

In *Bradbee v. Mayor etc.*, 4 Man. & G. 714 (761), it was said: "We are of opinion that the defendants had no right to underpin the party-wall, either partially or wholly, unless that could be done without injuring the plaintiff's house": See, also, *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Gayford v. Nicholls*, 9 Ex. 702; *Dorrity v. Rapp*, 72 N. Y. 307.

¹²⁸ In the case before us, there is no difficulty in holding the second paragraph of complaint sufficient.

Upon the question as to the sufficiency of the evidence, we are of the opinion that the action of the trial court must be sustained. The appellee possessed an easement for the support of her house, by the party-wall. It appears from the evidence that the digging of the trench in the appellant's cellar occasioned the damage complained of by weakening the support of the wall. If it can be said that the workmen employed by the appellee were employed to dig the ditch, he must be held liable for the injury thereby occasioned, whether those from whose negligent performance of the work it resulted were his servants or his contractors or their servants.

The evidence is unsatisfactorily presented in the record. The questions addressed to the witnesses are not set out. The bill of exceptions presents mere notes of the evidence, not the language of the witnesses in full. The facts relating to the employment of the workmen are meagerly shown. It appears that the appellant directed the workmen to put in the waterpipes so that they would not freeze. The situation of the pipes, the parts of the house to which they were to be taken, and what portions of the premises, other than through the cellar, they were to traverse, are not shown. It must have been within the contemplation of the employer and the employes that the pipes were to pass through the cellar. We cannot say that it was not within the province of the jury to find that the digging of the ditch at the place where the pipes were laid in the cellar was contemplated by the appellant and his workmen, and within the authority given them by him, and that the act in and by the doing of which the injury was caused was done in pursuance of the contract be-

tween the appellant and his plumbers. The digging was a necessary incident of the work which the plumbers were employed to do. Their negligence was not in the ¹³⁹ doing of a thing merely collateral to the work undertaken, but was the doing of a thing contracted for.

The judgment is affirmed.

PARTY-WALLS.—GRANT OF EASEMENT OF LATERAL SUPPORT and of right to use party-wall is presumed from its enjoyment for the period of prescription: *Dowling v. Hennings*, 20 Md. 179; 83 Am. Dec. 545, and note; monographic note to *Bloch v. Isham*, 92 Am. Dec. 289, on the law of party-walls.

PARTY-WALLS.—NEGLIGENT EXCAVATION.—An action on the case lies for a negligent excavation by an adjoining owner on his own lot, causing an injury to the party-wall and the adjoining building: See monographic note to *Bloch v. Isham*, 92 Am. Dec. 296, on the law of party-walls.

HANNA v. ISLAND COAL COMPANY.

[5 INDIANA APPEALS, 163.]

ATTORNEY AND CLIENT—LIEN OF ATTORNEY—CLIENT'S RIGHT TO COMPROMISE ACTION.—Under a statute giving a lien to an attorney on any judgment obtained by him for his client, the attorney, in an action to recover damages for injuries to his client, acquires no lien for fees, and money expended, until after judgment. Hence, until then, the client may settle, compromise, and release the cause of action, without consulting his attorney, and without making the defendant liable to the latter, although the client has agreed with his attorney not to do so, and the defendant has notice of such agreement, and of the attorney's claim. Neither will the client's insolvency render the defendant liable to the attorney.

ATTORNEY AND CLIENT—LIEN OF ATTORNEY—COMPROMISE BEFORE JUDGMENT.—If a cause of action is one for unliquidated damages, and not assignable, such as an action for personal injuries resulting from negligence, the client cannot give his attorney any lien that will prevent a settlement or compromise by the parties before judgment, even if the amount is definitely fixed, and an agreement made that the same shall become a lien, and the adverse party notified of the fact.

PLEADING—COLLUSION BETWEEN CLIENT AND DEFENDANT.—Characterizing a transaction as fraudulent does not make it so in law unless it is so in fact. Therefore, a charge, by the plaintiffs' attorney, of fraudulent collusion between the plaintiff and the defendant in a damage suit, for the purpose of cheating the attorney "out of his fees and expenses," amounts to nothing, if he does not state facts sufficient to support the charge. An allegation that the client compromised his claim with the defendant and dismissed the action before judgment, without the consent of his attorney, is insufficient, as the client had a lawful right to do so.

J. S. Bays, for the appellant.

A. G. Cavins, E. H. Cavins, and W. L. Cavins, for the appellee.

104 FOX, J. This was an action commenced in the Greene circuit court by the appellant against the appellee to recover the amount of an attorney's fee, for which the appellant claims the appellee was liable. The complaint filed was in two paragraphs. The court below sustained a demurrer to each paragraph. The appellant took proper exceptions to the ruling of the court, and refused to amend either paragraph of his complaint, whereupon the court gave judgment upon the demurrer in favor of the appellee.

The material allegations in the first paragraph were in substance as follows: That at the times mentioned in the complaint the appellant was an attorney at law, and, being so, one Charles Stark employed him to bring a suit in the Greene circuit court against the appellee for five thousand dollars for personal injuries received by him in the appellee's coal mines by reason of the negligence of the appellee, "and to properly conduct the same to a final determination"; that the appellant, as such attorney, did commence such action, "and spent much time and labor in preparing said suit ¹⁰⁵ for trial . . . and in employing assistance in said cause and paying the expenses thereof," and that by reason thereof the said Stark became indebted to him. It is then averred that the appellee, well knowing these facts, after the said suit had been commenced, and before trial, compromised and settled the cause of action with the said Stark without the knowledge or consent of the appellant, and paid him a sum of money unknown to the appellant, thus causing the suit to be dismissed; that before the said compromise was made, the appellant gave notice in writing to the appellee of his rights in the premises, and that the amount due him for his services, and for money he had expended, was unpaid. It is also alleged that, at the time the notice was given, and at the time the compromise was made, the said Stark was insolvent, which fact was known to the appellee.

The second paragraph of the complaint is substantially the same as the first, with the exception that it charges that at the time the compromise was made, the appellee, well knowing that the said Stark was insolvent, entered into a collusion with him for the fraudulent purpose of cheating the appellant "out of his lien for his services and expenses in said cause, and, for the fraudulent purpose of cheating him out of his fees for such services and expenses," compromised and settled said cause for a sum of money unknown to the appellant, and caused the same to be dismissed, whereby "the said fee and lien" were lost to the appellant.

It thus appears that the only question submitted for the con-

consideration of this court is the action of the court below in sustaining a demurrer to each of the paragraphs of the complaint.

It is alleged in the complaint, and admitted by the demurrer, that the appellant made a valid contract with the said Stark to perform services for him in bringing an action against the appellee for personal injuries received by him, resulting from the appellee's negligence. As to what the facts were constituting the cause of action that Stark claimed to ¹⁰⁶ have against the appellee we are not informed. The complaint simply informs us that the appellant was employed to bring suit against the appellee "for personal injuries received by said Stark," through the negligence of the appellee. It sufficiently appears, however, from the allegations of the complaint, that the appellant had a valid claim against Stark for services rendered.

There is no allegation that any money was expended by the appellant at the request of Stark, but, conceding that the appellant had the right to recover from Stark the money expended by him, as well as for the services rendered, the question is, Do the facts stated make a cause of action against the appellee?

The only statutory method of obtaining a lien by an attorney against his client is, in this state, given by section 5276 of the Revised Statutes of 1881, and this is only "on any judgment rendered in favor of any person or persons employing such attorney, to obtain the same." The lien provided for in this statute can only be had in the manner prescribed, after a judgment is rendered.

In this case, the cause of action, whatever it was, was compromised before judgment; therefore, the statute has no application. Under some circumstances, an attorney may hold a lien for fees and costs without the aid of the statute above mentioned.

In *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280, the following statement is made: "It is generally agreed, both here and in England, that a solicitor has a lien for his costs upon a fund recovered by his aid, paramount to that of the persons interested in the fund or those claiming as their creditors. . . . The reason for this rule is, that the services of the solicitor have, in a certain sense, created the fund, and he ought in good conscience to be protected." This language is quoted with approval in the case of *Justice v. Justice*, 115 Ind. 201. See, also, *Andrews v. Morse*, 12 Conn. 444; 31 Am. Dec. 752; *Stratton v. Hussey*, 62 Me. 286; *Boyle v. Boyle*, 106 N. Y. 654. In *Justice v. Justice*, ¹⁰⁷ 115 Ind. 201, it was decided that an attorney who, by his services, has procured a will to be set aside, and established his client's right to share in the estate of the testator, acquires an equitable

lien for his fees upon the funds so secured to his client, and is entitled to priority of payment over a judgment creditor of the latter, whose lien attached after the contract for such professional services was entered into.

In the case of *Courtney v. McGavock*, 23 Wis. 619, the court draws a distinction between an action for unliquidated damages and one upon a negotiable instrument or written contract. In the former case, the court says the attorney has no lien upon the cause of action before judgment; in the latter, "the lien attaches before judgment, from the moment the defendant has notice of the employment of the attorney, or from the commencement of the action; and any settlement made by the parties without discharging the fees of the attorney is deemed, as to him, so far fraudulent and void."

Ordinarily, however, an attorney acquires no lien for fees until after judgment; therefore, until after judgment, the client may settle and compromise and release the cause of action in any manner he pleases without consulting his attorney, and the attorney has no power to prevent it: *Simmons v. Almy*, 103 Mass. 33; *Parker v. Blighton*, 32 Mich. 266; *Pulver v. Harris*, 52 N. Y. 73; *Roberts v. Doty*, 31 Hun, 128; *Connor v. Boyd*, 73 Ala. 385; *Swanston v. Morning Star Min. Co.*, 13 Fed. Rep. 215; *Young v. Deanborn*, 27 N. H. 324. In such a case, a lien cannot be acquired before judgment, even by agreement between the attorney and client that will prevent the client from compromising and releasing the cause of action without the consent of the attorney, although the defendant may have notice of the agreement: *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *Kusterer v. Beaver Dam*, 56 Wis. 471; 43 Am. Rep. 725; *Pulver v. Harris*, 52 N. Y. 73. If the cause of action is one for unliquidated damages, and is not assignable, the client cannot give his attorney ¹⁶⁸ any lien upon it that will prevent a settlement or compromise by the parties before judgment, even if the amount is definitely fixed and an agreement made that the same shall become a lien and the adverse party notified of the fact: *Jones on Liens*, secs. 206, 207. Actions for slander and libel, assault and battery, personal injuries, resulting from the negligent conduct of others, are within the rule.

In the second paragraph of the complaint it is charged that the appellee entered into a fraudulent collusion with Stark, and compromised and settled the cause of action with him, knowing him to be insolvent, for the purpose of cheating the appellant "out of his fees" and "out of his lien for services and expenses." There is no allegation in the complaint that there was any agree-

ment between Stark and the appellant as to the amount appellant was to receive, or that he was to have a lien on the subject of the action. We have only the general statement that the appellant "was employed as an attorney to bring a suit in the Greene circuit court against the defendant, for five thousand dollars damages, for personal injuries" caused by the negligence of the appellee. It is not averred in either paragraph of the complaint that Stark had a meritorious cause of action against the appellant. It is apparent that the cause of action was not assignable, and was for unliquidated damages. Under section 282 of the Revised Statutes of 1881, it would not have survived the death of Stark, but would have died with him. It is clear that under the authorities the appellant did not, and could not, acquire a lien upon the cause of action claimed by Stark before judgment. If no lien existed, then there was none to divest by any collusion that Stark and the appellee might enter into. Stark had the right to compromise or release his claim at any time before judgment without the consent of his attorneys. If he had this right and exercised it, and in doing so discharged no lien acquired by the appellant, then the appellant suffered no injury that would give him a cause ¹⁰⁰ of action against the appellee. Of course, his right to proceed against Stark would remain unimpaired.

The charge of fraudulent collusion in the second paragraph of the complaint in nowise aids the appellant. Characterizing a transaction as fraudulent does not make it so in law, unless it is so in fact; therefore, when the appellant charged that the appellee was guilty of a fraudulent collusion for the purpose of cheating him "out of his fees and expenses," it was incumbent upon him to state facts sufficient to support the charge: *Conant v. National etc. Bank*, 121 Ind. 323; *Bodkin v. Merit*, 102 Ind. 293; *Joest v. Williams*, 42 Ind. 565; 13 Am. Rep. 377; *Ham v. Greve*, 34 Ind. 18.

When Stark compromised his claim with the appellee and dismissed the action without the consent of his attorney, he did what he had the lawful right to do. The contract to bring the action was made with Stark by the appellant. The appellee had nothing to do with it. Stark was the owner of the cause of action, and as such, under the circumstances, had the absolute control of it until it passed into a judgment. Having settled and compromised it before judgment, the appellee was released. The appellant, having acquired no lien upon, or interest in, such cause of action, no obligation in his favor was created by the transaction against the appellee.

The judgment is affirmed, with costs.

Lien of Attorneys.*

CLASSIFICATION.—Attorneys' liens are classed as general, or retaining, liens, and charging, or special, liens. The general lien attaches to all papers, documents, money, and other property which the attorney receives professionally. The particular lien attaches only to that which is recovered through the attorney's professional services: *Sanders v. Seelye*, 128 Ill. 631; *Butchers' Union etc. Co. v. Crescent City etc. Co.*, 41 La. Ann. 355, 361; *In re Wilson*, 12 Fed. Rep. 235. There is a clear distinction between a charging lien and a retaining lien, and a failure to distinguish between them, in many cases, has led to confusion on the subject: *Hurlbert v. Brigham*, 56 Vt. 368; *Weed Sewing Machine Co. v. Boutelle*, 56 Vt. 570; 48 Am. Rep. 821.

GENERAL LIEN—*Exists When, and for What.*—An attorney has a general, or retaining, lien upon all papers, books, documents, and money that come into his hands professionally, or in the course of his professional employment, without special contract; and this lien exists, not only for all the costs, charges, and disbursements due him in the particular cause in which they come into his possession, but also for the costs and the amount due him for other professional business and employment in other causes. It makes no difference what the purpose may have been in placing the papers, documents, and money in the hands of the attorney; but the lien is dependent upon possession, and does not attach to anything not in the attorney's hands. It expires when the possession ends: Monographic note to *Andrews v. Morse*, 31 Am. Dec. 759; *Dubois' Appeal*, 38 Pa. St. 231; 80 Am. Dec. 478; *Sanders v. Seelye*, 128 Ill. 631; *Manning v. Leighton*, 65 Vt. 84, 95; *Walker v. Sergeant*, 14 Vt. 247; *Pierce v. Underwood*, 103 Mich. 62, 64; *Robinson v. Hawes*, 56 Mich. 135; *Fulton v. Harrington*, 7 Houst. 182; *Scott v. Darling*, 66 Vt. 510; *McDonald v. Railroad*, 93 Tenn. 281, 282, 293; *Jennings v. Bacon*, 84 Iowa, 403, 406; *Foster v. Danforth*, 59 Fed. Rep. 750, 751; *Casey v. March*, 30 Tex. 181; *McDonald v. Napier*, 14 Ga. 89; *Longworth v. Handy*, 2 Disn. 75; *In re Wilson*, 12 Fed. Rep. 235; *Hooper v. Welch*, 43 Vt. 169; 5 Am. Rep. 267; *Gist v. Hanly*, 33 Ark. 233; *Butchers' Union etc. Co. v. Crescent City etc. Co.*, 41 La. Ann. 355; *Howard v. Osceola*, 22 Wis. 453; *Dennett v. Cutts*, 11 N. H. 163; *Jones v. Morgan*, 39 Ga. 310; 99 Am. Dec. 458; *Wright v. Cobleigh*, 21 N. H. 339; *In re Knapp*, 85 N. Y. 284; *Ward v. Craig*, 87 N. Y. 550.

Thus an attorney has a lien upon a bond and mortgage in his hands for foreclosure, not only for the costs and charges in that proceeding, but for any sum due him from the client for other professional business: *Bowling Green etc. Bank v. Todd*, 52 N. Y. 489. He has a lien upon a bond, a promissory note, or other negotiable paper, or upon a town warrant, or other municipal obligation in his hands for collection: *Howard v. Osceola*, 22 Wis. 453; *Sanders v. Seelye*, 128 Ill. 631. An attorney from whom papers, which he has a right to hold against a railroad company to secure payment for his services and for money loaned by him, have been taken by an order and decree of court, thereby swelling the funds for the payment of creditors of the railroad, is entitled to be paid, out of the funds realized from the sale of the road, the debts

* REFERENCE TO MONOGRAPHIC NOTES.

Attorneys' liens for compensation and costs: 31 Am. Dec. 755-760.

Right and power of attorney and client, respectively, to manage action: 37 Am. Dec. 166-170.

for which the papers were held: *McDonald v. Railroad*, 93 Tenn. 231, 294. While an attorney has a lien upon his client's papers in his possession, he has no lien upon anything belonging to his client, until it is in his possession: *St. John v. Dieffendorf*, 12 Wend. 261. The lien must arise from professional employment: *Worrall v. Johnson*, 2 Jacob & W. 214, 218; but if he receives papers in his professional capacity, it does not matter that he sustains some other business relation to his client: *King v. Sankey*, 6 Nev. & M. 839. The attorney has a lien not only upon papers, but upon articles coming into his hands professionally, such as those delivered to him to be exhibited to witnesses: *Friewell v. King*, 15 Sim. 191, where such a lien was enforced upon certain copies of a very expensive book used in evidence. The administratrix of a deceased solicitor may hold the papers in his possession at the time of his death until the lien he had is discharged or secured: *Redfearn v. Sowerby*, 1 Swanst. 84. A client has a right to change his attorney if he likes, but the papers in the suit cannot be taken out of the attorney's hands until his costs are paid: *Ex parte Yalden*, L. R. 4 Ch. Div. 129. If an attorney voluntarily withdraws from a case, he is not entitled to withhold a paper in his possession and prevent it from being used in evidence, until his fees are paid: *White v. Harlow*, 5 Gray, 463; but the client is entitled to an order for the delivery of the necessary papers in the cause for the further prosecution of the action, subject to the attorney's lien, and subject to redelivery after the hearing: *Colegrave v. Manley*, 1 Turn. & R. 400; *Cane v. Martin*, 2 Beav. 584; *Wilson v. Emmett*, 19 Beav. 233.

An attorney has no lien on papers which he has received as mortgagee: *Pelly v. Wathen*, 7 Hare, 351; or trustee: *In re Clark*, L. R. 4 Ch. Div. 515. He has no lien upon a fund which he was not instrumental in creating, and which never came to his hands: *Fulton v. Harrington*, 7 Houst. 182. He has no lien upon the damages recovered in a cause, before they come to his hands, although he has a demand against his client equal to the amount of the recovery: *St. John v. Dieffendorf*, 12 Wend. 261. He cannot maintain a claim upon a fund in court against a mortgagee or judgment creditor, although such mortgagee or creditor is his own client: *Dubois' Appeal*, 38 Pa. St. 231; 60 Am. Dec. 478. He has no lien on funds in the hands of the defendant: *Manning v. Leighton*, 65 Vt. 84, 95. He cannot assert a lien against money appropriated to his client by an act of the legislature while such money is in the custody, or under the control, of the state treasurer: *State v. Moore*, 40 Neb. 854. He has no lien on original records of court: *Clifford v. Turrill*, 2 De Gex & S. 1; or on his client's will: *Balch v. Symes*, 1 Turn. & R. 87. As the attorney's general lien depends upon possession, it does not reach to the judgment, as there can be no possession of a judgment; but it does extend to an execution or a copy of the judgment in the attorney's hands: *Wright v. Cobleigh*, 21 N. H. 339; *Hough v. Edwards*, 1 Hurl. & N. 171. "The right of the attorney is merely this—that if he gets the fruits of the judgment into his hands, the court will not deprive him of them until his costs are paid." The attorney's claim of a general lien on a judgment for costs cannot, therefore, defeat an attachment by a judgment creditor: *Hough v. Edwards*, 1 Hurl. & N. 171. One member of a firm of attorneys has no lien for an individual demand upon papers received by his firm: *Bowling Green etc. Bank v. Todd*, 52 N. Y. 489; but he does not lose

his lien upon documents which, having come into his possession, are afterward continued in the possession of the firm: *Pelly v. Wathen*, 7 Hare, 350.

An attorney's general lien covers his general balance of account against his client, and is not limited to the services rendered in the particular matter in which the papers are received: *Finance Co. v. Charleston etc. R. R. Co.*, 46 Fed. Rep. 426; *Ex parte Sterling*, 16 Ves. 258; *Longworth v. Handy*, 2 Disn. 75; *Robinson v. Hawes*, 56 Mich. 135; *Scott v. Darling*, 66 Vt. 510. If the client's intention is to deposit papers with his attorney for a particular purpose, and not to be subject to the attorney's general lien, that must be by special agreement; otherwise, they are subject to the general lien which the attorney has upon all papers in his hands: *Ex parte Sterling*, 16 Ves. 258. This lien, however, is limited to debts due to him in the character of attorney, and does not extend to general debts contracted outside of that capacity: *In re Galland*, L. R. 31 Ch. Div. 296. The attorney has a lien only upon such papers as are delivered to him for use in professional employment: *Balch v. Symes*, 1 Turn. & R. 87, 92; *Lawson v. Dickenson*, 8 Mod. 306. If he received the papers for a specific purpose, not connected with his professional employment, he has no lien thereon for his general balance of account. If it was agreed or understood that the papers were delivered for a specific professional purpose, a specific lien, instead of a general one, might arise for the specific service rendered: *Ex parte Sterling*, 16 Ves. 257; *Ex parte Pemberton*, 18 Ves. 262. An attorney's lien upon his client's papers for costs and disbursements will not be protected against pre-existing rights of third persons: *Walker v. Sargeant*, 14 Vt. 247.

Upon Moneys Collected.—The general lien of an attorney extends to moneys collected by him for his client in the course of his employment, whether upon a judgment, or award, or not: *In re Paschal*, 10 Wall. 483; *Dubois' Appeal*, 38 Pa. St. 231; 80 Am. Dec. 478; *Cooke v. Thresher*, 51 Conn. 105; *In re Knapp*, 85 N. Y. 284; *Dowling v. Egge-mann*, 47 Mich. 171; *Diehl v. Friester*, 37 Ohio St. 473, 477; *Bowling Green etc. Bank v. Todd*, 52 N. Y. 489; *Casey v. March*, 30 Tex. 180; *Kinsey v. Stewart*, 14 Tex. 457; *Read v. Bostick*, 6 Humph. 321; *Able v. Lee*, 6 Tex. 427, 431; *Lewis v. Kinealy*, 2 Mo. App. 33. Contra, *Walton v. Dickerson*, 7 Pa. St. 376; *Lucas v. Campbell*, 88 Ill. 447. As such a lien may be implied from the facts and circumstances of the case, it is unnecessary that there should be any express agreement as to the rate or measure of compensation: *In re Knapp*, 85 N. Y. 284. The lien attaches to money recovered or collected by the attorney upon a judgment: *Wells v. Hatch*, 43 N. H. 246; *Bowling Green etc. Bank v. Todd*, 52 N. Y. 489; and to money collected upon an award: *Ormerod v. Tate*, 1 East, 464. Before a judgment is collected, the attorney has a lien upon it, in some of the states, to the amount of his taxable fees and disbursements only. If, however, he actually collects the amount of a judgment, his lien is satisfied to the amount of his taxable fees and disbursements, and he receives that amount as his own money; the residue he receives as the money of his client; and, if any action is brought against him for its recovery, he may avail himself of his just claims for counsel fees and commissions, and of any other just debts, to defeat the action. This, however, it has been said, results not from the law of lien, but from the law of setoff: *Wells v. Hatch*, 43 N. H.

246. The attorney's lien upon moneys collected extends not only to his services and disbursements, in the case wherein the moneys are collected, but also to any general balance due him for professional services and disbursements: *Hurlbert v. Brigham*, 56 Vt. 368; *In re Knapp*, 85 N. Y. 284; *In re Attorney*, 87 N. Y. 521; *Cooke v. Thresher*, 51 Conn. 105. In *Pope v. Armstrong*, 3 Smedes & M. 214, it was held, however, that he has a lien on money collected for the amount due him in the particular case in which it was received; but not for any general balance due him for professional services rendered in other cases. To the same effect, see, also, *Waters v. Grace*, 23 Ark. 118; *Lann v. Church*, 4 Madd. 391. If an attorney has, in good faith and for a stipulated fee, performed part of the services involved in a lawsuit, and stands ready to perform the remainder, he is entitled, as against any creditor of his client, where the fee has remained unpaid, to treat and hold as a retainer in that suit, money, to a reasonable amount, subsequently collected by him for his client: *Randolph v. Randolph*, 34 Tex. 181. An attorney having the money of clients in his hands may retain it, and any paper and documents belonging to his client, until the claims of the attorney for fees and disbursements are paid or adjudicated: *In re Paschal*, 10 Wall. 483, 497. The attorney has a lien upon the moneys of his client, to secure his professional compensation, or balance of account, though the client is an executor, and the services were rendered, and the moneys received, on behalf of the estate: *In re Knapp*, 85 N. Y. 284; *Hurlbert v. Brigham*, 56 Vt. 368; *Read v. Bostick*, 6 Humph. 321; *Lewis v. Kinealy*, 2 Mo. App. 33; and he will be protected in retaining his fee out of money which has thus come to his hands. An attorney not only has a lien on moneys collected under a judgment which he has recovered for his client, for his reasonable fees for services rendered by him in the cause, but he will be protected in making payment, out of the funds collected by him, of like reasonable fees to associate counsel in the cause employed by the client: *Jackson v. Clopton*, 66 Ala. 29. An attorney has a lien on money received by him on account of a client for all services rendered that client, and his lien is to be measured by the value of such services, in jurisdictions where the matter of compensation between attorney and client is a matter of contract, express or implied. And, if the client sues to recover money collected by his attorney, the latter may retain the whole amount, if the value of his services is equal to or exceeds the sum collected: *Ward v. Craig*, 87 N. Y. 550. The attorney, however, will not be permitted to determine the amount of compensation, where that is not fixed; nor can his client. Where the right of an attorney to a lien upon the money in his hands is clear, and the amount only is in question, the court, or a referee, or a jury passing upon an issue sent to it, may determine that question, though the items of the attorney's account are such as are ordinarily subject to taxation: *In re Knapp*, 85 N. Y. 284. The lien of an attorney for general professional services prevails against one to whom the client has assigned the cause of action before judgment, for a pre-existing debt, in a jurisdiction where such consideration is not regarded as a valuable consideration: *Schwartz v. Schwartz*, 21 Hun, 33. It also prevails against the client's assignment for the benefit of his creditors: *Ward v. Craig*, 87 N. Y. 550. As to whether the attorney's claim upon moneys collected for his client, for the payment of any indebtedness of the client to him rests upon the law of lien, or the

law of setoff, the cases are at variance. An examination of most of the cases will show that the right rests upon the law of lien: *Longworth v. Handy*, 2 Disn. 75; *McDonald v. Napier*, 14 Ga. 89; but some courts hold that it results from the law of setoff: *Wells v. Hatch*, 43 N. H. 246; and others, that it is a right to defalcate, rather than a right of lien: *Dubois' Appeal*, 38 Pa. St. 231; 80 Am. Dec. 478; *McKelvy's Appeal*, 108 Pa. St. 615; *Balsbaugh v. Frazer*, 19 Pa. St. 95.

An attorney has no lien, however, upon his client's money which has been left with the attorney for a special purpose, and he cannot, consistently with his duty, apply it to any other purpose without leave of his client: *Anderson v. Bosworth*, 15 R. I. 443; 2 Am. St. Rep. 910. Hence, if money is specially deposited with an attorney to be used as cash bail for a client, to be returned as soon as that purpose shall have been accomplished, the attorney cannot fasten a lien thereon for his services. He is simply a special bailee and responsible as such: *State v. Lucas*, 24 Or. 168. An attorney who has rendered professional services to an executor in the administration of an estate has a claim upon the executor personally, but he has no lien upon such estate for his services, though he is in possession of property of the estate: *De Lamater v. McCaskie*, 4 Demarest, 549; *In re Lamberson*, 63 Barb. 297. But compare *In re Knapp*, 85 N. Y. 284. An attorney who has collected money for a client will not be allowed to hold the entire amount, merely because a small part of it is due to him as fees. Upon his refusal to pay it over, he will be allowed to retain enough to cover his fees, but no more: *Miller v. Atlee*, 3 Ex. 799; *Conyers v. Gray*, 67 Ga. 329. Counsel employed to assist in the trial of an action have no lien upon a judgment recovered therein, for the services rendered by them: *Brown v. Mayor*, 9 Hun, 587. The attorney's lien is, of course, unavailing, unless it has attached to the subject matter: *Stewart v. Flowers*, 44 Miss. 513; 7 Am. Rep. 707.

Enforcement of Lien.—The general lien of an attorney upon his client's papers is a passive one, and cannot be actively enforced, either at law or in equity. It amounts to a mere right to retain the papers, as against the client, until the attorney is fully paid: *Boxon v. Holland*, 4 Mylne & C. 354; *Brown v. Bigley*, 3 Tenn. Ch. 618, 621; *In re Wilson*, 12 Fed. Rep. 235; *McDonald v. Railroad*, 93 Tenn. 281, 293. This lien is one in which there is no right of sale: *McDonald v. Railroad*, 93 Tenn. 281, 293. An attorney's lien upon papers in a suit for his fees may, however, be indirectly enforced, under some circumstances, by order and execution: *Greenfield v. Mayor*, 28 Hun, 320; and it is sometimes proper for the court to determine the existence and amount of the lien, and to establish the condition upon which the attorney shall deliver up the property: *McPherson v. Cox*, 96 U. S. 404. An attorney's lien upon a promissory note in his hands for collection does not give him any right to a judgment against the defendant for the amount of his fees, after the defendant has paid the note to the attorney's client: *Tillman v. Reynolds*, 48 Ala. 365.

A court will not disregard the right of an attorney or deny him his lien where it has justly attached: *In re Attorney*, 87 N. Y. 521; 63 How. Pr. 152. If his lien is questioned, it must be determined by the court, or a referee, upon a proper investigation: *In re Knapp*, 85 N. Y. 284; *In re Attorney*, 87 N. Y. 521; 63 How. Pr. 152. If the retention of papers by an attorney who has not been paid his fees, and upon which

he claims a lien, would embarrass the client in the prosecution or defense of pending actions, a court will order the papers to be delivered over upon the amount of the fee being secured, particularly if there is any doubt as to the validity of the attorney's claim: *Cunningham v. Widing*, 5 Abb. Pr. 413; *In re Galland*, 31 Oh. Div. 296; *In re Bevan*, 33 Beav. 439; *In re Jewitt*, 34 Beav. 22.

Loss or Extinguishment of Lien.—An attorney's general lien upon papers is lost or extinguished by parting with their possession: Note to *Andrews v. Morse*, 31 Am. Dec. 759; *Dubois' Appeal*, 38 Pa. St. 231; 80 Am. Dec. 478, even though that was done by mistake on the part of the attorney; but if the papers did not get lawfully out of his possession, his lien continues, and he may maintain trover for them: *Dicas v. Stockley*, 7 Car. & P. 587. Nor is the lien lost by a transfer of possession to an agent, as the latter's possession is that of the principal, or by a transfer to another subject to the lien: *Watson v. Lyon*, 7 De Gex, M. & G. 288, 298. An attorney's lien is superseded by taking security for the debt which is the subject of the lien, whether such security is due or not: Note to *Andrews v. Morse*, 31 Am. Dec. 759; *Cowell v. Simpson*, 16 Ves. 275. The lien upon a fund is also lost by taking an assignment of the fund itself: *Fulton v. Harrington*, 7 Houst. 182. But the lien upon papers is not extinguished by the attorney's taking the client's note or acceptance for the amount due, unless it appears that it was given or received in payment of such amount: *Dennett v. Cutts*, 11 N. H. 163; *Stevenson v. Blakelock*, 1 Maule & S. 535. The lien of an attorney upon papers is not affected by his client's assignment in bankruptcy or insolvency, or for the benefit of creditors. In either case, the assignee takes subject to the attorney's equitable right at the date of the assignment: *Ex parte Sterling*, 16 Ves. 258; *Ward v. Craig*, 87 N. Y. 550. Such lien is good against all persons claiming under the client: *In re Gregson*, 26 Beav. 87.

From what is said above of the general, or retaining lien, of an attorney, for a general balance due him arising out of his professional employment, upon all papers of his client coming into his possession in the course of his professional employment, it is noticeable that the lien is valuable only to the extent that the papers are necessary and indispensable to the client, or, as stated in some of the cases, "to the extent the client can be worried thereby": *McDonald v. Railroad*, 93 Tenn. 281, 293, per Wilkes, J.

The Federal Courts recognize no lien at common law in behalf of an attorney beyond that given by the local law: *Gregory v. Pike*, 67 Fed. Rep. 837. An attorney employed by two clients to protect their interest in a large number of the bonds of an insolvent railway company, has a lien upon the bonds of his clients, and upon any portion of the proceeds of the sale applicable to their payment, where the road has been ordered sold under a decree of foreclosure, but he has no lien on the property of the road in the hands of the purchaser, though such purchaser was one of his clients, and the purchase price was insufficient, after paying costs and receiver's certificates issued by order of the court, to leave any balance applicable to the bonds: *Coe v. East etc. R. R. Co.*, 65 Fed. Rep. 16. An attorney employed by the pledgee of certain notes, pending a suit in equity to recover their possession from the pledgee, to bring an action at law, which results in the payment into court of the amount due, which fund is then transferred from the

action at law into the register in the equity suit, has no lien upon the fund produced, either before or after its transfer, as against other parties who, in the equity suit, claimed an interest in the notes: *Gregory v. Pike*, 67 Fed. Rep. 837. If an attorney prosecutes a suit and recovers land for his client, and the latter afterward sells it and takes a deed of trust and bond for the purchase money, and makes the attorney a trustee in the trust deed, and delivers the papers to him, the attorney has a lien upon the papers for his services in the suit; and, if the client brings a bill in equity to have the trustee removed, and to compel the delivery of the papers, it is the duty of the court to decide upon the existence and amount of the lien claimed by the attorney, and to decree such delivery on payment of the amount of the lien found to exist. It is, furthermore, proper for the court to decree such delivery upon the performance of the condition stated, though the attorney, by neglecting to file a cross-bill, has lost his right to a decree for affirmative relief: *McPherson v. Cox*, 96 U. S. 404. In the federal courts, an attorney is held to have no general lien upon an uncollected judgment for services in other suits, but only a particular lien for his costs and compensation in that particular case: *In re Wilson*, 12 Fed. Rep. 235. *Prima facie*, an attorney has a lien for compensation on the papers in his hands where he has rendered some services: *Lessynsky v. Merritt*, 9 Fed. Rep. 688. If he has given up his employment and withdrawn from the case, he is still entitled to his lien, in the absence of any showing that he agreed not to make any claim for compensation, or not to claim any lien for his services: *Finance Co. v. Charleston etc. R. R. Co.*, 48 Fed. Rep. 45. While an attorney has a lien on papers in his possession, he will not be permitted to make a professional misuse of them, as in taking an undue advantage of the client by bringing suits against him for other parties, upon causes of action arising out of transactions with which he was professionally connected while counsel for the client: *Finance Co. v. Charleston etc. R. R. Co.*, 48 Fed. Rep. 45.

SPECIAL OR CHARGING LIEN.—*Generally.*—Besides the general or retaining lien which an attorney has upon papers, books, documents, money, and other property in his possession, to secure his professional compensation he has what is called, for want of a better name, a particular, or charging, lien upon a judgment procured by him for his client. This right to recover for his services in obtaining a judgment for his client is called a lien, in the broad sense of the term, although it does not depend upon possession, but rests merely on the equity of the attorney to be paid his fees and disbursements out of the judgment which he has obtained. It is considered reasonable and proper that an attorney, by whose labor and at whose expense a judgment has been obtained for his client, should have an interest in that judgment which the law will regard and protect. An eminent judge once said "that the convenience, good sense, and justice of the thing required it." So, while we talk of an attorney having a lien upon a judgment, it is, in fact, only a claim or right to ask for the intervention of the court for his protection, when, having obtained a judgment for his client, he finds that there is a probability of the client depriving him of his interest in the fruits of that judgment. The lien of an attorney upon a judgment is an equitable lien, and is upheld simply upon the theory that his services and skill produced it. This seems to be the only ground upon which this lien has ever been put. Little is known of its origin, but

the principle has long been recognized that a "party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and, in many instances, at whose expense, those fruits are obtained." In support of these views, see monographic note to *Andrews v. Morse*, 31 Am. Dec. 755, on attorneys' liens for compensation and costs; *McDonald v. Napier*, 14 Ga. 89; *Wright v. Cobleigh*, 21 N. H. 339; *Horton v. Champlin*, 12 R. I. 560; 34 Am. Rep. 722; *Warfield v. Campbell*, 38 Ala. 527; 82 Am. Dec. 724; *Humphrey v. Browning*, 46 Ill. 476; 95 Am. Dec. 446; *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368; *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *Sanders v. Seelye*, 128 Ill. 631; *In re Wilson*, 12 Fed. Rep. 235.

After judgment, the attorney's equitable right to a lien upon it is recognized and enforced by many of the courts, independently of any statute, at least to the extent of his costs, where the taxation of costs on account of the attorney is authorized by law: *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *McDonald v. Napier*, 14 Ga. 89, 106; *Wright v. Cobleigh*, 21 N. H. 339; *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368; note to *Andrews v. Morse*, 31 Am. Dec. 755; *Marshall v. Meech*, 51 N. Y. 140; 10 Am. Rep. 572. But no lien can be acquired where it is found that nothing was due from the defendant to the plaintiff: *Atwood v. Mt. Holly*, 65 Vt. 121.

Other courts deny the existence of any attorney's lien after judgment, where there is no taxation of costs on account of the attorney, authorized by statute: *Frissell v. Haile*, 18 Mo. 18; *Sanders v. Seelye*, 128 Ill. 631, 637; *Nichols v. Pool*, 89 Ill. 491; *Forsythe v. Beveridge*, 52 Ill. 268; 4 Am. Rep. 612; *Ex parte Kyle*, 1 Cal. 332; *Mansfield v. Dorland*, 2 Cal. 507; *Russell v. Conway*, 11 Cal. 93; *Hogan v. Black*, 66 Cal. 41; *Roberts v. Nelson*, 22 Mo. App. 28; *Alexander v. Grand Avenue Ry. Co.*, 54 Mo. App. 66; *Brooke's case*, 12 Opin. Atty. Gen. 216; *Hill v. Brinkley*, 10 Ind. 102. The governor of a state has no power to employ counsel to represent it in litigation so as to give the latter a lien on the judgment recovered: *Compton v. State*, 38 Ark. 601. Compare *State v. Edgefield*, 4 Baxt. 92.

Extent of Lien.—In the opinions concerning attorneys' liens, much is said about "costs," "taxable costs," "fees," "disbursements," and "compensation," and it is not always clear what is meant, particularly when an effort is made to show that the law governing an English attorney's lien is applicable in this country. In England, as we understand it, the services of advocates are, in theory, gratuitous, and their fees are quiddam honorarium. The attorneys' fees are the only charges which are actionable, or legally coercible. These are taxed as a part of the costs, and it necessarily results that the attorney's lien applies alone to taxed costs; and, as there are no other charges cognizable by the courts, the lien of the attorney cannot be extended any farther. But the attorney's lien exists in England for the attorney's bill, and that is made up of fees ascertained by law, and his disbursements and charges on account of his client, the disbursements, however, being distinguishable from the costs which the law provides as a compensation: See *Warfield v. Campbell*, 38 Ala. 527; 82 Am. Dec. 724; *McDonald v. Napier*, 14 Ga. 89, 110, and English cases therein cited. In this country, the compensation of attorneys is generally a matter of contract, express or implied, between the attorney and client, and in no sense costs of the

suit. The fee bill was abolished in New York long ago, but that was never the foundation of the lien. Fee bills may regulate the amount of an attorney's compensation, but he is entitled to a lien as against his client, because his labor and skill contributed to the judgment: *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368. It is evident, therefore, that the English rule governing the allowance of an attorney's lien has a very limited application in this country. As said in *Frissell v. Haile*, 18 Mo. 18: "Attorneys and counselors at law in Missouri are not to be confounded with the mere attorney and solicitor in England. These last are recognized officers of the court, and are entitled to fees for the services performed by them in the same manner as the clerks of our courts of record. Their fees are ascertained and fixed by rules of court, and are recognized in the taxation of the costs of a suit. Such being their foundation, the law confers a lien on papers and on judgments to secure their payment, and will not suffer collusive compromises between the parties to a suit, made with a view to prevent their recovery. Attorneys at law, in our courts, are allowed no fees which are taxed as costs. They look to contracts made with their clients for remuneration for their services. If they receive the money of those who employ them, they may retain their fees, just as any other bailee may retain for services rendered in the care of the subject of the bailment. Hence, the learning in the English books, in relation to the liens of attorneys, has no application, or an extremely limited one, under our system of laws."

In the absence of any statute extending the lien, the general rule is, that an attorney's lien upon a judgment for his fees is limited to the taxable costs in the case: *Whitcomb v. Straw*, 62 N. H. 650; *Wells v. Hatch*, 43 N. H. 246; *Currier v. Boston etc. R. R.*, 37 N. H. 223; *Wright v. Cobleigh*, 21 N. H. 339; *Shapley v. Bellows*, 4 N. H. 347; *Scharlock v. Oland*, 1 Rich. 207; *Ex parte Kyle*, 1 Cal. 332; *Mansfield v. Dorland*, 2 Cal. 507; *Russell v. Conway*, 11 Cal. 93; *Hogan v. Black*, 66 Cal. 41; *Massachusetts etc. Co. v. Township*, 48 Fed. Rep. 145; *Braden v. Ward*, 42 N. J. L. 518; *Phillips v. Stagg*, 2 Edw. Ch. 108; *Miller v. Newell*, 20 S. C. 123; 47 Am. Rep. 833; *Wells v. Elsam*, 40 Mich. 218, 221; *Phillips v. Mackay*, 54 N. J. L. 319.

It does not include counsel fees, or incidental expenses not taxable: *Wells v. Hatch*, 43 N. H. 246; *Scharlock v. Oland*, 1 Rich. 207. It does not extend to commissions, or other charges, however proper in themselves: *Wright v. Cobleigh*, 21 N. H. 339. It must be confined to the costs in the identical action: *Phillips v. Stagg*, 2 Edw. Ch. 108; *Massachusetts etc. Co. v. Township*, 48 Fed. Rep. 145; and cannot be extended to prospective services upon the hearing of an appeal: *Massachusetts etc. Co. v. Township*, 48 Fed. Rep. 145. If the attorney has no taxable costs, he has no lien, of course, on anything pertaining to the judgment under the above rule: *Ex parte Kyle*, 1 Cal. 332; *Mansfield v. Dorland*, 2 Cal. 507; *Russell v. Conway*, 11 Cal. 93; *Hogan v. Black*, 66 Cal. 41. If several attorneys have rendered services for the complainant in a suit, they are equally entitled to a lien for compensation, to the extent of his disbursements and costs taxed, on the fruits of the judgment, and, if one of them has obtained an assignment of such fruits, his possession cannot be disturbed in favor of another: *Massachusetts etc. Co. v. Township*, 48 Fed. Rep. 145. An attorney's lien upon an uncollected judgment is confined to the judgment in the particular action in which the services were rendered: *Phillips v. Stagg*, 2

Edw. Ch. 108; In re Wilson, 12 Fed. Rep. 235; Williams v. Ingersoll, 89 N. Y. 508, 517; Shapley v. Bellows, 4 N. H. 347; Wright v. Cobleigh, 21 N. H. 339, 341; McWilliams v. Jenkins, 72 Ala. 480; and is not increased by subsequent services in independent matters: In re Wilson, 12 Fed. Rep. 235.

But there are many courts which extend the attorney's lien upon a judgment so as to cover not merely taxable costs, but a reasonable compensation for his services in obtaining the judgment, though there is no agreement between the attorney and his client concerning the amount which the attorney is entitled to charge for his services. The extent of the lien, in such cases, is ascertained upon the basis of a quantum meruit, which may be ascertained by the court, or by a referee, upon a summary application. If the amount of compensation has been agreed upon, the lien attaches to that extent: Carter v. Bennett, 6 Fla. 215; Carter v. Davis, 8 Fla. 183; McDonald v. Napier, 14 Ga. 89; Cage v. Wilkinson, 3 Smedes & M. 223; Benjamin v. Benjamin, 17 Conn. 110; Cooke v. Thresher, 51 Conn. 105; Barnes v. Taylor, 30 N. J. Eq. 467; In re Wilson, 12 Fed. Rep. 235; Warfield v. Campbell, 38 Ala. 527; 82 Am. Dec. 724; Andrews v. Morse, 12 Conn. 444; 31 Am. Dec. 752, and monographic note thereto on attorneys' liens for compensation and costs: Garner v. Garner, 1 Lea, 29; Hunt v. McOlanahan, 1 Heisk. 503; Pleasants v. Kortrecht, 5 Heisk. 694; Perkins v. Perkins, 9 Heisk. 95; Vaughn v. Vaughn, 12 Heisk. 472; Covington v. Bass, 88 Tenn. 496; Warfield v. Campbell, 38 Ala. 527; 82 Am. Dec. 724; Ex parte Lehman, 59 Ala. 631; Jackson v. Clopton, 66 Ala. 29; Mosely v. Norman, 74 Ala. 422; Central R. R. Co. v. Pettus, 113 U. S. 116, 127. Compare McCas v. Grant, 43 Ala. 262.

In the earlier decisions in Vermont, the attorney's lien was confined to the taxable costs in the suit: Heartt v. Chipman, 2 Aiken, 162; but later decisions in that state have established the rule that the lien extends to the reasonable fees and disbursements in the suit in which the judgment was recovered: Hooper v. Welch, 43 Vt. 169; 5 Am. Rep. 267; Hutchinson v. Howard, 15 Vt. 544. "No good reason can be given," says Ross, J., in Weed Sewing Machine Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821, "for limiting an attorney's charging lien to what, under our law, are the taxable costs in favor of his client in the suit. If he is to be given a lien at all upon a judgment recovered by his services, it should be to the extent of the value of his services in the suit. His services are presumed to have been skillfully performed, and valuable because so performed. They enhance his client's claim presumably to the extent of the value of his services, the same as the tailor's services in manufacturing a patron's cloth into a coat enhance the value of the materials to the extent of the value of his services. We are aware that the decisions in this country are not uniform on the extent of an attorney's charging lien. In some states it is held to cover his reasonable charges and disbursements in the suit, while in others it is limited to the amount of costs taxable in favor of his client in the suit. But these are what the law allows to be recovered in favor of the prevailing party. They are taxed between party and party, and not between attorney and client, and are in no sense the measure of the value of the attorney's services and disbursements in the suit. They include, frequently, court, clerk, witness, and officers' fees in the suit which the client has advanced. I cannot help thinking that this class of decisions have their origin in not observ-

ing the distinction between taxable costs, which at the common law was a taxation between the attorney or solicitor and his client, and the taxable costs under our statutes, which is a taxation in favor of the recovering party against the defeated party." So, in New York, prior to the code of 1848, an attorney had a lien upon a judgment recovered by him, but the amount was limited to his taxable costs. The taxation of costs, however, was abolished by that code, though it did not abolish the lien of the attorney, and the compensation of the attorney was left to be determined by contract, either express or implied, between the parties. Consequently, the implied equitable lien was extended to cover the agreed compensation, whatever the amount, in all cases where the cause of action was assignable or judgment was obtained. The attorney, to the extent of his compensation, was deemed to be an equitable assignee of the judgment, and had a lien upon it when recovered: *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368; *Marshall v. Meech*, 51 N. Y. 140; 10 Am. Rep. 572; *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *Wright v. Wright*, 70 N. Y. 98. To the same effect is *Ex parte Lehman*, 59 Ala. 631; *Mosely v. Norman*, 74 Ala. 422; *Gist v. Hanly*, 33 Ark. 233, 235. In the absence of any agreement as to fees, it was at one time supposed that the amount of the taxable costs continued to be the measure of compensation allowed to the attorney, and which would, of course, be the extent of the lien: *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368, 371. But it was afterward decided that the bill of costs taxed in an action was not, as between the attorney and client, the measure of compensation for the services of the attorney therein; and that, in the absence of a definite agreement as to the amount of his fees, the attorney might recover the reasonable value of his services; such value being a fact to be established, like any other fact, by evidence: *Whitelegge v. De Witt*, 12 Daly, 319; *Carr v. Robert*, 1 Hilt. 498; *Gallup v. Perue*, 10 Hun, 525. Under the present law of New York (Code Civ. Proc. 1879, sec. 66), there is now a statutory lien upon the cause of action, which continues until a final judgment is rendered. So, in Virginia and West Virginia, the attorney's lien was formerly limited to his fees taxed in the costs; but as the statute there authorizes attorneys to make contracts with their clients for their fees, their lien on judgments obtained cover, not merely their taxable costs, but their services and disbursements, whether the amount of compensation is agreed upon or depends upon a quantum meruit; and, while the lien is a special lien for disbursements and services rendered in obtaining the particular judgment or decree, yet it extends to all disbursements and services rendered in any other case so connected with it as to form the basis on which such judgment or decree is rendered or which is essential to the rendition of such judgment or decree: *Renick v. Ludington*, 16 W. Va. 378; but not to services in other cases: *Fowler v. Lewis*, 36 W. Va. 112, 140.

Lien and Compromise before Judgment.—An attorney's lien does not, in the absence of any express provision of the statute, attach before judgment; and the client may, therefore, settle or compromise the suit in any manner he chooses, without consulting his attorney, and regardless of the attorney's claims. The latter has no right to interfere with, or power to prevent, such settlement or compromise until a judgment is entered, for until then there is nothing upon which a lien can attach. The right of parties to settle their suits in good faith, and without col-

lusion for the express purpose of wronging another, is undisputed and indisputable, even in England, where costs to attorneys are regulated by law, and taxable, and, a fortiori, must that right be recognized here, where there are no taxable costs in favor of attorneys. From the principle that there is no lien until judgment, it follows that it is competent for the parties, acting in good faith, to settle and discontinue a suit before judgment, without the consent of the attorney; and he is remitted to his remedy against his client for his compensation: *Wells v. Hatch*, 43 N. H. 245; *Parker v. Blighton*, 32 Mich. 266; *Wright v. Hake*, 58 Mich. 525; *Voight Brewery Co. v. Donovan*, 103 Mich. 190; *Casey v. March*, 30 Tex. 181; monographic note to Board of Commrs. v. Younger, 87 Am. Dec. 168, 169, discussing the power of the client over an action; *Randall v. Van Wagenen*, 115 N. Y. 527; 12 Am. St. Rep. 828; *Kusterer v. Beaver Dam*, 56 Wis. 471; 43 Am. Rep. 725; *Houghton v. Clarke*, 80 Cal. 417; *Whittaker v. Clarke*, 33 Tex. 647; *Miller v. Newell*, 20 S. C. 122; 47 Am. Rep. 833; *Heister v. Mount*, 17 N. J. L. 438; *Young v. Dearborn*, 27 N. H. 324, 327; *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *Swanston v. Morning Star Min. Co.*, 13 Fed. Rep. 215; *Shank v. Shoemaker*, 18 N. Y. 489; *Hutchinson v. Peters*, 18 Vt. 614; *Weed Sewing Machine Co. v. Bontelle*, 56 Vt. 570; 48 Am. Rep. 821; *Wright v. Wright*, 70 N. Y. 96; *Tillman v. Reynolds*, 48 Ala. 365; *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 12 Fed. Rep. 815; *Pulver v. Harris*, 52 N. Y. 73; *Kirby v. Kirby*, 1 Paige, 565.

And the lien of the attorney may be defeated by such a settlement, though the client agreed to pay his attorney a percentage of the proceeds of the judgment: *Courtney v. McGavock*, 23 Wis. 619; *Miller v. Newell*, 20 S. C. 122; 47 Am. Rep. 833; *Lamont v. Washington etc. R. R. Co.*, 2 Mackey, 502; 47 Am. Rep. 268; *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *Kusterer v. Beaver Dam*, 56 Wis. 471; 43 Am. Rep. 725; or not to compromise the action: *Mosely v. Jamison*, 71 Miss. 456. The client may always settle an action for unliquidated damages, even against the protest of the attorney, in the absence of a statute protecting the latter from the beginning of the suit, as a party having a cause of action, in its nature not assignable, cannot, by any agreement before judgment, or a verdict thereon, give his attorney any interest therein: *Kusterer v. Beaver Dam*, 56 Wis. 471; 43 Am. Rep. 725; *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *Henchey v. Chicago*, 41 Ill. 136; *Mosely v. Jamison*, 71 Miss. 456; *Lamont v. Washington etc. R. R. Co.*, 2 Mackey, 502; 47 Am. Rep. 268. The question of alleged fraud on the part of the defendant in securing a settlement and discontinuance of a suit cannot be tried upon affidavits: *Voight Brewery Co. v. Donovan*, 103 Mich. 190; and a settlement by stipulation between the parties to the suit will not be set aside as fraudulent without proof of a fraudulent intent in the defendant, although such intent on the plaintiff's part is shown, and he is insolvent: *Courtney v. McGavock*, 23 Wis. 619. The retaining of an attorney to prosecute an action, and its commencement by him, give him no lien upon what may, in the event of a trial, be recovered therein: *Pulver v. Harris*, 52 N. Y. 73. An attorney for a wife cannot insist upon proceeding with a compromised divorce suit, against the consent of his client, upon the ground that his costs are not paid: *Kirby v. Kirby*, 1 Paige, 565. After the entry of a default, but before entry of judgment, the parties may, if acting in good faith, make a settlement

of the claim and costs of suit without reference to the attorney's fees, as the entry of a default does not constitute a perfected judgment. Until judgment the attorney has no lien that can stand in the way of such a settlement: *Hooper v. Welch*, 43 Vt. 169; 5 Am. Rep. 267. But for the purpose of securing the lien of the attorney, the order of the court that judgment be entered is to be deemed the judgment. "Such order is a final determination of the case, the end of all litigation and controversy as to the merits of the case. The time when the judgment is entered up in form is immaterial": *Young v. Dearborn*, 27 N. H. 324, 331, per Bell, J. If an attorney withdraws from a case voluntarily, before judgment, the court will not, unless a special reason is shown therefor, impose a lien in his favor on any ultimate recovery as a condition to the substitution of other attorneys: *Hektograph Co. v. Fourl*, 11 Fed. Rep. 844. It is only the attorney who is in charge of the suit at the time judgment is entered that is entitled to a lien; *Wells v. Hatch*, 43 N. H. 246, 249. A former attorney, however, may have a lien by special agreement made with the client: *In re Wilson*, 12 Fed. Rep. 235. Counsel employed to assist an attorney in trying a cause have no lien for their services upon the judgment recovered: *Brown v. Mayor*, 9 Hun, 587; 11 Hun, 21; *Foster v. Danforth*, 59 Fed. Rep. 750; contra, *Jackson v. Clopton*, 66 Ala. 29.

Collusive Compromise or Settlement.—Sometimes a collusive settlement is made between the parties for the purpose of defrauding the attorney of his fee before any judgment or decree has been obtained. When there is an evident intention thus to cheat the attorney and to defraud him of his rights, the proper course for the attorney to pursue is to proceed with the suit in the name of his client, notwithstanding the collusive settlement for the purpose of collecting his costs: *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *Talcott v. Bronson*, 4 Paige, 501, 503; *McDonald v. Napier*, 14 Ga. 89; *Howard v. Osceola*, 22 Wis. 453; *Voell v. Kelly*, 64 Wis. 504; *Young v. Dearborn*, 27 N. H. 324; *Heister v. Mount*, 17 N. J. L. 438; *Courtney v. McGavock*, 23 Wis. 619; *Barnes v. Taylor*, 30 N. J. Eq. 467; *Jones v. Morgan*, 39 Ga. 310; 99 Am. Dec. 458; *Randall v. Van Wagenen*, 115 N. Y. 527; 12 Am. St. Rep. 828.

"There are many cases," says Earl, J., in *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75, where this has been allowed to be done. It is impossible to ascertain precisely when this practice commenced, nor how originated, nor upon what principle it was based. It was not upon the principle of a lien, because an attorney has no lien upon the cause of action, before judgment, for his costs; nor was it upon the principle that his services had produced the money paid his client upon the settlement, because that could not be known, and, in fact, no money may have been paid upon the settlement. So far as I can perceive, it was based upon no principle. It was a mere arbitrary exercise of power by the courts; not arbitrary in the sense that it was unjust or improper, but in the sense that it was not based upon any right or principle recognized in other cases. The parties being in court, and a suit commenced and pending, for the purpose of protecting attorneys who were their officers and subject to their control, the courts invented this practice and assumed this extraordinary power to defeat attempts to cheat the attorneys out of their costs. The attorneys' fees were fixed and definite sums, easily determinable by taxation, and this

power was exercised to secure them their fees." When the parties collusively agree to practice a fraud upon their attorneys, or either of them, a court will not aid them to consummate their unjust designs: *Heister v. Mount*, 17 N. J. L. 438. In such a case, it will not enforce an agreement to dismiss the action: *Young v. Dearborn*, 27 N. H. 324. It will, too, reverse an order of discontinuance to enable the plaintiffs' attorney, who was not consulted in regard to the settlement, to proceed to collect the costs of the action and his fees: *Howard v. Osceola*, 22 Wis. 453. It will order a reference to ascertain the amount of the lien: *Barnes v. Taylor*, 30 N. J. Eq. 467. It will not set a settlement aside as fraudulent without proof of fraudulent intent in the defendant, although such intent on plaintiff's part is shown: *Courtney v. McGavock*, 23 Wis. 619. The fact that there was no consideration, or no adequate consideration, for the settlement and discharge of the suit, is evidence of bad faith: *Young v. Dearborn*, 27 N. H. 324. A settlement effected by the attorney of one party with the opposite party, in the absence of the attorney of the latter, should be closely scrutinized, and will be set aside where there is any appearance of fraud or undue influence: *Voell v. Kelly*, 64 Wis. 504. The satisfaction of a judgment between the parties cannot prejudice the lien of the attorney for services rendered in the procurement of the judgment; and it has been held that execution may issue, notwithstanding, for the balance due him: *Foster v. Danforth*, 59 Fed. Rep. 750. "The lien of attorneys," says Champlin, C. J., in *Lindner v. Hine*, 84 Mich. 511, 515, "attaches to the fruits of the judgment. It attaches to the money payable to the client, if it is the proceeds of the labor and skill of the attorneys. It attaches also to moneys received by way of compromise by the client in the cause, for the money is regarded as the fruit of the attorneys' labor and skill. And if the client settles the case after judgment, so as to deprive the attorneys of their costs and fees, the latter have an action against the former."

A proctor who has commenced a suit for a seaman, upon a just claim, may proceed for costs, after a settlement made by the parties, without his knowledge: *Angell v. Bennett*, 1 Sprague, 85; *The Brig Planet*, 1 Sprague, 11; *Collins v. Nickerson*, 1 Sprague, 126, and note on clandestine settlements with seamen; note to *Gaines v. Travis*, Abb. Adm. 297, 301; and the court, in determining the right to costs, will inquire into the fairness of the settlement with the seaman: *The Victory*, 1 Blatchf. & H. 443. A suit by a proctor in admiralty for his costs or fees is a familiar proceeding in the admiralty tribunals, both in this country and in England: *The Ship Cabot*, 1 Newb. Adm. 348. An outdoor settlement is regarded as fraudulent as against the proctors and officers of the court: Note to *Gaines v. Travis*, Abb. Adm. 297, 301. In admiralty, costs are technically awarded to parties, but substantially they belong to the proctor to the suit, and the court will uphold his right to them against acts of the principal to his prejudice: *Collins v. Hathaway*, *Olcott*, 176. If the proctor for a seaman intends, after a clandestine settlement, to continue the suit to recover costs, distinct notice should be given to the party sought to be charged: *The Sarah Jane*, 1 Blatchf. & H. 401. A proctor is not allowed, however, to proceed with the suit merely because he objects to the settlement. Thus, a settlement with a seaman of his claim for damages for a tort, although made after suit brought, and in the absence of his proctor, will be upheld, where the costs of the court were secured to the proctor, if it was made fairly and

understandingly, and it does not appear that the consideration paid was inadequate: *Brooks v. Snell*, 1 Sprague, 48. So, in a suit by a seaman for a tort, if a settlement is made, without the knowledge of the libellant's proctor, but in good faith, and when the situation of the respondent is such that there is more danger of undue influence upon him than upon the libellant, the proctor cannot recover his costs: *Purcell v. Lincoln*, 1 Sprague, 230. The cases in which the proctor's right to recover his fees may be defeated are in actions for a personal tort, where the right of action is in dispute, and in which the respondent may compromise with the libellant before decree, without regarding the libellant's costs. A compromise, in such a case, is a bar to a further prosecution of the suit by the libellant's proctor to obtain the costs: *Peterson v. Watson*, 1 Blatchf. & H. 487. Hence, a notice by the proctor for the libellant, to the respondent personally, in an action for a personal tort, that in case of a compromise out of court, he will be held liable for the costs, does not vary the relative rights of the parties, and need not be regarded: *Peterson v. Watson*, 1 Blatchf. & H. 487. If a suit is compromised without satisfying a proctor's costs, and he desires to prosecute it to recover his costs, the regular practice is to notice the cause for trial, and give notice to the opposite party that the suit is continued to recover costs and nothing more: *Peterson v. Watson*, 1 Blatchf. & H. 487.

Lien by Agreement or Assignment.—After judgment, an attorney has a lien thereon for any compensation which his client agreed to pay him. To that extent he is regarded as an equitable assignee of the judgment: *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75. A person owning a judgment for the recovery of money may give his attorney, or any other person, by agreement, rights and equitable interests therein, which the defendant therein charged with notice must respect. So, if the cause of action before judgment be in its nature assignable, the owner of it may assign, and, by agreement, create legal and equitable interests therein, and such agreements may be made with attorneys, as well as with other persons, and, when such interests have been created and notice given of them, they must be respected: *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *Wylie v. Cox*, 15 How. 415; *Newell v. West*, 149 Mass. 520; *Harshman v. Armstrong*, 119 Ind. 224. If an attorney renders services and expends money in instituting and conducting a suit, and the plaintiff orally agrees that he may retain so much of the avails thereof as will pay him therefor, and for previous services in other matters, and the attorney conducts the suit to a favorable conclusion, he has, as against the plaintiff, an equitable lien upon the avails, both for his services and expenses in the suit and for the previous services covered by the agreement; and if the plaintiff goes into insolvency after such agreement, the trustee in insolvency stands in his place, and takes the estate burdened by the equitable encumbrance: *Cooke v. Thresher*, 51 Conn. 105.

But before judgment, in the absence of any agreement, the attorney has not now, and never had, any lien upon, or interest in, the cause of action; and when the cause of action is, by its nature, not assignable, the party owning it cannot, by any agreement, give his attorney or other person any interest therein. Still, an agreement to divide the recovery, in an action for personal injuries, or other nonassignable cause of action, would attach itself to the judgment, when recovered,

and give the attorney an equitable interest therein: *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *Pulver v. Harris*, 52 N. Y. 73; *Wright v. Wright*, 70 N. Y. 96; *McBratney v. Rome etc. R. R. Co.*, 87 N. Y. 467; *Williams v. Ingersoll*, 89 N. Y. 508; and an agreement for a stated compensation, in any cause of action, attaches to the judgment when recovered: *La Framboise v. Grow*, 56 Ill. 197; *Wylie v. Coxe*, 15 How. 415; *Cowdrey v. Galveston etc. R. R. Co.*, 93 U. S. 352; *McPherson v. Cox*, 96 U. S. 404. Claims for personal injuries caused by the negligence of another, or for unliquidated damages, are not assignable, and an attorney has not, and cannot get, a vested interest therein, and has, therefore, no lien even for his taxable costs: *Kusterer v. Beaver Dam*, 56 Wis. 471; 43 Am. Rep. 725; *Voell v. Kelly*, 64 Wis. 504; *Henchey v. Chicago*, 41 Ill. 136. So, an action for slander or libel, or for assault and battery, is not assignable, and the attorney has no lien on the cause of action before judgment, though the client agreed that the attorney should have for his services a portion or all of the damages recovered: *Miller v. Newell*, 20 S. C. 123; 47 Am. Rep. 833; *Quincey v. Francis*, 5 Abb. N. C. 286. But as an agreement between an attorney and his client that the former shall have a lien for all sums that may be owing or due him for services, and that such lien shall be superior to any right the client may have, operates as an equitable assignment of a sum subsequently awarded to the client in an action for damages for a personal tort, and attaches to the award as soon as it is made, such agreement is good as against the client or any attaching creditor, notwithstanding no notice of the lien was given to the debtors who were adjudged to pay the award: *Williams v. Ingersoll*, 89 N. Y. 508, 522. It is held in Illinois that, in the absence of an express contract out of which an equitable assignment arises, an attorney at law has no lien for his compensation upon the judgment or decree rendered in a suit prosecuted by him, or upon the real estate, moneys, fund, or other property recovered by means of his legal services or skill; that an equitable assignment is such a one as gives the assignee a title which, though not cognizable at law, a court of equity will recognize and protect; that, to operate as an equitable assignment, there must be an actual appropriation of the fund, or of some designated part, proportion, or per cent of it; and that an agreement of a party to pay his attorney and counsel a reasonable compensation for his legal services out of the proceeds of the litigation, is one depending upon the mere personal responsibility of the employer, and creates no equitable lien in favor of the attorney. Such a case, it is said, differs from one where there is a fund in charge of a chancery court which is administering on such fund: *Story v. Hull*, 143 Ill. 506. The existence of a lien for costs and agreed compensation, in favor of the attorneys of a party who has obtained judgment, does not confer a right on them to stand in the way of a settlement of the action which does not prejudice any right of theirs. An agreement between an attorney and client, giving the former a percentage of any recovery, does not deprive the party of the right to control the management of his own cause and to determine when the litigation shall cease. The client still remains the lawful owner of the cause of action, and is not bound to continue, or to permit the continuance of, the litigation for the benefit of his attorney, if he thinks it advisable to stop, and is willing and able to satisfy the just claims of the latter. The lien of an attorney, under such an agreement,

operates only as a security for his legal claims: *Lee v. Vacuum Oil Co.*, 126 N. Y. 579.

Notice of Lien.—The general rule is, that an attorney's charging lien, or the right to make his claim for compensation a charge upon the judgment, is not perfected until notice is given to the defendant: *Manning v. Leighton*, 65 Vt. 84, 95; *Hurlburt v. Brigham*, 56 Vt. 368; *Weed Sewing Machine Co. v. Boutelle*, 56 Vt. 570; 48 Am. Rep. 821; *Courtney v. McGavock*, 23 Wis. 619; *Young v. Dearborn*, 27 N. H. 324, 328; *Braden v. Ward*, 42 N. J. L. 518; *Voell v. Kelly*, 64 Wis. 504; *Hooper v. Welch*, 43 Vt. 169; 5 Am. Rep. 267; *Pinder v. Morris*, 3 Caines, 165; *St. John v. Diefendorf*, 12 Wend. 261; *People v. New York Common Pleas*, 13 Wend. 649; 28 Am. Dec. 495; *Marshall v. Meech*, 51 N. Y. 140; 10 Am. Rep. 572; *Randall v. Van Wagenen*, 115 N. Y. 527; 12 Am. St. Rep. 828.

Notice to the judgment debtor of the attorney's lien is necessary or needful in order to protect it against a bona fide settlement and payment of the debt by the debtor, made in ignorance of the existence of the lien: *Hooper v. Welch*, 43 Vt. 169; 5 Am. Rep. 267; *Williams v. Ingersoll*, 89 N. Y. 508, 522; *Voell v. Kelly*, 64 Wis. 504; *Young v. Dearborn*, 27 N. H. 324, 328; *Courtney v. McGavock*, 23 Wis. 619. An attorney, not having given notice of his lien for costs, cannot object that an assignment of a judgment against his client, taken for the purpose of setoff, is in fraud of his lien: *People v. New York Common Pleas*, 13 Wend. 649; 28 Am. Dec. 495. The notice need not necessarily be a personal notice by the plaintiff's attorney to the defendant. Any notice of the existence of the claim, and that it will be asserted, is sufficient: *Braden v. Ward*, 42 N. J. L. 518, 521. Nor is actual notice of the claim of the attorney necessary in all cases to protect his rights. "If the party acts in the face of circumstances, which are sufficient to put him on inquiry, he acts contrary to good faith and at his peril": *Young v. Dearborn*, 27 N. H. 324, 328. In the absence of notice of the attorney's lien, the defendant, acting in good faith, has the right to pay the judgment to the plaintiff: *Wright v. Wright*, 70 N. Y. 98. But, where notice of the lien is given to the judgment debtor, the court will protect the lien: *Pulver v. Harris*, 52 N. Y. 73; *Barnes v. Taylor*, 30 N. J. Eq. 467; *Randall v. Van Wagenen*, 115 N. Y. 527; 12 Am. St. Rep. 828; *Andrews v. Morse*, 12 Conn. 444; 31 Am. Dec. 752. If costs are paid after notice of the lien, the plaintiff's attorney may collect them, notwithstanding the payment: *Ten Broeck v. De Witt*, 10 Wend. 618. So, if the defendant, after notice from plaintiff's attorney, pays the amount of the judgment to the plaintiff, without satisfying the attorney for his costs, such payment is in his own wrong, and he is liable to the attorney for the amount of his bill: *Martin v. Hawks*, 15 Johns. 405; *Barnes v. Taylor*, 30 N. J. Eq. 467. In such cases, the plaintiff's attorney may, notwithstanding such payment, proceed with the execution against the debtor to the extent of his fees and disbursements: *Andrews v. Morse*, 12 Conn. 444; 31 Am. Dec. 752. When an attorney has a lien upon a judgment, it is presumed that a plaintiff in a trustee proceeding has knowledge of such lien; and he is affected with notice of it: *Weed Sewing Machine Co. v. Boutelle*, 56 Vt. 570; 48 Am. Rep. 821. If a client has agreed to pay his attorney out of the proceeds of the judgment, the attorney should notify the defendant of the agreement, after which a settlement to the prejudice of the attorney's rights would be held fraudulent: *Courtney v. McGavock*, 23 Wis. 619. When the recovery is solely for costs, the judgment itself

is legal notice of the lien, and this cannot be discharged by payment to anyone but the attorney: *McGregor v. Comstock*, 28 N. Y. 237; *Reich v. Meech*, 51 N. Y. 140; 10 Am. Rep. 572. But, if the judgment is for damages and costs, it is not notice of the lien, and the lien can be protected only by notice to the judgment debtor: *Marshall v. Meade*, 51 N. Y. 140; 10 Am. Rep. 572. The notice of lien should be given to the adverse party personally and not to his attorney. Such a notice given to the defendant's attorney will not protect the plaintiff's attorney in case a settlement is made by the parties to the action without providing for the lien: *Wright v. Wright*, 7 Daly, 62, affirmed in *Wright v. Wright*, 70 N. Y. 96.

Setoff—Assignment of Judgment.—Upon the question as to whether the lien of an attorney is subject to a right of setoff in the other party to the suit, there are two lines of cases, one holding that it is, the other that it is not. Those cases holding that it is do so upon the ground that such lien is subject to, and must give way to, the equitable rights of the parties. As an attorney has no lien for any greater amount than what is found to be actually owing by the opposite party to his client, it is reasoned that his lien must be subject to the equitable claims of the parties in the cause, as well as to the rights of third parties, which cannot be varied or controlled by it. His lien is subordinate to the right of setoff: See *McDonald v. Smith*, 57 Vt. 502; *Fairbanks v. Devereaux*, 58 Vt. 359; *Yorton v. Milwaukee*, 62 Wis. 367; *Bosworth v. Tallman*, 66 Wis. 533; *Mohawk Bank v. Burrows*, 6 Johns. Ch. 317; *Porter v. Lane*, 8 John. 357; *Nicoll v. Nicoll*, 16 Wend. 446; *Wright v. Treadwell*, 14 Tex. 255; *Benjamin v. Benjamin*, 17 Conn. 110; *Marshall v. Cooper*, 43 Md. 46; *Levy v. Steinbach*, 43 Md. 212; *Mosely v. Norman*, 74 Ala. 422; *Ex parte Lehman*, 59 Ala. 631; *People v. New York Common Pleas*, 13 Wend. 649; 28 Am. Dec. 495; *Renick v. Ludington*, 16 W. Va. 878; *Andrews v. Morse*, 12 Conn. 444; 31 Am. Dec. 752; *National Bank v. Eyre*, 8 Fed. Rep. 733; *Fitzhugh v. McKinney*, 43 Fed. Rep. 461.

An assignment of the judgment by the plaintiff to his attorneys to secure them for their fees, disbursements, and advancements will not defeat a right of setoff: *Yorton v. Milwaukee etc. Ry. Co.*, 62 Wis. 367; *Fitzhugh v. McKinney*, 43 Fed. Rep. 461.

Those cases holding that the attorney's lien is superior to the right of setoff do so upon the ground that the equity of the attorney to claim and maintain his lien is strong, and ought to be respected, especially where his fees for obtaining a judgment appear to be just. His right, therefore, to a lien for his costs is considered paramount to the right of the debtor to set off a judgment he holds against the judgment creditor: See *Shapley v. Bellows*, 4 N. H. 347; *Currier v. Boston etc. R. R.*, 57 N. H. 223; *Holt v. Quimby*, 6 N. H. 79; *Phillips v. Mackay*, 54 N. J. L. 819; *Carter v. Davis*, 8 Fla. 183; *Davidson v. Alfaro*, 80 N. Y. 660; *Diehl v. Friester*, 37 Ohio St. 473; *Warfield v. Campbell*, 38 Ala. 527; 82 Am. Dec. 724; *Bradt v. Koon*, 4 Cow. 416. Compare *Lewis v. Kincaid*, 2 Mo. App. 33. It must be observed that the statute has so changed the rule in some of the states as to make some of the earlier cases valueless as authority. Thus, in New York, since the act of July 10, 1879, section 66, no setoff is allowed as against the attorney's lien: *Naylor v. Lane*, 66 How. Pr. 400; *Ennis v. Curry*, 61 How. Pr. 1; *Turno v. Parks*, 2 How. Pr. N. S., 35; *Place v. Hayward*, 3 How. Pr., N. S., 59. It is not clear how far the attorney's right of lien will stand in the way

setoff sought in an equitable action: *Davidson v. Alfaro*, 80 N. Y. 5; though it was not allowed to do so in *Fitzhugh v. McKinney*, 48 Rep. 461.

The authorities upon the question as to how an attorney's lien is affected by the client's assignment of the judgment are discordant and reconcilable; but we venture to say that the lien of an attorney in an assigned judgment is now recognized in very many, if not in a majority, of the cases, as superior to any right of setoff as to judgments between parties: *Middlesex Freeholders v. State Bank*, 38 N. J. Eq. 36, and selected cases in note thereto; *Terney v. Wilson*, 45 N. J. L. 282; *Remy v. Ludington*, 16 W. Va. 378; even where the judgment sought to be set off was recovered before the other judgment: *Benjamin v. Benjamin*, 17 Conn. 110; *Rumrill v. Huntington*, 5 Day, 163; *Ely v. Cooke*, 28 N. Y. 365; collected cases in note to *Middlesex Freeholders v. State Bank*, 38 N. J. Eq. 36; especially where the judgment has been assigned to the attorney as security for his compensation and costs, whether after the judgment was obtained or before: *Rumrill v. Huntington*, 5 Day, 163; *Potter v. Hunt*, 68 Mich. 242; *Ely v. Cooke*, 28 N. Y. 365.

The attorney may enforce his lien against an assignee of the judgment, without notice to him: *Sexton v. Pike*, 13 Ark. 193; *Frink v. McComb*, 60 Fed. Rep. 486. In other words, notice of the existence of the attorney's lien to the assignee of the judgment or decree is not essential to the maintenance of such lien against such assignee without notice: *Renick v. Ludington*, 16 W. Va. 378. An assignee of a judgment takes it subject to rights of setoff which have already attached: *People v. New York Common Pleas*, 13 Wend. 649; 28 Am. Dec. 495. A defendant against whom a judgment has been recovered cannot, by subsequently purchasing a judgment against the plaintiff, offset it so as to defeat the attorney's lien: *Bradt v. Koon*, 4 Cow. 416. An agreement between attorneys and their client that they are to be paid for their services rendered in the prosecution of a suit, and reimbursed for moneys advanced, from the proceeds of the judgment which may be obtained, operates as an equitable assignment of the judgment to the attorneys to the extent of such claims, and until the same are paid the plaintiff can give no valid discharge of the judgment. And such assignment will prevail over the plaintiff's right of setoff: *Weeks v. Wayne Circuit Judges*, 73 Mich. 256; *Ely v. Cooke*, 28 N. Y. 365; *Terney v. Wilson*, 45 N. J. L. 282; *Williams v. Ingersoll*, 89 N. Y. 508; *Frink v. McComb*, 60 Fed. Rep. 486.

Priorities—Attachment—Bankruptcy—Purchase Pendente Lite.—An attorney who has procured a will to be set aside, and established his client's right to share in the estate of the testator, acquires an equitable lien for his fees upon the fund so secured to his client, and is entitled to priority of payment over a judgment creditor of the latter whose lien attached after the contract for such professional services was entered into: *Justice v. Justice*, 115 Ind. 201. An attorney's lien upon a judgment is superior to the claim of a creditor in whose favor execution has been levied: *Henry v. Traynor*, 42 Minn. 234. Such lien is superior to an attachment by trustee process: *Weed Sewing Machine Co. v. Boutelle*, 56 Vt. 50; 48 Am. Rep. 821; *Hutchinson v. Howard*, 15 Vt. 544. The lien of a lawyer on money to be paid out of a fund in court is superior to the lien of a subsequent attaching creditor, although the client is a nominal defendant in the case: *Damron v. Robertson*, 12 Lea, 372. If the plaintiff,

after agreeing to give his attorney a portion of the proceeds of a judgment, goes into insolvency, the trustee in insolvency stands in his place and takes the estate burdened by the equitable encumbrance: *Cooke v. Thresher*, 51 Conn. 105. If he prosecutes a suit for the insolvent up to the date of the adjudication of insolvency, and afterward for the assignee to final judgment, he has a lien upon such judgment for the full amount of his fees: *Rogers v. Heath*, 62 Vt. 101. If a client becomes insolvent pending the action, and the costs are paid to a receiver after notice of the attorney's lien, the party so paying such costs is not protected from execution on the judgment: *Matter of Bailey*, 66 How. Pr. 64; 31 Hun, 608. Where an assignee in bankruptcy assumes control of the action, the court will protect the right of the original attorney to compensation out of the fund: *Clark v. Binninger*, 1 Abb. N. C. 421; *Moore v. Taylor*, 40 Hun, 56. One who purchases a fund in court during the pendency of the suit purchases with notice of the attorney's lien upon the fund for his fee for services rendered with respect to it: *McCain v. Portis*, 42 Ark. 402. Certain bondholders appeared, by counsel, in a suit by bondholders to foreclose a mortgage of the corporate property and franchises, and contested the creditors' right to proceed and took various steps during the progress of the cause, involving labor and responsibility on their counsel. These contesting bondholders afterward, during the progress of the litigation, sold their bonds; and on the petition of their counsel to be allowed a fee, payable out of the dividend which would go to these bonds, it was held that they had a lien upon such dividend, and that the purchasers of the bonds *pendente lite* took subject to this lien: *Mahone v. Southern Tel. Co.*, 33 Fed. Rep. 702.

Lien on Land.—Unless authorized by statute, an attorney has no lien on land for prosecuting a suit to recover it for his client: *Fowler v. Lewis*, 36 W. Va. 112; *Hogg v. Dower*, 36 W. Va. 200; *McCoy v. McCoy*, 36 W. Va. 772; *McCullough v. Flournoy*, 69 Ala. 189; *Humphrey v. Browning*, 46 Ill. 476; 95 Am. Dec. 446; *Martin v. Harrington*, 57 Miss. 208; *Coxsens v. Whitney*, 3 R. I. 79; *Smalley v. Clark*, 22 Vt. 598; *Stewart v. Flowers*, 44 Miss. 513; 7 Am. Rep. 707; *Hanger v. Fowler*, 20 Ark. 667; *Hershy v. Du Val*, 47 Ark. 86; or for defending a suit to recover it from his client: *Fowler v. Lewis*, 36 W. Va. 112; *Greer v. Ferguson*, 56 Ark. 324; or for defending a suit to subject it to a debt or claim: *Fowler v. Lewis*, 36 W. Va. 112; *McCoy v. McCoy*, 36 W. Va. 772; *Hinson v. Gamble*, 65 Ala. 605; *Lee v. Winston*, 68 Ala. 402. This question is lucidly discussed in *Fowler v. Lewis*, 36 W. Va. 112; and the pivotal idea is, that the lien of the attorney does not extend to the property which is the subject matter of the action: *McWilliams v. Jenkins*, 72 Ala. 480. In Tennessee, however, the courts recognize the existence of the attorney's lien on the land of his client, for his services in recovering or protecting it, upon the principle that the attorney has a lien upon his client's property for such services; and they decree that the lien may be declared by order in the cause in which the services are rendered: *Hunt v. McClanahan*, 1 Heisk. 503. The lien was for a time declared in favor of the attorney for the defendant as well as of the plaintiff: *Hunt v. McClanahan*, 1 Heisk. 503; but, upon further consideration, that doctrine was repudiated as operating as a restraint upon the free disposition of property, and as being in conflict with the policy of the registration laws. The lien was then limited to cases of actual recovery of the land: *Pierce v. Lawrence*, 16 Lea, 572; *Stanford v.*

Andrews, 12 Heisk. 664; although a suit might be successfully defended: Garner v. Garner, 1 Lea, 29. If the lien is declared by order of court, it has priority of satisfaction over the lien of a judgment creditor of the client, acquired by a subsequent decree, sale thereunder, and purchase of the land, where the bill to enforce the lawyer's lien is filed before the sale is confirmed: Brown v. Bigley, 3 Tenn. Ch. 618. But the declaration of a lawyer's lien on land by the court in which the services were rendered, although binding on the parties, and those claiming under them pending the litigation, does not affect the rights of a third person having a prior lien: Pierce v. Lawrence, 16 Lea, 572. That an attorney may acquire a lien on his client's land recovered from the other party, see Smith v. Young, 62 Ill. 210.

Waiver and Release of Lien.—The lien of the attorney is liable to be defeated or lost in a number of different ways: Note to Andrews v. Morse, 31 Am. Dec. 759. It may be waived by any transaction or arrangement made by or with the attorney, which satisfactorily shows an intention to waive such lien and rely exclusively on some other security or mode of payment; but the lien will continue to exist, unless a manifest intention that it shall not continue to exist appears: Renick v. Ludington, 16 W. Va. 378. The lien upon a fund is lost by taking an assignment of the fund itself: Fulton v. Harrington, 7 Houst. 182; but an attorney's lien is not divested by the fact that the judgment obtained by him became dormant, and was afterward revived by other attorneys: Jenkins v. Stephens, 60 Ga. 216. Nor is such lien discharged by a delay of several years to collect the demand, if there is no negligence on the part of the attorney, and the debtor has notice of the claim: Stone v. Hyde, 22 Me. 318. So, if money has been paid into court, and taken out by the attorney in part satisfaction of the demand sued upon, and has been paid over to his client without deducting his fees, this will not avoid the lien of the attorney: Hooper v. Brundage, 22 Me. 460. An attorney may waive his lien by procuring a satisfaction of the judgment: Cowen v. Boone, 48 Iowa, 350; or may lose it by releasing property from the operation of a judgment: Wishard v. Biddle, 64 Iowa, 526; or may lose it by recovering judgment against his client for his services: Clark v. Dickerman, 95 Mich. 289.

Enforcement of Lien.—An attorney's lien is enforceable through the control the courts have of their judgments and records, and by means of their own process: Goodrich v. McDonald, 112 N. Y. 157; Yourie v. Nelson, 1 Tenn. Ch. 614. If an attorney applies to the court to protect his lien, the court will prevent money from being paid over until his demand is satisfied; and if the judgment debtor pays a judgment to the judgment creditors, after notice of the lien, the court may require him to pay it again, to the attorney. This is a power which the court exercises toward its officers and suitors within its jurisdiction: Adams v. Fox, 40 Barb. 442. If an attorney, in a divorce proceeding, has filed a lien upon the judgment for his fee, the court has power to summon the attorney before it to determine what lien he may have, and what will be a reasonable fee for his services: State v. Sachs, 3 Wash. 371. If the attorney is clearly entitled to a lien, a reference may be ordered to determine its amount: Barnes v. Taylor, 30 N. J. Eq. 467. But a court will not make an order practically enforcing the lien, without any notice to or hearing of the clients: Attorney General v. North America etc. Ins. Co., 93 N. Y. 387. If no definite fee is agreed upon, the court

should merely declare the lien and leave counsel to enforce it by an appropriate proceeding; but if the fee is fixed by agreement, the court should enforce it: *Perkins v. Perkins*, 9 Heisk. 95. If there is money in court upon which a lawyer claims a lien, a rule is held to be a proper remedy to settle all controverted questions between the client and attorney in respect to it: *Walker v. Floyd*, 30 Ga. 237; and to such rule it is not necessary to attach a bill of particulars of the various services he has rendered, steps taken, or things done in the various stages of the suit in which the services were rendered; nor is it necessary for him, on the trial, to go into proof of the same, as, in pleading and proof, the services in a litigation must be treated as a whole: *Walker v. Floyd*, 30 Ga. 237. But an attorney cannot thus collect his fee by ruling his client, where the opposite party has paid the money to his client after the litigation has ended, and there is no longer any judicial proceeding before the court, as the court cannot control persons in transacting their ordinary business affairs: *Whittle v. Newman*, 34 Ga. 377.

Although a judgment on which an attorney has a lien for his costs has been discharged by the creditor, the attorney may enforce his claim by an action on the judgment in the name of the creditor: *Stone v. Hyde*, 22 Me. 318; *Bickford v. Ellis*, 50 Me. 121; *Newbert v. Cunningham*, 50 Me. 231; 79 Am. Dec. 612; though it is held in *Horton v. Champlin*, 12 R. I. 550, 34 Am. Rep. 722, that an attorney's lien on a judgment does not authorize him to bring suit thereon in his client's name without his authority. So, an attorney who has prosecuted a bastardy process to final judgment and execution may maintain a suit upon the bond given by the respondent in that process to recover his claim, and enforce his lien, notwithstanding the complainant in the original process has given a full discharge to the obligors: *Bickford v. Ellis*, 50 Me. 121. And an attorney, as an equitable assignee, has the right to enforce a replevin bond to the extent of his lien, and this right the obligee in the bond cannot defeat: *Newbert v. Cunningham*, 50 Me. 231; 79 Am. Dec. 612. An attorney, in seeking to enforce his lien by action, must show the amount due for fees, either by stating a contract fixing the amount or by averring the value of the services: *Day v. Bowman*, 109 Ind. 383; and, if this is not done, a complaint against a judgment plaintiff and others, by an attorney who has entered a notice of lien upon a judgment for his fees for recovering the judgment, to set aside an entry of satisfaction of the judgment made by the judgment plaintiff, on the ground of its having been fraudulently made, is bad: *Dunning v. Galloway*, 47 Ind. 182.

A solicitor's claim for fees will not be passed upon without notice to his client, and proof by the attorney to sustain his claim: *Black v. Black*, 32 N. J. Eq. 74; *Attorney General v. North America etc. Ins. Co.*, 93 N. Y. 387. If the amount only is in dispute, a reference may be ordered to determine it: *Barnes v. Taylor*, 30 N. J. Eq. 467; *In re Knapp*, 85 N. Y. 284; but the court has no power to determine the amount of compensation due the attorney, if any, over the taxed costs: *Lailey v. Murphy*, 136 N. Y. 50. If there is a dispute as to what the contract between the attorney and client is, or in regard to the amount which the attorney is entitled to demand under it, or, if the amount of compensation is made, by express agreement, to depend upon the value of the services, and is unliquidated, the attorney's remedy is by direct action against all the parties. There cannot, it is said, be a compulsory

reference on these questions. If the client admits his liability, or, in other words, if there is no controversy as to the terms of the contract, nor as to the amount he ought to pay under it, the difficulty might be settled on motion: *Fox v. Fox*, 24 How. Pr. 409. "In my judgment," said Backes, J., in the case last cited, and in which there was a controversy as to the amount due, "the proper way for the attorney to proceed, with a view to a determination of the matters in controversy in a case like this, is by an action to determine the amount or extent of the lien, and have a decree declaring the judgment subject to the lien, and for liberty to issue execution thereon for the amount due him by virtue of his contract with his client. Then issue may be framed and a trial had in a way to secure the rights of all parties." But, Morgan, J., in *Adams v. Fox*, 40 Barb. 442, considered that there was no necessity for such an action, even in cases where the compensation was not stipulated, that it was an experiment under the code, and that the court had plenary power to protect the attorney's lien without driving him to an action, and without inconvenience to the client further than the adjustment of the sum due his attorney.

The court may declare a lien by order in the cause in which the services are rendered: *Hunt v. McClanahan*, 1 Heisk. 503; and the proceeding to enforce a solicitor's lien is by reference in the cause wherein the services were rendered, or by bill, to which the client is made a defendant, stating the nature and particulars of his services, and the compensation claimed: *Bowling v. Scales*, 1 Tenn. Ch. 618. In Maryland it is considered that all contracts between attorneys and clients, relative to professional services, should be settled and decided upon in like manner as all other contracts; and that they cannot, and ought not, to be introduced into and blended with any pending suit: *Strike's case*, 1 Bland. 57, 98; *Marshall v. Cooper*, 43 Md. 46, 62.

The lien of an attorney upon a judgment recovered by him is governed by the law of the state where the judgment was recovered and the lien attached, and not by the law of the state where the judgment is sought to be collected: *Citizens' Nat. Bank v. Culver*, 54 N. H. 327; 20 Am. Rep. 134; and, while a proceeding by an attorney to enforce his claim does not constitute an action, within the literal operation of the statute of limitations, yet, in enforcing it, the court will be governed by the analogy of the statute: *Richardson v. Brooklyn City etc. R. R. Co.*, 7 Hun, 69; *Winans v. Mason*, 33 Barb. 522.

A judgment for costs only belongs to the attorney, who is regarded as the equitable assignee thereof, and he should prosecute in his own name the undertaking given to secure its payment: *Kipp v. Rapp*, 2 How. Pr., N. S., 169. An attorney claiming a lien on a judgment for costs simply, and who brings an action against his client to recover the amount, cannot, if collusion is not charged, make the judgment debtor a party, with a view of having the amount declared a lien upon the judgment: *Adams v. Fox*, 40 Barb. 442.

If an attorney has commenced an action, and his client settles it with the opposite party before judgment, collusively, to deprive him of his costs, the court will permit the attorney to go on with the suit for the purpose of collecting his costs; and his remedy is to proceed with the suit, in the name of his client, notwithstanding the collusive settlement: *Talcott v. Bronson*, 4 Paige, 501; *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *Pickard v. Yencer*, 21 Hun, 403; *Wilber v.*

Baker, 24 Hun, 24; Forstman v. Schulting, 35 Hun, 504; Anonymous, 2 Daly, 533; Coleman v. Ryan, 58 Ga. 132; Jones v. Morgan, 39 Ga. 310; 99 Am. Dec. 458; without first obtaining leave so to do from the court: Forstman v. Schulting, 35 Hun, 504; contra, Goddard v. Trenbath, 24 Hun, 182; and, if the attempted settlement does not, for any reason, result in a discontinuance of the suit, the attorney may recover judgment therein for his fees: Carpenter v. Myers, 90 Mich. 209. But the attorney, in establishing his right to fees, must establish the plaintiff's right to recover on the state of facts existing at the time the case was disposed of, independently of the question of fees: Rodgers v. Furse, 83 Ga. 115. After settlement by the parties, the attorney's lien cannot be enforced, upon a mere motion to compel the defendant to pay the plaintiff's attorney his taxable costs, by awarding a judgment therefor. An application by the plaintiffs' attorney for an order directing the defendant to pay his costs and counsel fee, or that he have judgment therefor, "is not warranted by the practice": Smith v. Baum, 67 How. Pr. 267; Chase v. Chase, 65 How. Pr. 306. Before a settlement can be set aside or treated as fraudulent, some good reason therefor must be shown, and the plaintiff is entitled to notice of any application for such purpose; and if the attorney, as such, has any claim for counsel fees or costs upon the defendant, he must, in his own behalf, notice his motion, or bring his action to enforce such claim: Chase v. Chase, 65 How. Pr. 306. An attorney must obtain leave of the court before he can institute supplementary proceedings upon a judgment in favor of his own client after the title to that judgment has passed from the client to a receiver, especially where the proceedings are instituted by an affidavit that says nothing about the lien of an attorney: Moore v. Taylor, 2 How. Pr., N. S., 343. If there has been a fraudulent satisfaction of judgment by a client, ignoring his attorney's lien for costs, the question as to whether relief will be given to the attorney upon a summary application by motion, or he will be required to bring suit, is within the discretion of the supreme court, and its determination is not reviewable in the court of appeals: Howitt v. Merrill, 113 N. Y. 630. The New York practice on enforcing attorneys' liens is stated in a note to Eberhardt v. Schuster, 10 Abb. N. C. 391.

STATUTES—Generally—Equity.—It is provided by statute, in some of the states, that an attorney shall have a lien upon a judgment obtained for his client, and the statutory lien is sometimes given upon the cause of action, continuing until a final judgment is reached. The statute has put at rest many questions upon which the decisions were conflicting, and has made positive rules concerning attorneys' liens. The only questions, therefore, under the statutory law governing the subject, are the validity and construction, or interpretation, of the statute. Such a statute is remedial, and is to be largely and beneficially construed in advancement of the remedy, so as to secure and protect, and not defeat, the rights and objects intended by its provisions: Crowley v. Le Duc, 21 Minn. 412. A statute giving to an attorney, who appears for a party in an action, a lien upon his client's cause of action, or counterclaim, which attaches "to a verdict, report, decision, or judgment in his client's favor, and the proceeds thereof, in whosoever hands they may come," is prospective only in its operation, and has no effect upon a judgment previously recovered: Goodrich v. McDonald, 112 N. Y. 157. Such a statutory provision does not prevent the parties to the action

from settling the same, or the client from releasing a judgment in his favor: *Poole v. Belcha*, 181 N. Y. 200. An attorney's lien, under a statute, is an equitable right or privilege. It is not property in the thing which gives a right of action at law, but a charge upon the thing which is protected in equity, though courts of law may recognize it when the res is in possession of the lienor, and the owner is seeking to deprive him of it: *Fillmore v. Wells*, 10 Col. 228; 3 Am. St. Rep. 567. An attorney's lien, under a statute, for compensation, will support a suit in equity where the employment is questioned and the amount unliquidated, and, having assumed jurisdiction to enforce the lien, equity will retain it for all purposes, determining the incidental, though material, legal questions involved: *Fillmore v. Wells*, 10 Col. 228; 3 Am. St. Rep. 567. The statutory lien may be created when the only claim in suit is one for damages for personal injuries, unliquidated, and undetermined by judgment or verdict: *Kansas Pac. Ry. Co. v. Thacher*, 17 Kan. 92. Statutes declaring an attorney's lien have been held simply declaratory of the common law, so far as they are the same respecting the subject matter: *Gist v. Hanly*, 33 Ark. 233; but to stand in lieu of it as to matters not controlled by common law: *Jennings v. Bacon*, 84 Iowa, 403. In some of the states, an attorney cannot acquire a statutory lien for his compensation upon a judgment obtained by him, unless he has a special agreement as to the amount thereof: *In re Scoggin*, 5 Saw. 549. A prosecuting attorney who obtains judgment for a county against a defaulting treasurer is not entitled to a lien upon the judgment to secure his statutory fee: *Wood v. State*, 125 Ind. 219.

Extent of Lien.—The Massachusetts statute, securing to an attorney a lien for his unpaid fees and disbursements, on any execution lawfully in his hands, limits the lien to taxable costs only. It does not extend to counsel fees: *Woods v. Verry*, 4 Gray, 357; *Ocean Ins. Co. v. Rider*, 22 Pick. 210; *Little v. Rogers*, 2 Met. 478; *Rider v. Ocean Ins. Co.*, 20 Pick. 259; *Baker v. Cook*, 11 Mass. 236; *Dunklee v. Locke*, 13 Mass. 525. The statutory charging lien is so restricted in other jurisdictions: *Hooper v. Brundage*, 22 Me. 460; *Newbert v. Cunningham*, 50 Me. 231; 79 Am. Dec. 612; *Stratton v. Hussey*, 62 Me. 286; *Massachusetts etc. Co. v. Township*, 48 Fed. Rep. 145; but covers all fees and disbursements, though the suit is commenced by one attorney and prosecuted to final judgment by another: *Stratton v. Hussey*, 62 Me. 286; while in others the lien is not limited to costs or to taxable costs, but reaches all fees due for services rendered, whether the amount has been agreed upon or is to be settled in suit as upon a quantum meruit: *Fillmore v. Wells*, 10 Col. 228; 3 Am. St. Rep. 567; *Renick v. Ludington*, 16 W. Va. 378; *Morrison v. Ponder*, 45 Ga. 167; *Porter v. Hanson*, 36 Ark. 591; *Stephens v. Farrar*, 4 Bush, 13. In some states the attorney's lien upon the fruits of a suit is limited to the services rendered therein: *Massachusetts etc. Co. v. Township*, 48 Fed. Rep. 145. It does not extend to prospective services in the hearing of an appeal: See case last cited. In other states the lien is not limited to compensation for services rendered by the attorney in procuring the judgment upon which he relies: *Fillmore v. Wells*, 10 Col. 228; 3 Am. St. Rep. 567. It extends, however, only to the balance due on a judgment after an offset of mutual judgments: *Tiffany v. Stewart*, 60 Iowa, 207; *Field v. Maxwell*, 44 Neb. 900. In Louisiana, the statute authorizes a retaining lien of the costs, expenses, commissions, or fees due under a mandate, although the latter

is not liquidated: *Butchers' Union etc. Co. v. Crescent City etc. Co.*, 41 La. Ann. 355. After judgment has been obtained, an execution issued, and the lien has attached thereto, an attorney's statutory charging lien extends to suits arising from, and incidental to, the enforcement of the judgment: *Newbert v. Cunningham*, 50 Me. 231; 79 Am. Dec. 612.

Lien and Compromise Before Judgment.—The general rule is, that the statutory charging lien of an attorney does not exist until after judgment is obtained; and that parties, without the consent of the attorney, may settle and discontinue a suit before judgment, leaving the attorney to his remedy against the client for compensation. Such a settlement, however, to be effective, must be made in good faith, and not with a view of cheating the attorney: *Randall v. Van Wagenen*, 115 N. Y. 527; 12 Am. St. Rep. 828; *Poole v. Belcha*, 131 N. Y. 200; *Abbott v. Abbott*, 18 Neb. 503; *Sheedy v. McMurtry*, 44 Neb. 499; *Field v. Maxwell*, 44 Neb. 900; *Potter v. Mayo*, 3 Greenl. 34; 14 Am. Dec. 211; *Hobson v. Watson*, 34 Me. 20; 56 Am. Dec. 632; *Getchell v. Clark*, 5 Mass. 309; *Simmons v. Almy*, 103 Mass. 33; *Gist v. Hanly*, 33 Ark. 233, 235; *Casar v. Sargeant*, 7 Iowa. 317; *Wood v. Anders*, 5 Bush, 601; *Rowe v. Fogle*, 88 Ky. 105; *Hawkins v. Loyless*, 39 Ga. 5; *Newbert v. Cunningham*, 50 Me. 231; 79 Am. Dec. 612; and the rule that parties may compromise before judgment, without the consent of the plaintiff's attorney, is not confined to cases of contract. Attorneys have no statutory lien before judgment, on the plaintiff's claim for unliquidated damages in cases of tort. A release in such cases is effectual and a bar to the action: *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75; *Wood v. Anders*, 5 Bush, 601; *Abbott v. Abbott*, 18 Neb. 503. If a plaintiff, in good faith, dismisses his action, whether in contract or tort, receiving nothing from the defendant, the attorney for the plaintiff has no lien for his fee, and, therefore, must look to the plaintiff and not the defendant: *Rowe v. Fogle*, 88 Ky. 105. If an attorney recovers nothing for his client, there is nothing to which an attorney's lien can attach: *Wilson v. House*, 10 Bush, 406. In some states an attorney's statutory lien upon the claim in litigation attaches at the commencement of the action: *Robertson v. Shutt*, 9 Bush, 659; *Twiggs v. Chambers*, 56 Ga. 279. In other words, it is upon the cause of action: *Poole v. Belcha*, 131 N. Y. 200. But, in other jurisdictions, a client is not allowed to defeat his attorney's statutory lien by a compromise of the suit, though made in good faith, and without the knowledge or consent of the attorney. The lien is held to attach to the sum due upon the compromise: *Covington v. Bass*, 88 Tenn. 496; *Pleasants v. Kortrecht*, 5 Heisk. 694; *Twiggs v. Chambers*, 56 Ga. 279.

Collusive Compromise or Settlement.—If a settlement is made collusively between the parties to an action before judgment, for the purpose of defrauding the attorney out of his costs, authorized by statute, the court may interpose for his protection by permitting him to proceed with the suit, and to recover, if the facts permit it, to the extent of his costs in the action: *Randall v. Van Wagenen*, 115 N. Y. 527; 12 Am. St. Rep. 828; or his fees: *Coleman v. Ryan*, 58 Ga. 132; *Patrick v. Leach*, 17 Fed. Rep. 476. While a lien cannot be affected by a release of the judgment, without satisfying the attorney, and while the court may, and probably should, set it aside in order to protect the attorney's lien (*Bailey v. Murphy*, 136 N. Y. 50), yet the judgment will not be kept alive

after the release, unless necessary for the protection of the attorney. Until the lien is asserted in some way, the judgment remains the property of the client. In order, therefore, to justify the court in disregarding a settlement and release made between the parties in an action, it must be shown that to give full effect to them will operate as a fraud upon the attorney, or to his prejudice by depriving him of his costs, or turning them over to an irresponsible client: *Poole v. Belcha*, 131 N. Y. 200. An attorney cannot, on the compromise of a suit without his consent, maintain an independent action against the defendant in such suit on a claim that by a fraudulent and collusive settlement such defendant prevented the attorney from prosecuting the former action to judgment, and thereby obtained the fruits of an agreement between the attorney and the plaintiff, by the terms of which the attorney was entitled to one-half of any sum recovered, and to repay himself out of the other one-half for advances made by him to the plaintiff: *Randall v. Van Wagenen*, 115 N. Y. 527; 12 Am. St. Rep. 828. A motion to set aside a fraudulent settlement was sustained in *Aspinwall v. Sabin*, 22 Neb. 73; 3 Am. St. Rep. 258.

Waiver of Lien.—The lien allowed to an attorney by statute may be waived by any arrangement or transaction made by or with the attorney, which satisfactorily shows an intention to waive such lien and rely exclusively on some other security or mode of payment. It will continue to exist, however, unless a manifest intention that it shall not continue to exist appears: *Renick v. Ludington*, 16 W. Va. 378; *Cowen v. Boone*, 48 Iowa, 350. The attorney waives his lien by procuring the satisfaction of the judgment after filing his claim for a lien: *Cowen v. Boone*, 48 Iowa, 350. But he is not deprived of it by taking the note of his client for his fee: *Davis v. Jackson*, 86 Ga. 138.

Notice of Lien—Satisfaction of Judgment.—Under statutes giving to an attorney a charging lien on moneys due to his client and in the hands of the adverse party, the lien does not attach until notice is given: *Myers v. McHugh*, 16 Iowa, 335; *Hurst v. Sheets*, 21 Iowa, 501; and it must be in writing: *Phillips v. Germon*, 43 Iowa, 101. The lien will not be postponed to proceedings in garnishment in which notice is subsequently served: *Myers v. McHugh*, 16 Iowa, 335; and a right to set off a judgment recovered in one action against that recovered in another between the same parties which arises before such notice is superior to it: *Hurst v. Sheets*, 21 Iowa, 501. The notice of claim of lien is sufficient, if it is inserted by the plaintiff's attorney in the original notice served upon the defendant in an action, if such notice is properly signed; and a single notice that a lien is claimed is sufficient to cover all services rendered in the action by the claimant, whether before or after the service of the notice. Neither is the statutory right to a lien, given to an attorney, on money due his client in the hands of the adverse party, confined to actions on contract, but it exists in all actions where there is a money liability from the adverse party to his client: *Smith v. C. R. etc. R. Co.*, 56 Iowa, 720.

To secure the lien given by statute, to an attorney, on the papers of his client in his possession, or upon the money in his hands belonging to his client, or upon money in the hands of a third party, or upon the fruits of a judgment generally, in an action or proceeding in which the attorney was employed, he must give personal notice in writing, for the lien attaches only from the time of giving notice of it: *Wright v. Wright*,

70 N. Y. 98; *Leavenssen v. Lafontane*, 3 Kan. 523; *Kansas Pac. Ry. Co. v. Thacher*, 17 Kan. 92; *Patrick v. Leach*, 12 Fed. Rep. 661; *Elliott v. Atkins*, 26 Neb. 403; *Clark v. Sullivan*, 3 N. Dak. 280; *Hroch v. Aultman*, 3 S. Dak. 477. The notice is sufficient, if it fairly informs the party that a lien is claimed, its nature and character, for what it is claimed, and upon what it is sought to be enforced: *Crowley v. Le Duc*, 21 Minn. 412. In *Stephens v. Farrar*, 4 Bush, 13, it is held that the institution and prosecution of a suit to judgment, by the plaintiff's attorney, as such, is sufficient notice to the judgment defendant that the plaintiff's attorney has a lien upon the judgment for reasonable compensation for services. The written notice required by statute may be served upon the party personally, or upon his attorney of record: *Kansas Pac. Ry. Co. v. Thacher*, 17 Kan. 92; though it was questioned in *Wright v. Wright*, 70 N. Y. 98, whether a notice to defendant's attorney of the lien is sufficient; but, to bind a corporation, it must, if it is not served on its attorney, be served on its duly authorized agent: *Kansas Pac. Ry. Co. v. Thacher*, 17 Kan. 92; *Smith v. C. R. etc. R. Co.*, 56 Iowa, 720. The attorney can acquire no statutory lien upon a judgment, until notice is given: *Dodd v. Brott*, 1 Minn. 270; 66 Am. Dec. 541; though he has a lien from that time: *Leavenson v. Lafontane*, 3 Kan. 523. An attorney's claim of lien upon a judgment must be made in writing to bind the judgment creditor, or those claiming through him: *Phillips v. Germon*, 43 Iowa, 101. After the recovery of judgment, it is held, in some states, that it is optional with the attorney whether, in order to establish his lien, he will give written notice of such claim for a lien to the judgment debtor, or enter the same in the judgment docket: *Hroch v. Aultman*, 3 S. Dak. 477; *Clark v. Sullivan*, 3 N. Dak. 280, 283; but in others, that the lien, to be effectual, must be entered at the time the judgment is rendered: *Day v. Bowman*, 109 Ind. 383; *Alderman v. Nelson*, 111 Ind. 255. The entry of notice, however, upon a judgment docket of a claim to an attorney's lien does not entitle an attorney in a cause to a lien upon a judgment rendered therein, as against an assignment of the judgment made prior to the entry of notice: *Jennings v. Bacon*, 84 Iowa, 403. In some states, an attorney is not bound to give notice of his intention to rely on his lien, in order to make it available against a discharge by the client: *Newbert v. Cunningham*, 50 Me. 231; 79 Am. Dec. 612; *Gammon v. Chandler*, 30 Me. 152; or to protect himself against a purchaser of the judgment: *McCain v. Portis*, 42 Ark. 402.

After notice of the claim of lien upon a judgment by the plaintiff's attorney, the defendant cannot defeat such lien by paying or satisfying the judgment in full, to the plaintiff in person, and taking his receipt in full satisfaction thereof; or by any compromise or settlement which ignores the attorney's claim: *Stephens v. Farrar*, 4 Bush, 13; *Larned v. Dubuque*, 86 Iowa, 166; *Fisher v. Oskaloosa*, 28 Iowa, 381; *Foster v. Danforth*, 59 Fed. Rep. 750; *Brainard v. Elwood*, 53 Iowa, 30. The defendant, if he settles and pays after such notice, is still liable to the plaintiff's attorney for his fee, and execution may issue for the amount: *Winslow v. Central Iowa Ry. Co.*, 71 Iowa, 197; *Foster v. Danforth*, 59 Fed. Rep. 750. But a settlement is good as against the attorney, unless the defendant has been notified of his claim of lien: *Wright v. Wright*, 70 N. Y. 98; *Stevenson v. Smith*, 62 Ga. 175; *Green v. Southern Exp. Co.*, 39 Ga. 20. If the attorney's lien upon his client's recovery is prop-

erly declared by entry of record in the cause, the debtor is bound by it, whether he has actual notice of it or not: *Covington v. Bass*, 88 Tenn. 496. Under the Georgia statute, an attorney has the same right and power over a judgment and execution to enforce his lien as his client has, for the amount due thereon, "and no person can satisfy such judgment or execution until the lien or claim of the attorney is satisfied": *Tarver v. Tarver*, 53 Ga. 43.

Setoff—Assignment of Lien or Judgment.—Some cases hold that the statutory lien of an attorney upon a judgment obtained by him, to the extent of his reasonable fees and disbursements, is paramount to any rights of the parties in the action or to any setoff: *Rice v. Day*, 33 Neb. 204; *Robertson v. Shutt*, 9 Bush, 659; *Adams v. Lee*, 82 Ind. 537; *Hroch v. Aultman*, 3 S. Dak. 477; *Puett v. Beard*, 86 Ind. 172; 44 Am. Rep. 280; but others hold such lien subject to all proper setoffs existing against the judgment at the time it was rendered: *Ex parte Lehman*, 59 Ala. 631; *Mosely v. Norman*, 74 Ala. 422; *Tiffany v. Stewart*, 60 Iowa, 207; *Field v. Maxwell*, 44 Neb. 900; *Clark v. Sullivan*, 3 N. Dak. 280. A judgment assigned by a client to his attorney in compensation for services cannot be set off: *Wells v. Elsam*, 40 Mich. 218.

The lien of an attorney, upon a judgment, for his compensation, is incident to the judgment to which it is attached, and is assignable: *Day v. Bowman*, 109 Ind. 383; *Sibley v. Pine County*, 31 Minn. 201.

The assignee of a judgment takes the equitable title, subject to an attorney's lien on the same for a reasonable fee: *Sexton v. Pike*, 13 Ark. 193; *Cunningham v. McGrady*, 2 Baxt. 141; *Ballinger v. Tarbell*, 16 Iowa, 491; 85 Am. Dec. 527. If the judgment creditor assigns the judgment to his attorney, it merges any statutory lien for costs which the attorney may have had thereon: *Dodd v. Brott*, 1 Minn. 270; 66 Am. Dec. 541. If the plaintiff assigns his interest in the judgment before it is entered, the assignee holds free from the attorney's lien: *Potter v. Mayo*, 3 Greenl. 34; 14 Am. Dec. 211.

Priorities.—The statutory lien of an attorney attaches, for his fees, upon all property recovered by his services, and is superior to all of the liens thereon: *Sexton v. Pike*, 13 Ark. 193. An attorney's lien upon the fund or property recovered is superior to the rights of either the assignee or heirs of the plaintiff in the property; but it extends only to his compensation for services in the particular suit in which it is claimed: *Porter v. Hanson*, 36 Ark. 591. An attorney, who has procured a will to be set aside, has a lien upon the fund thus secured to his client, and is entitled to priority of payment over a judgment creditor of the latter, whose lien attached after the contract was made with the attorney: *Justice v. Justice*, 115 Ind. 201. The attorney's lien is superior to a mortgage of the debtor's realty made pending an appeal: *Covington v. Bass*, 88 Tenn. 496.

Lien on Land.—Without a statute to authorize it, attorneys cannot sustain a claim against real estate for services in either prosecuting or defending a suit involving it: *Hershy v. Du Val*, 47 Ark. 86; *Fowler v. Lewis*, 36 W. Va. 112. An attorney, therefore, has no lien upon the assets of an estate realized from a sale of its lands for defending a suit brought to establish a demand against it; and no lien upon a fund arising from a sale of land of a person or estate, already owned by such person or estate, for services purely defensive, in resisting suits brought to establish demands against it: *Fowler v. Lewis*, 36 W. Va. 112. The

lien on the specific property recovered, provided by the Arkansas statute, is limited to cases where there has been an actual recovery, and cannot be extended to professional services which merely protect an existing title or right to property: *Hershy v. Du Val*, 47 Ark. 86; *Lane v. Hallum*, 38 Ark. 385; *Porter v. Hanson*, 36 Ark. 591. The privilege granted by the Louisiana statute in favor of all attorneys, for the amount of their professional services on all judgments obtained by them, cannot be extended so as to affect property which the creditor may have acquired in execution or in satisfaction of the judgment: *Luneau v. Edwards*, 39 La. Ann. 876; and the statutes of that state confer no privilege upon real estate in favor of attorneys at law for their fees in obtaining judgment maintaining the title and possession of defendants in a petitory action: *Mechanics' etc. Ins. Co. v. Levi*, 40 La. Ann. 135. An attorney has a lien for his fee upon the fund recovered. Hence, if, in satisfaction of a judgment for money, the client purchases land sold to satisfy it, the lien attaches to the land: *Porter v. Hanson*, 36 Ark. 591.

In other jurisdictions, an attorney's statutory lien attaches as well to judgments involving an interest in real property as to mere money judgments: *Fillmore v. Wells*, 10 Col. 228; 3 Am. St. Rep. 567. Such a lien will attach to land recovered by the attorney for his client: *Wilson v. Wright*, 72 Ga. 848; *Hunt v. McClanahan*, 1 Heisk. 503; *Perkins v. Perkins*, 9 Heisk. 95. It has been held that an attorney has a lien on a homestead for services rendered in protecting it against creditors: *Strohecher v. Irvine*, 76 Ga. 639; 2 Am. St. Rep. 62; but, on the other hand, where a plaintiff sought to establish a resulting trust in land, but was defeated, it was held that the defendant's solicitor could not assert a lien on the land thus successfully defended: *Garner v. Garner*, 1 Lea, 29.

Enforcement of Lien.—If an attorney attempts to assert a statutory lien for his fees to the prejudice of other creditors, the facts must appear as to the nature and extent of the recovery by him for his client. The mere fact that a commissioner, in making deeds of partition, has inserted a lien in favor of attorneys, does not give them a lien, where the authority of the commissioner to insert the lien does not appear: *Martin v. Kennedy*, 83 Ky. 335. The lien of an attorney is not kept in force by his giving the statutory security required to pay over money collected by him on a judgment, if the claimant is found to be entitled to it: *Cross v. Ackley*, 40 Iowa, 493. In enforcing an attorney's lien, the amount due for fees must be shown: *Day v. Bowman*, 109 Ind. 383. An attorney may enforce a lien on a judgment for alimony: *Putnam v. Tennyson*, 50 Ind. 456. If the amount due on an execution is sufficient to discharge the claim or lien of an attorney, who is proceeding to enforce it, the defendant cannot arrest the proceeding for illegality, on the ground that the judgment plaintiff has agreed, for value, to give indulgence, or by setting up the fact of payment, and that the attorney has no lien, unless the payment was made by the defendant: *Tarver v. Tarver*, 53 Ga. 43. If a case has been compromised pending appeal, the lien of attorneys cannot be enforced against the debtor or his property for a larger sum than that due to their client under the compromise: *Covington v. Bass*, 89 Tenn. 496. If the sheriff has collected the money due on a judgment, attorneys, who have given him notice of their lien, may require him to retain the amount of their lien out of the money so collected, when the money is demanded by an assignee of the judgment: *Gill v. Truelsen*,

33 Minn. 373. If it appears that fees are due an attorney for services in a particular case, he may be admitted, under the Nebraska statute, as a party plaintiff in such action for the purpose of protecting and enforcing his lien: *Reynolds v. Reynolds*, 10 Neb. 574; *Patrick v. Leach*, 17 Fed. Rep. 476; *Oliver v. Sheeley*, 11 Neb. 521. If an attorney neglects to proceed to enforce his lien for compensation under a judgment involving an interest in land until the judgment debtor has discharged his liability, or an innocent third party has, in good faith and for a valuable consideration, purchased the land, the attorney will be held to have waived and lost his right to look to the debtor on one hand and the land on the other for his compensation: *Fillmore v. Wells*, 10 Col. 228; 3 Am. St. Rep. 567. But, after an attorney has filed a bill to enforce his lien for fees, one who purchases the land does so with notice, and does not acquire a title freed from the attorney's lien: *Wilson v. Wright*, 72 Ga. 848. An attorney's lien upon a judgment cannot be enforced after the right of action upon the contract for such fees between the attorney and client has become barred by the statute of limitations: *Larned v. Dubuque*, 86 Iowa, 166. So, if he never acquired any lien on the judgment for his fees by a compliance with the statute, he cannot, after his claim is barred in a suit at law by the statute of limitations, prosecute a suit in equity to have a lien established upon the judgment: *McNagney v. Frazer*, 1 Ind. App. 98. If an attorney renders services in an action under an agreement that he is to be paid only in case of success, and only out of the proceeds received, he has an equitable lien upon, or ownership, as equitable assignee, in such proceeds; but, if the agreement fixes no sum or rate of compensation for his services, the attorney, in an action to enforce his lien or claim, is bound to establish, by competent evidence, as against the client, the value of his services: *Harwood v. La Grange*, 137 N. Y. 538.

SMITH v. EIGERMAN.

[5 INDIANA APPEALS, 299.]

TAXES UPON REAL ESTATE constitute a personal liability against the person owning it at the time they accrued, but not against a subsequent purchaser thereof.

DEEDS—COVENANT AGAINST ENCUMBRANCES.—An encumbrance upon property at the time the grantor acquired the title to it is not within his covenant against "encumbrances done or suffered" by him.

DEEDS—ENCUMBRANCES "SUFFERED" BY GRANTOR. An encumbrance upon property "suffered" by the grantor means one within his power and duty to have avoided. "Suffer," in that connection, implies reasonable control, and it cannot be held to apply to a thing not caused by the act of the party, nor within his power to prevent.

DEEDS—ENCUMBRANCE "SUFFERED" BY GRANTOR.—Taxes which were a lien upon land at the time of its conveyance, though not payable until afterward, are not an encumbrance within the scope of a covenant in deed of conveyance, limiting the liability of the grantors to encumbrances resulting from their acts, or things "suffered" by them, where it is not shown that they were under any personal obligation to discharge the tax lien.

PLEADING—UNPAID TAXES—SUFFICIENCY OF COMPLAINT FOR BREACH OF COVENANT AGAINST ENCUMBRANCES.—A complaint for the breach of a special covenant against encumbrances in a deed of conveyance, alleging that unpaid taxes constituted an encumbrance upon the land at the time of its conveyance, does not state facts sufficient to constitute a cause of action, where it does not allege that the defendants owned the property at the time the taxes accrued, this being necessary to show their personal liability.

J. W. Nichols, for the appellants.

G. W. Beeman, H. A. Steis, and M. M. Hathaway, for the appellee.

²⁶⁶ **CRUMPACKER, J.** This action was brought by Fredericka Eigerman against Smith and wife for the breach of a special covenant against encumbrances contained in a deed of conveyance. The deed was executed on the eleventh day of September, 1890, and contains the following covenant: "The said Edwin K. Smith, party of the first part, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said party of the second part, her heirs and assigns, that he has not done, or suffered to be done, anything whereby the said premises hereby granted are or may be in any manner encumbered or charged." There was no general covenant in the deed upon the subject of encumbrances. It is averred in the complaint that the taxes for the year 1890, amounting to one hundred and eighty dollars, constituted an encumbrance upon the land at the time of the conveyance, and plaintiff had been compelled to pay the same to protect her title. The plaintiff had judgment below, and the defendants ²⁷⁰ appeal and assign for error that the complaint does not state facts sufficient to constitute a cause of action.

Under the revenue laws of this state, taxes become a lien upon real estate upon the first day of April, although they are not payable until the first day of the following January, so it is manifest at the time the deed in this case was executed, there was a valid and subsisting lien upon the property. Taxes upon real estate constitute a personal liability against the person owning it at the time they accrued, but a subsequent purchaser is not personally liable for taxes which stood against the property at the time of his purchase, although they continue to be a lien upon the property: *Blodgett v. German Sav. Bank*, 69 Ind. 153.

It does not appear from the complaint under consideration that appellants, or either of them, owned the property in question on the first day of April, 1890, the date upon which the taxes accrued. By the special covenant in the deed, the liability of the grantors is limited to encumbrances which resulted from acts

of theirs or things suffered by them to be done, and the question for decision is, Do the taxes for the year 1890 constitute an encumbrance within the scope of that covenant? It may be said at the outset that the taxes accrued through no act of the grantors; that they did nothing to charge the premises with the lien, so if any liability exists it must be found under the other clause of the covenant.

An encumbrance upon property, suffered by the grantor, means one within his power and duty to have avoided. "Suffer," in that connection, implies responsible control, and it cannot be held to apply to a thing not caused by the act of the party nor within his power to prevent. An instance of a lien within the scope of the covenant would be a judgment against the covenantors. While it might not have been within their power to have prevented the judgment in one sense, within the sense of the law, it could have been avoided by the payment of the debt. Such a lien could not exist except by the default of the parties in failing to ²⁷¹ discharge their personal obligation, consequently, could only be by their sufferance. But where the grantor is under no personal obligation to discharge a lien, and it was not created by his act, he cannot be held upon a covenant like that under consideration. An encumbrance upon the property at the time the grantor acquired the title to it is not within his covenant against "encumbrances done or suffered" by him: *Parker v. Parker*, 93 Ala. 80; *Brown v. Young*, 69 Iowa, 625; *Cole v. Lee*, 30 Me. 392; *Comstock v. Smith*, 13 Pick. 116; 23 Am. Dec. 670.

The case of *Hobson v. Middleton*, 6 Barn. & C. 295, was an action for the breach of a limited covenant against encumbrances resulting from acts done or suffered and permitted by the defendant. It was charged in the declaration that the defendant joined in, and consented to, the execution of a deed which created a charge upon the premises. The answer alleged that the defendant could not have prevented the execution of the instrument, and the court held he was not responsible for the deed of the other party, although he did consent to its execution. In deciding the case, Bayley, J., said: "Now the words 'permitting and suffering' do not bear the same meaning as 'knowing of and being privy to'; the meaning of them is, that the defendant should not concur in any act over which he had a control. As far as the execution of the deed by himself, he admits the breach, but, as to the residue, says he could not prevent it; and, if 'permitting and suffering' applies only to that which he could prevent, it is clear that his consent in this case was not a breach of the covenant."

The same meaning was given the terms "suffer" and "permit" in the following cases: *Towson v. Green*, 2 Car. & P. 110; *Stanford v. Forbes*, 6 Ad. & E. 572.

Applying these principles to the case in judgment, it must be held that the complaint is insufficient. The encumbrance was not created by the act of the appellants, nor by any power for which they were in any respect ²⁷² responsible. They could not have removed it at any time before the deed was executed, and it does not appear that they were under any personal obligation to have done so afterward.

The judgment is reversed.

TAXES—COVENANT AGAINST ENCUMBRANCES.—A tax is generally regarded as a personal obligation, but the owner of real estate is not personally liable for taxes assessed against another as the owner: See monographic note to *Richards v. Commissioners*, 42 Am. St. Rep. 638, 657, on the recovery of a personal judgment for taxes. *Cochran v. Guild*, 106 Mass. 29, 8 Am. Rep. 296, holds that taxes assessed on land May 1st are an encumbrance thereon from that date, though payment is not to be made until the tax bills are issued to the collector, on October 1st, and that there is, therefore, a breach of covenant against encumbrances executed in June: *Contra*, *Barlow v. Saint Nicholas etc. Bank*, 63 N. Y. 399; 20 Am. Rep. 547. That a tax is an encumbrance, see note to *Burr v. Lamaster*, 27 Am. St. Rep. 435.

FARMERS' MUTUAL FIRE ASSOCIATION OF ALLEN COUNTY v. KRYDER.

[5 INDIANA APPEALS, 430.]

INSURANCE—BARN AND "CONTENTS THEREIN"—HORSES KILLED OUTSIDE OF BARN.—No liability accrues in case of loss, under a policy of insurance covering a barn and "contents therein," except for such property as was actually in the barn when damaged or destroyed. Hence, there can be no recovery for the loss of horses, killed by lightning, which were not in the barn at the time they were killed.

INSURANCE—AGENT'S REPRESENTATION AS TO PROPERTY COVERED.—The liability of an insurance company is not affected by its agent's representation to the insured, while writing a policy upon a barn and "contents therein," that his horses will be within the protection of the policy, whether in the barn or out.

W. G. Colerick, for the appellant.

⁴³¹ **CRUMPACKER, J.** The Farmers' Mutual Fire Association is a mutual fire insurance company organized under the laws of this state for the purpose of insuring farm property, exclusively, in Allen county. On the tenth day of March, 1890, Kryder became a member of said company, and it issued to him a policy for \$1,400, insuring him against loss by fire or lightning,

distributed as follows: Frame dwelling-house, \$400; contents therein, \$300; frame barn, \$400; contents therein, \$300.

The application described the property and distributed the insurance in the same manner as the policy. Upon the back of the policy, the company's articles of association and by-laws were printed, and, by apt reference in the policy, they were made part of it. At the time the policy was issued, Kryder had three horses in the barn, besides harness, vehicles, tools, farm implements, hay, and grain. He usually kept these horses in the barn, except when they were out temporarily for ordinary use as farm horses. He sold one of the horses in the barn at the date of the policy and purchased another, which he kept and used in the place of the one sold. On the eighth day of July, 1890, Kryder was hauling wheat with one of the horses he had in the barn at the date of the policy and the one subsequently purchased, and, while approaching the barn with a load of wheat, both of said horses, when about fifty feet from the barn, were struck and killed by a shaft of lightning. Suit was brought upon ⁴³³ the policy to recover the loss, and the plaintiff obtained judgment for the value of both horses.

There was no limit to the duration of the policy, provided assessments were paid and its conditions were kept by the insured. Notice and proof of loss were duly furnished. It appears that the company's agent examined the horses in the barn before taking the risk, and represented to plaintiff that they would be covered by the policy, as well while being used out of the barn as when standing in it, but plaintiff read the policy and application before accepting the insurance.

These facts are disclosed by the pleadings and also by the special findings, and they sufficiently present the question involved in the appeal, viz: Were the horses, at the time they were killed, within the protection of the policy? Obscure and equivocal provisions in insurance policies are to be construed in favor of the insured. Security being the purpose of such contracts, they are to be construed with the view of effectuating that end, and regard must be had to the character of the property covered by the policy and the nature of the use that is ordinarily made of it. One who insures his property, in the absence of express restrictions in the contract, may make such use of it as it is reasonably adapted to without forfeiting the protection of the policy. Insurance upon a stock of merchandise kept for sale in the course of trade will give the insured the right to carry on his business in the ordinary way, and stock purchased to replace that which is sold will receive the benefit of the insurance. It would be un-

reasonable to suppose that one would insure in such a manner that he could get the benefit of the security only by suspending business. Risks of that character are termed "shifting risks," and the liability of the insurer has reference to the property on hand at the time of the loss instead of the date of the policy.

⁴³³ The contents of a barn of a farmer, from the nature of his vocation, are almost constantly changing. Hay and grain raised one season are sold or consumed by stock and replaced by the crop of the season following. Tools and implements wear out and decay with use and age and others are purchased as the necessities require. Animals may die or be sold and others reared or purchased to supplant them, so a long term policy upon the contents of the barn of a farmer must be issued in contemplation of these changes, and belongs to the class of "shifting risks" above noted.

These principles are well established, and, if the animals destroyed in the case before us were, at the time of their destruction, contents of the barn, within the meaning of the policy, appellee would be entitled to recover for the horse purchased after the insurance was effected, as well as the other. But no personal property is described in the policy, and none is referred to therein, even in general terms. It cannot be said that the insurance was limited to the property in the barn at the date of the policy, because it is apparent that the policy would cover any property such as is usually kept in agricultural barns at any time during the term of insurance. If there had been no horses in the barn when the policy was issued, it would cover those afterward put in it as "contents." Where personal property is insured by descriptive expressions, though very general, and is represented in the application and policy as being "contained in" a certain house or barn, or upon a certain farm, such representation amounts to a warranty that the property is at the place designated at the time the policy was executed, but not that it will remain there. Under such provisions, the insured has the right to use the property in the usual manner without losing his protection, and he may remove it temporarily, if it be necessary in making such use of it. ⁴³⁴ Thus, it is held, that particular property is covered by the policy, and the designation of the place of its location is descriptive, and designed merely to aid in its identification: *McCluer v. Girard etc. Ins. Co.*, 43 Iowa, 349; 22 Am. Rep. 249; *Holbrook v. St. Paul etc. Ins. Co.*, 25 Minn. 229; *Noyes v. North Western etc. Ins. Co.*, 64 Wis. 415; 54 Am. Rep. 631; *Haws v. Fire Assn.*, 114 Pa. St. 431; *Lyons v. Providence etc. Ins. Co.*, 13 R. I. 347; 43 Am. Rep. 32; *Hartford etc. Ins. Co. v. Farrish*,

73 Ill. 166; *English v. Franklin etc. Ins. Co.*, 55 Mich. 273; 54 Am. Rep. 377; *Bradbury v. Westchester Fire Ins. Assn.*, 80 Me. 396; 6 Am. St. Rep. 219.

In the case of *McCluer v. Girard etc. Ins. Co.*, 43 Iowa, 349, 22 Am. Rep. 249, it was held that a policy insuring carriages "contained in a frame barn," giving its location, covered a phaeton which was in the barn at the date of the policy, but was destroyed at a shop where it had afterward been temporarily removed for repairs. In the opinion, however, the court said: "In the case at bar, there is nothing to indicate that it was the intention to insure the contents of the barn as such."

The case of *Bradbury v. Westchester Fire Ins. Assn.*, 80 Me. 396, 6 Am. St. Rep. 219, was an action upon policies which covered the plaintiff's "frame stable building, occupied by assured as a hack, livery, and boarding stable, situated," etc., and his "carriages, sleighs, hacks, hearses, harnesses, blankets, robes, and whips contained therein." The suit was for the loss of a hack by fire while at a shop for repairs. The court held there could be no recovery, because there was no particular property described in the policies of which the location could be descriptive. In deciding the question, it was said: "The policies insure such of the plaintiff's carriages, hacks, etc., as are contained in his stable at the time of loss. We can see no other way of identifying the property covered by the policies."

There is a possible conflict upon some of the propositions enunciated, between the Maine case upon the one side and several of the others above cited upon the other, ⁴³⁵ but an examination of those cases will demonstrate that the facts were clearly distinguishable from those in the case before us, and entirely different principles were applicable. There the property was described, but here no description was suggested or referred to in the policy, so far as is pertinent to this inquiry, except the barn and "contents therein." The contents of the barn were insured as such, and any item of property which was not included in that designation was not within the terms of the policy. There is no other way of discovering the property insured. Appellee's barn may have had the capacity to accommodate only three horses, and yet he may have had twenty upon his farm, which at one time or another within the existence of the insurance had been kept in the barn, and the construction contended for by appellee would require the insurance to follow and attach to all of these horses while owned by him and kept upon the farm. This would greatly enhance the risk under the lightning clause in the policy, and perhaps five times as much property as

could be possibly gotten into the barn at any one time would be embraced in the term "contents therein." We cannot give the policy in question any such an interpretation. It is clear, we think, upon well-understood principles, that no liability can accrue under the policy, within the meaning of the term "contents therein," except for such property as was actually in the barn when damaged or destroyed.

The fact that the agent represented to appellee that his horses would be within the protection of the policy whether in the barn or out cannot affect appellant's liability. The policy was read by appellee, and the representation was not of any material matter of fact, but of a question of law relative to the construction of the contract. Appellee had no right to rely upon such representation, and fraud cannot be predicated upon it: *Burt v. Bowles*, 69 Ind. 1; *Clodfelter v. Hulett*, 72 Ind. 137.

⁴³⁶ Counsel for appellee have not favored us with a brief of the case.

The judgment is reversed, with instructions to the trial court to restate the conclusions of law in accordance with this opinion, and render judgment thereon in favor of appellant.

FIRE INSURANCE—CONSTRUCTION OF POLICY.—If property "contained in" a certain place is insured against fire, it has been held that there can be no recovery if it is burned elsewhere: *English v. Franklin Fire Ins. Co.*, 55 Mich. 273; 54 Am. Rep. 377; monographic note to *McCluer v. Girard Fire etc. Ins. Co.*, 22 Am. Rep. 253-255; but, in a majority of cases, the loss is held to be covered by the policy, which is supposed to be issued with reference to the ordinary use and nature of property: See monographic note to *McCluer v. Girard Fire etc. Ins. Co.*, 22 Am. Rep. 253-255; *Noyes v. Northwestern etc. Ins. Co.*, 64 Wis. 415; 54 Am. Rep. 631; *Niagara Fire Ins. Co. v. Elliott*, 85 Va. 962; 17 Am. St. Rep. 115; *Lyons v. Providence etc. Ins. Co.*, 13 R. I. 347; 43 Am. Rep. 32. Thus, if a policy of insurance is issued on a carriage described as "contained in a frame barn," and the carriage is destroyed by fire while at a carriage shop undergoing repairs, the loss is covered by the policy: *McCluer v. Girard Fire etc. Ins. Co.*, 43 Iowa, 349; 22 Am. Rep. 249.

A MISREPRESENTATION OF LAW affords no basis for an action of deceit: Note to *Cottrill v. Krum*, 18 Am. St. Rep. 559. If one has no right to rely upon a representation, the law will not protect him, if he does act upon it. He must exercise his common sense: Note to *Thompson v. Phoenix Ins. Co.*, 46 Am. Rep. 360.

PENNSYLVANIA COMPANY v. DOLAN.

[6 INDIANA APPEALS, 109.]

CONTRACTS FOR PERMANENT EMPLOYMENT—NEGLIGENCE—PERSONAL INJURIES—RELEASE.—If a yard brakeman, employed by a railroad company, is injured through the negligence of the company, while performing his duties, and the company, in consideration of a written release executed by the brakeman, discharging the company from liability, pays him one hundred dollars, and promises, verbally, to give him "steady and permanent employment," at a stated compensation, such payment and promise is an acknowledgment of the company's liability, and the release is a good consideration for the verbal promise. Hence, if the company breaks such promise by discharging the employé without cause, the latter can maintain an action for damages for breach of the contract, and need not make the release a part of his complaint, as the action is not upon a written instrument, but upon the company's parol promise.

CONTRACTS TO GIVE "STEADY AND PERMANENT EMPLOYMENT"—PUBLIC POLICY.—A verbal promise by a railroad company to give an employé, who is injured while performing his duties, "steady and permanent employment," in consideration of a written release executed by the latter, discharging the company from all liability arising out of the injury, is not void for uncertainty and indefiniteness as to time of employment, but is an agreement to retain the employé as long as the latter is able, ready, and willing to perform such services as the company may have for him to do. Such promise is not against public policy on the ground that the company is a quasi public servant, and cannot, by this kind of an agreement, "tie its hands," as the public could not be affected by holding the company to its contract.

CONTRACTS—"STEADY AND PERMANENT EMPLOYMENT"—RELEASE—MUTUALITY.—There is no want of mutuality in a contract made by a person having a cause of action against another for injuries sustained through the latter's negligence, whereby the former relinquishes his claim in consideration of a sum of money advanced, and of the latter's promise to furnish him with "steady and permanent employment" at stated wages, as the claim relinquished has a certain value.

CONTRACTS—MASTER AND SERVANT—BREACH OF CONTRACT OF EMPLOYMENT—DAMAGES.—If a servant, hired for a definite period, is discharged by the master before the expiration of such term, he has his remedy in an action for damages for the breach of the contract.

CONTRACTS—PERSONAL SERVICES—STATUTE OF FRAUDS.—A contract personal in its nature, as one for personal services, which might terminate with the death of the party making it, though the contract is for an indefinite period, or a term of years, is not within the statute of frauds.

EVIDENCE—MERGER—PROOF OF CONSIDERATION OF RELEASE BY EXTRINSIC FACTS.—If an employé is injured during his employment and gives his employer a written release from liability in consideration of a parol promise by the latter to employ him for a definite time, at fixed wages, and suit is brought for a breach of the verbal agreement, the parol agreement to employ is not merged in the written release, and the true consideration of the release may be shown by proof of extrinsic facts, even if it were treated as the foundation of the action, especially where it is incomplete and does not contain a stipulation for contractual consideration, nor an enforceable contract.

DAMAGES—WRONGFUL DISCHARGE OF EMPLOYÉ BEFORE TERM OF SERVICE HAS EXPIRED.—The measure of dam-

ages for the wrongful discharge of an employé before his term of service has expired, where he elects to treat the contract of hire as continuing in force, and sues the master for breach of the contract, is the amount of wages he would have earned under the contract, deducting such sums as he earned, or, by reasonable diligence, might have earned, elsewhere, allowance being made for the expense of obtaining other employment. The burden of proof is on the defendant to show that the plaintiff might have obtained other employment.

PLEADING—VARIANCE—TIME OF EMPLOYMENT.—There is no fatal variance between the proof and complaint in an action for damages for a breach of a contract of employment, where the complaint avers the time of employment to be "steady and permanent," and the plaintiffs' testimony is that he was employed for life.

S. Stansifer, for the appellant.

¹¹⁰ **REINHARD, J.** The first error of which the appellant complains is the overruling of its demurrer to the appellee's complaint, which, with the caption and formal parts omitted, is as follows: "The plaintiff, James Dolan, complains of the defendant, the Pennsylvania Company, and for cause of action says that the defendant company was, on the days and times of the grievances hereinafter mentioned, a railroad corporation duly organized and existing under the laws of the state of Indiana, owning, using, and operating a line of railroad known as the Jeffersonville, Madison, and Indianapolis Railroad, together with its locomotives, cars, switches, sidetracks, and other appurtenances ¹¹¹thereto belonging at the county of Clark, in said state; that on the ninth day of January, 1890, the plaintiff was in the service of the defendant, in the capacity of yard brakeman, at said county; that the defendant required of him, as a part of his duties as such brakeman, to couple and uncouple cars, and assist in removing and transferring them from place to place on the defendant's track, in defendant's yard, and, in the coupling and uncoupling of said cars, the duties of plaintiff required him to pass in between them while they were in motion; that while the plaintiff was then and there engaged in the services of defendant in the line of his employment, and in the act of coupling defendant's cars, he received a permanent injury of his right hand, causing the loss of his thumb and forefinger, and, as a result thereof, permanently lost the natural and proper use and strength of his right hand and arm, and caused him thereby to suffer great pain in body and mind, and put him to great expense for medical and surgical aid and nursing in trying to cure himself of said injuries; that said injury was caused by the negligent failure of the defendant in knowingly allowing and permitting the drawheads and deadwoods attached to said cars to become broken and out of repair, and also in allowing and permitting the deadwoods to be and remain of uneven height on said cars, thereby render-

ing it very dangerous and hazardous to couple the same, which facts were well known to the defendant and unknown to the plaintiff; that said injury was caused by the negligence of the defendant, and without any fault or negligence on the part of the plaintiff; that by reason of said injury, the defendant became liable to plaintiff in damages in the sum of five thousand dollars (\$5,000); that at the time of receiving said injury, plaintiff was earning and receiving from the defendant for his services the sum of two dollars per day for his said services; that the said injury rendered the plaintiff unfit and unable to continue in the service of the defendant as yard ¹¹² brakeman, and he was, for that reason, discharged from the service and pay of the defendant by the defendant; that thereafter, to wit. on the thirty-first day of January, 1890, the plaintiff called on the defendant and demanded of defendant the amount due him for said injuries, and requested the payment thereof; that defendant then promised and agreed to pay plaintiff therefor, in full settlement and satisfaction for said debt and injury, the sum of one hundred dollars in money and receive him back into their service, and re-employ him and give him a job of steady and permanent employment, and pay him therefor an amount per day for his services equal to the amount he was earning and receiving at the time of his severe injury; that said sum of one hundred dollars would be paid at once, and that he should be employed as soon as he was sufficiently recovered from his severe injuries as to be able to work; that the defendant required, as a condition to said promise and agreement, and as a further consideration therefor, that plaintiff should sign and execute a release to defendant, releasing defendant from all liability for damages and all claims and rights whatever growing out of said injury, and relinquishing all claims and rights to bring suit therefor; that the defendant promised and agreed that all the said promises and agreements would be faithfully and honestly carried out and performed by defendant in the event that the said promises, agreements, and conditions were accepted by plaintiff. It was further provided and agreed by the parties that the said promises and agreements, when carried out and performed by defendant, should operate and be in full satisfaction and payment to plaintiff of all debts, damages, and causes of action growing out of, or which might arise by reason of, said injury in any way. The plaintiff then accepted of said promises, agreements, and conditions in full satisfaction and payment of his injuries: that afterward, to wit. on the — day of February, 1890. in pursuance of said promises, agreements, conditions, ¹¹³ and acceptance thereof as aforesaid, the plaintiff and

defendant met at the office of the defendant, in the city of Jeffersonville, in said county, and the defendant then and there, for the purpose of carrying out the said promises and agreements, paid to plaintiff the sum of one hundred dollars as a partial payment of the same, and the plaintiff then and there accepted of defendant the said sum of one hundred dollars as a partial payment and satisfaction of the promises and agreements of the defendant as agreed, and the plaintiff then and there signed and executed to defendant the release required by the defendant and agreed to by the parties as aforesaid, and to the full and complete satisfaction of the defendant, which release was received and accepted by defendant and is now in its possession; that afterward, to wit, on the first day of March, 1890, when plaintiff had sufficiently recovered of his said injuries as to be able to go to work, he called on the defendant and notified it of that fact, and demanded that the defendant re-employ him; whereupon defendant at once employed him and gave him a job of flagging its trains, in which employment defendant kept and retained him about three months, when, without any cause or fault on the part of the plaintiff, the defendant discharged him from its services and pay, without giving any cause or reason to plaintiff for so doing; that during all the time of said three months' re-employment the plaintiff honestly and faithfully and properly discharged all the duties assigned him; that ever since the discharge of the plaintiff last above named, the defendant has refused, and now refuses, to receive the plaintiff back into its service and give him a job of steady and permanent employment, or give him employment of any kind, or pay him any money, though often requested by plaintiff to do so; that the plaintiff was able, ready, and willing to continue in the service of defendant, at flagging trains, and is now, and has been at all ¹¹⁴ times, able, ready, and willing to flag trains, or to do and perform any other service for defendant within his power to do, all of which facts, now and during all of said time, were well known to defendant; by reason of which facts and grievances plaintiff has, during all of said time, been out of employment and unable to earn any money, and has suffered great loss and damage thereby, in the sum of five thousand dollars; that the plaintiff has done and performed all the conditions, promises, and agreements on his part to be done and performed by him in the premises as hereinbefore stated; that the defendant has failed and refuses to do and perform its promises and agreements in manner and form as above stated and set out. Wherefore," etc.

We think it readily appears from the foregoing complaint that the gravamen of the action is not the personal injury therein set out, but the breach of the contract pleaded: *Kentucky etc. Cement Co. v. Cleveland*, 4 Ind. App. 171.

The liability of appellant for the injury is acknowledged by the agreement to compensate the appellee for the same. The question with which we are concerned, therefore, is not one of tort, but of pure contract. The appellee was injured by the appellant's negligence. The parties met and agreed to settle the controversy arising out of such injury, the appellant agreeing to pay the appellee in cash one hundred dollars, and to give him steady and permanent employment at a compensation equal to that he was receiving from the company prior to the sustaining of the injury. In consideration of the premises, the appellee agreed to execute to the appellant a written release, discharging the latter from all liability arising out of the personal injury sustained by the appellee, for which the appellant was liable to him.

There is no claim that the release was procured by fraud, nor can there be any question as to the sufficiency of the ¹¹⁵ consideration, as a parol promise to take the party back into employment is sufficient to that end: 20 Am. & Eng. Ency. of Law, 762, note 1.

The release was in writing. It is alleged that the instrument is in possession of the appellant, but it is not shown that it, or a copy thereof, had been demanded of the latter and refused. It seems to have been the view of the pleader that it was necessary to make the release an exhibit. It is insisted on behalf of the appellant that, in order to make the excuse for not filing such exhibit valid, it should have been averred that the original or a copy of the instrument had been demanded of the appellant and refused. It is proper to state here that we do not regard the complaint as declaring upon a written instrument. The reasons for this must be obvious. In the first place the rule is well settled that where the contract declared upon is not all in writing, it is regarded as a parol contract: *Louisville etc. Ry. Co. v. Reynolds*, 118 Ind. 170. But, aside from this, the action is not upon the release, but upon the promise of the appellant to do certain things for which the release was given, and of which it formed the consideration. We take it that if A conveys to B by deed a tract of land, for which B agrees to pay A a sum of money, in an action for the purchase price the deed is not the foundation of the suit, and need not be made an exhibit of the complaint. The agreement to pay is the foundation of such action, and,

whether or not notes or other writings had been executed for such purchase money, the complaint is in no sense based upon the deed. The pleading of the instrument first occurs generally in the answer or plea of the defendant, unless the action is brought to set aside the release, and, if the plaintiff desires to controvert the release, he must do so in his reply: 2 *Estes's Pleading and Practice*, 735, 736.

It was not necessary, therefore, to file the release, or a copy thereof, with the complaint as an exhibit.

¹¹⁶ The next objection is, that the parol agreement relied upon is void for uncertainty. The expression that the appellant agrees to give the appellee "a job of steady and permanent employment" is not so vague and indefinite, as to time of performance, that its meaning may not be easily understood. Words are to be taken in their most usual and known signification, but they get their meaning almost wholly from the time, place, and circumstances under which they are used. The words "steady and permanent" usually signify stability and duration, and this is especially true when they are applied to the subject matter and the peculiar circumstances under which they are here used. We think, when reasonably construed, they show an agreement on the part of appellant to furnish appellee with employment as long as the latter is able, ready, and willing to perform such services as the company may have for him to perform.

The appellant's counsel suggests that, as the company is a quasi public servant, it would be against public policy to hold that the corporation could, by this kind of an agreement, "tie its hands." We do not so regard the matter. The rights of the public could in no manner be impaired or made to suffer by holding the appellant to its contract. It appears from the complaint that the appellee had been taken back into the employment of the company, and that he had performed his work satisfactorily and was discharged without cause. These facts are admitted by the demurrer. If the appellee, for any reason, was not fully able to do such work as the company might be in a position to give him, and ready and willing to do the same, this would be matter of defense for the answer.

The further contention of appellant's counsel is, that the alleged parol agreement lacks the element of mutuality. He argues that in every contract of hiring and service there must be a two-fold obligation—the one on the part of the employer to hire, and the other on the part of the ¹¹⁷ employé to serve—and this must be for a definite time. He insists further that an employment for an indefinite time is an employment at the will of

the parties; and so, when the term of service is left to the discretion of either party, it is at the will of either.

These propositions are doubtless correct as abstract statements of law, and, whatever force they might have when applied to an ordinary case of hire, they can have no application where the consideration for the employment is paid, partially at least, as it was here, in advance. Suppose that, instead of the release executed by the appellee, he had paid the appellant five hundred dollars in cash, in consideration of which the latter had agreed to employ the former as a flagman in its yards, during his life, at the rate of two dollars per day. Could it be held that the want of mutuality would entitle the appellant to keep the five hundred dollars, and, after a few months of employment and without any fault on his part, discharge him? We think not. There is no want of mutuality in such a case. The appellee has parted with value, and the appellant owes him a reciprocal obligation, and that is to furnish him work at stated wages to enable him to make a living, or partly so. There is no difference in principle between the case supposed and the one in hand. Here the appellee has relinquished a claim against the appellant that had a certain value. He has placed it beyond his power to recover upon that claim, and the appellant has received a corresponding benefit. The appellant, recognizing his obligation in the premises, gives the appellee employment for a short time, and then, without the latter's fault, and without any just cause, and in violation of the terms of its agreement, discharges him, and leaves him in his crippled condition to buffet with the world as best he can. This is, in our estimation, a flagrant breach of contract, and courts exist to a poor purpose if they can give no redress for such a wrong.

¹¹⁸ We do not think the points as to want of mutuality and indefiniteness are well taken.

Having determined that the contract as to time is sufficiently definite, it follows, we think, that the rule must be applied that where a servant who has been hired for a definite period has been discharged by the master, before the expiration of such term, he has his remedy in an action for damages for the breach of the contract: *Richardson v. Eagle Machine Works*, 78 Ind. 422; 14 Am. Rep. 584; 14 Am. & Eng. Ency. of Law, 797; 2 Sutherland on Damages, 471; Wood on Master and Servant, 194; 1 Addison on Contracts, 8th ed., top p. 450, et seq; 2 Sedgwick on Damages, secs. 607, 664, et seq.

Some question might well be taken upon the statute of fraud, which provides that no action can be maintained on a contract

not in writing, that is not to be performed within one year from the making thereof: Rev. Stats. 1881, sec. 4904, subd. 5.

It has, however, been frequently decided that where a contract is personal in its character, as a contract for personal services, which might terminate with the death of the party making it, though the contract be for an indefinite period or a term of years, it is not within the statute of frauds: *Hill v. Jamieson*, 16 Ind. 125; 79 Am. Dec. 414; *Indiana etc. Ry. Co. v. Scearce*, 23 Ind. 223; *Straughan v. Indianapolis etc. R. R. Co.*, 38 Ind. 185; *Marley v. Noblett*, 42 Ind. 85.

The case of *Hobbs v. Brush Electric Light Co.*, 75 Mich. 550, was a suit for personal injuries inflicted by the defendant's alleged negligence. It appeared on the trial that the plaintiff had signed a release executed in good faith, discharging the defendant from all liability, because the superintendent said he would give him steady employment. It was claimed on the part of the plaintiff on appeal that there was a total want of consideration, for the reason that no debt or obligation was created against the plaintiff, which he was bound in law to pay, the ¹¹⁹ promise to furnish steady employment being void by the statute of frauds because it was not in writing. As in the case at bar, no particular time was specified during which employment was to be furnished. The court held that the verbal promise to give plaintiff steady employment was a good consideration for the release, and would be valid for one year at least.

We are of the opinion that the complaint in the case before us states a good cause of action. This disposes of the first and second assignments, and we proceed to the next.

The third specification of error questions the correctness of the ruling in sustaining a demurrer to the second paragraph of the answer. This pleading sets out the written release, and seeks to raise the point that the parol agreement to employ is merged in the written release. The paragraph is as follows: "For a further and second paragraph of answer, the defendant says that said release stipulates and provides that said sum of one hundred dollars is the final and full consideration for all claims or demands whatsoever against the defendant for his alleged injuries. All as shown by copy of the release, which is herewith filed and made a part hereof."

Then follows a copy of the release, which is as follows: "Know all men by these presents, that I, for and in consideration of one hundred dollars, to me paid by the Pennsylvania Company, the receipt whereof is hereby acknowledged, do release and discharge the Pennsylvania Company from the payment of

any further sum or sums of money, for or on account of the claim I have or may have against said company, as above stated. And I hereby agree that this release shall operate as a bar to any suit at law, or otherwise, which I, or any of my heirs, executors, administrators, or personal representatives may or can maintain by reason of claim as aforesaid. Witness my hand," etc.

¹²⁰ It must be apparent that there is nothing in this answer, or in the written release accompanying it, that constitutes any defense to the action. There is no inconsistency between the instrument set out and the averments of the complaint in relation thereto. The doctrine that all the oral negotiations are merged in the written contract, and that the terms of the latter cannot be varied by proof of a contemporaneous verbal agreement, does not apply. Even if the release were treated as the foundation of the action, the true consideration might be inquired into. This may be done even where the consideration expressed varies from, or is contradicted by, the true one: *Pickett v. Green*, 120 Ind. 584; *Levering v. Shockey*, 100 Ind. 558; *McMahan v. Stewart*, 23 Ind. 590; *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638; *Rockhill v. Spraggs*, 9 Ind. 30; 68 Am. Dec. 607.

The exception to this rule is where the parties have undertaken to specify the consideration in the writing, and where such consideration is contractual in its nature. In that case, parol evidence to vary the terms of the agreement will not be admitted: *Reisterer v. Carpenter*, 124 Ind. 30; *Pickett v. Green*, 120 Ind. 584, and cases cited; *Conant v. National etc. Bank of Terre Haute*, 121 Ind. 323.

In the case at bar, the parol agreement to employ the appellee at a certain compensation was purely collateral to the release. If the parties had undertaken to put the terms of the consideration, so far as it relates to the employment, in the written release, perhaps they would be concluded by its recitals, inasmuch as such portion of the consideration is contractual in its character. In that event, the instrument would be more than a release, however; it would embrace, also, the contract for future employment, and, in an action for the breach of such contract, the instrument would doubtless constitute the foundation.

But, as the writing is incomplete, and does not contain a stipulation for a contractual consideration, nor an enforceable contract, extrinsic facts may be averred and proved, ¹²¹ showing its true consideration: *Kentucky etc. Cement Co. v. Cleveland*, 4 Ind. App. 171.

The demurrer to the answer was properly sustained.

The overruling of the motion for a new trial is the last error assigned. One of the reasons assigned in the motion was the giving of instruction No. 6, and another the refusal to give the appellant's eleventh instruction.

We give below, from the brief of appellant's counsel, the substance of the instruction given and the objections urged against its correctness, together with his reasons for thinking that his own instruction should have been given instead. He says:

"The court's sixth instruction relates to the measure of damages, and, after stating that if the jury find so and so (omitting the necessary element of mutuality and fixed duration of contract), the plaintiff will be entitled to damages, and after warning the jury that there can be no recovery for appellee's permanent injuries, declares that the 'action is to recover damages for a breach of contract, and the recovery must be limited to actual pecuniary loss sustained by plaintiff on account of such breach since his discharge from defendant's service, and what will probably and reasonably be sustained by him hereafter. In this connection, the jury may consider the plaintiff's age and physical condition at the time of his discharge, and then, presuming that, with habits of industry and sobriety, he makes all proper and reasonable efforts to help himself, how far will he fall short of being able to earn, in some capacity, wages equivalent to the wages he was getting at the time of his injury, and then the amount assessed must be solely for the purpose of compensating plaintiff for the loss which will reasonably and probably be sustained by him on account of such breach of contract.'

"The instruction not only gives damages 'since the injury,' but also future, for life damages.

"For the past, there was a tangible basis for ascertaining, ¹²⁰ or reasonably approximating, actual damages because of inability to get employment elsewhere, and of his ability, habits, etc. For the future there is no such basis, all is mere speculation, guesswork. The instruction proceeds upon the theory that the cause of claim is on an entirety, and cannot, therefore, be divided. On the contrary, it is submitted that after the close of each day lost he could have sued for that day. Appellant's refused instruction 11, limiting the recovery to the 'present time,' is literally correct, it is submitted.

"The instruction invites the presumption by the jury that appellee, with habits of sobriety and industry, would make all proper and reasonable efforts to help himself, and this, too, during life: and this, too, without success."

We have given the question raised by the learned counsel a

careful consideration, and have come to the conclusion that the position taken by him is not tenable. A brief review of the authorities will supply the reason for this conclusion. *Richardson v. Eagle Machine Works*, 78 Ind. 422, 41 Am. Rep. 584, was an action by a servant against his master, who had hired the servant for a definite period and wrongfully discharged him before the expiration of the same. In the course of the opinion, the court, by Niblack, J., makes use of the following language:

"Considerable uncertainty existed at one time as to the proper remedy upon the breach of a simple contract for labor for a specified time, or in some specified undertaking. But we think it may be safely inferred from the recently decided cases, that where a servant has been wrongfully discharged before the conclusion of his term, he may, in addition to his right to recover for wages already earned, treat the contract of hiring as continuing on his part, and sue for damages for the breach by the master, or he may rescind the contract and recover the value of his services actually rendered.

"It was formerly held, that where, in such a case, the servant ¹²³ treated the contract as continuing in force, he might recover what was denominated constructive wages for the remainder of his term; but what might then have been denominated constructive wages is now included under the general head of damages resulting from the master's breach of the contract of employment: *Ricks v. Yates*, 5 Ind. 115; *Moody v. Leverich*, 4 Daly, 401; *Gandell v. Pontigny*, 4 Camp. 374. . . .

"The plaintiff having brought and prosecuted to final judgment one action for the defendant's breach of the contract sued on in this case, . . . full damages might have been demanded and recovered in the first action: *Crosby v. Jeroloman*, 37 Ind. 264."

The case of *Hincholiffe v. Koontz*, 121 Ind. 422, 16 Am. St. Rep. 403, is a more recent one. Koontz sued the appellants to recover damages for the alleged breach of a contract, by which the appellants had hired Koontz to serve as their foreman in a brickyard for one year, at a stated salary. It was there held, Mitchell, J., speaking for the court, that the measure of damages was, *prima facie*, the amount stipulated, subject to such reduction as might be made to appear proper, on the part of the defendant, by showing that the plaintiff either procured, or could, with reasonable efforts, have procured, other employment, or that he occupied his time at his own or other remunerative business.

Mr. Sedgwick, after stating that the authorities are in conflict upon this subject, declares the rule, as held by the recent de-

cisions, to be, that the plaintiff must recover his entire damages in one action, "and that the measure of damages is, therefore, the amount of wages due at the time of the trial, together with compensation for the future benefit the plaintiff would probably have realized under the contract, with the proper deductions." He further says: "It is the plaintiff's duty to use reasonable efforts to avoid loss by securing employment elsewhere. The ¹²⁴ measure of damages is, therefore, the amount of wages he would have earned under the contract, deducting, however, such sums as he earned, or by reasonable diligence might have earned, elsewhere, and making allowance for the expenses of obtaining employment. The burden of proof is on the defendant to show that the plaintiff might have obtained other employment; for the failure of the plaintiff to obtain other employment does not affect the right of action, but only goes in reduction of damages, and, if nothing else is shown, the plaintiff is entitled to recover the contract price, upon proving the defendant's violation of the contract, and his own willingness to perform": Sedgwick on Damages, 8th ed., secs. 666, 667.

Other authorities might be cited, but we need not further pursue the inquiry.

The appellee testified upon the trial that the time for which the appellant had employed him, or agreed to retain him in its employment, was during his life. Counsel thinks, or intimates, that this does not sustain the averment of the complaint, that the employment was to be "steady and permanent," and asks if this is not a fatal variance. We do not so regard it. We think the evidence tends to prove the averments with reference to the time of employment.

Some further objection is made to instructions given and refused, but, without setting them out, it will be sufficient to state that the rulings upon these instructions is in consonance with our views of the law as declared in other portions of this opinion.

Judgment affirmed.

CONTRACTS—CONSIDERATION.—THE COMPROMISE of disputed claims is binding upon the parties as a mutual settlement, so far as the question of consideration is concerned: *Farmers' etc. Ins. Co. v. Chesnut*, 50 Ill. 111; 99 Am. Dec. 492, and note; and the release of a right or the dismissal of a suit, unless it is palpably unjust, is a good consideration for a promise: *Adams v. Wilson*, 12 Met. 138; 45 Am. Dec. 240; *Long v. Towl*, 42 Mo. 545; 97 Am. Dec. 355; *East Line etc. R. R. Co. v. Scott*, 72 Tex. 70; 13 Am. St. Rep. 758.

MASTER AND SERVANT—CONTRACT FOR PERSONAL SERVICES—DISCHARGE—STATUTE OF FRAUDS—The remedy of an employé, wrongfully discharged before the end of his term, where the contract of hiring is for a definite time, is: 1. To elect to treat the con-

tract as rescinded, and sue on a quantum meruit; or 2. To sue for an entire breach of the contract by the defendant, and recover all damages sustained up to the trial; or 3. To wait until his wages would mature under the terms of the contract, and sue and recover as upon performance on his part: *Liddell v. Chidester*, 84 Ala. 508; 5 Am. St. Rep. 387. The measure of damages, in such cases, is the amount of wages he would have earned under the contract, after deducting such sums as he had earned, or, by the exercise of reasonable diligence might have earned, in the line of his business during the remainder of the period covered by the contract: *Baltimore Baseball Club v. Pickett*, 78 Md. 375; 44 Am. St. Rep. 304; *John C. Lewis Co. v. Scott*, 95 Ky. 484; 44 Am. St. Rep. 251, and note. The employé is bound, however, to use reasonable efforts to obtain employment elsewhere, to keep the damages reduced, but the burden of showing that he might have found such employment elsewhere is upon the defendant: *Notes to John C. Lewis Co. v. Scott*, 44 Am. St. Rep. 253; *Wright v. Bank of Metropolis*, 6 Am. St. Rep. 365; *Gates v. School District*, 57 Ark. 370; 38 Am. St. Rep. 249, and note.

CONTRACTS—CONTEMPORANEOUS AGREEMENTS.—A verbal contract may be proved, although the parties have made a written contract at the same time touching the same subject, if it does not contradict or vary the writing; and a verbal promise, forming the consideration of an agreement, but not expressed in it, may be proved: *Hersom v. Henderson*, 21 N. H. 224; 53 Am. Dec. 185, and note. Parol evidence is also admissible in explanation of the written contract to show the situation of the parties, the object in view, and the consideration, but not to contradict or control the same: *Note to Blossom v. Griffin*, 67 Am. Dec. 80. See, also, *Sutton v. Beckwith*, 68 Mich. 303; 13 Am. St. Rep. 344, and note.

CONTRACTS—STATUTE OF FRAUDS.—A contract admitting of a valid execution within one year is not within the statute of frauds: *Dant v. Head*, 90 Ky. 255; 29 Am. St. Rep. 369, and note. A contract for personal services, which may terminate with the death of the party making it, though the contract is for an indefinite period or a term of years is not within the statute: *Hill v. Jamieson*, 16 Ind. 126; 79 Am. Dec. 414.

CONTRACTS FOR PERMANENT EMPLOYMENT.—A contract whereby an employer, for a sufficient consideration, agrees to employ another for whatever length of time the latter may desire to serve, entitles the employé to fix the period of his service when he presents himself for work and demands employment, and he may recover damages for a breach of contract if he is not furnished with employment for the time thus fixed. The original contract becomes certain when the term of service is so fixed, and is not within the statute of frauds. And the compromise of a pending action, whereby the plaintiff agrees to accept a money judgment in his favor for a less sum than the damages claimed by him in his petition, and a promise by the defendant to give him future employment in full satisfaction of his claim, constitute a sufficient consideration to support the contract for future employment. The absence of a promise by the plaintiff to serve in the future employment is a matter of no importance, except as it may bear on the question whether the contract was sufficiently certain: *East Line etc. R. R. Co. v. Scott*, 72 Tex. 70; 13 Am. St. Rep. 758. If a contract for the employment of a person in a particular business as long as the latter may elect to serve, is broken by the employer, the employé having never, by his election, fixed the term of service, cannot recover substantial damages, as the obligation violated is too uncertain: *Bolles v. Sachs*, 37 Minn. 315.

A verbal agreement, based upon a good consideration, to furnish "steady" employment to a discharged employé, for no definite time, has been held valid for one year at least; and the taking of a discharged employé back into service, at fixed wages, with a promise of "steady" employment, has been held, as in the principal case, a suffi-

cient consideration for the release by the employé of a claim for damages for injuries received through the negligence of the employer prior to such discharge. If he is afterward discharged without cause, his remedy is upon the agreement: *Hobbs v. Brush Electric Light Co.*, 75 Mich. 550. The principal case was referred to, and its doctrines were approved and followed, in *Harrington v. Kansas City etc. Ry. Co.*, 60 Mo. App. 223. There the terms of the contract were that the employment should be "steady and constant" as long as the employé should properly do the work assigned to him. The consideration of the contract was a small sum of money and a release from damages for personal injuries alleged to have been caused by the employer. The court held that the contract was not within the statute of frauds; that it could be terminated only according to its terms; and that it could not, therefore, be terminated at the will of the employer. The only consideration recited in the release was the receipt of the money mentioned; but the court allowed the plaintiff to prove the additional consideration for the release to that mentioned therein, viz., that defendant should give him "steady and constant" employment, etc., there being no evidence in the writing itself that the consideration recited therein was a matter of contract between the parties. But the court afterward explained, in another case, that whenever the consideration of a written instrument goes beyond mere recital and becomes contractual, thereby "creating" and "attesting" rights, it cannot be varied by parol evidence: *Davis v. Gann*, 63 Mo. App. 425, 429. The rule as to proof of consideration by parol in such cases is, that if a written instrument forms part of a more comprehensive transaction, the terms of which are not attempted to be expressed in writing, parol testimony as to such parts of the transaction as were not reduced to writing is admissible: *Harrington v. Kansas City etc. Ry. Co.*, 60 Mo. App. 223; *Davis v. Gann*, 63 Mo. App. 425; *Thomas v. Hammond*, 47 Tex. 42.

A contract to serve for life is not illegal: *Wallis v. Day*, 2 Mees. & W. 273, 281; and a special contract that one party shall remain with another and carry on the latter's farm until the death of the owner, when the employé is to receive the farm as compensation for his services, is broken and determined by a sale of the farm, or a part of it, by the owner, although to pay an antecedent debt; and the employé may recover the value of the services previously rendered: *Canada v. Canada*, 6 Cush. 15.

The notion of the principal case, and of the Missouri cases above cited, seems to be that the term "permanent," "steady," or "constant," embraces the idea of absolute perpetuity; but it is not so considered by some courts. Thus, "permanent" employment is said to mean nothing more than an employment for an indefinite time, and which may be severed whenever the interest of either party requires a change: *Lord v. Goldberg*, 81 Cal. 596; 15 Am. St. Rep. 82. In this case the contract was that the employment of a salesman was to be "permanent" so long as he desired to make it so, in consideration of using his best efforts to extend the business; but the court held that this did not mean that the employment was intended to be for life, or for any fixed or certain period, but only that it was to continue indefinitely, and until one or the other of the parties should wish, for some good reason, to sever the relation. So, in *Perry v. Wheeler*, 12 Bush, 541, 548, the plaintiff was elected "permanent" rector of a church, and was afterward, as he claimed, wrongfully dismissed. The court said: "He certainly was elected permanent rector; but we do not understand the term 'permanently,' as used in this case, to mean that the parties were to be bound together by ties to be dissolved only by mutual consent or for sufficient legal or ecclesiastical reasons. . . . We understand that he was called as the rector of the church for an indefinite period, and that it was intended that he should continue to hold the place until one or the other of the contracting parties should desire to terminate the connection." And in *Elderton v. Emmons*, 4 Com. B. 479, it was claimed that the

plaintiff was retained and employed as the "permanent" attorney and solicitor of the defendant company, and had been wrongfully discharged. It was held that the word "permanent," as used in the resolution of appointment, denoted no more than a general employment, as contradistinguished from an occasional or special employment.

EVANSVILLE & TERRE HAUTE RAILROAD COMPANY v. ATHON.

[8 INDIANA APPEALS, 295.]

CARRIERS OF PASSENGERS—DUTY AND LIABILITY.—

A carrier must exercise the highest degree of care to secure the safety of its passengers, and is responsible for the slightest neglect, if any injury is caused thereby. A carrier's duty is not ended with carrying a passenger safely from one point to another, but the carrier must set the passenger down safely, if, in the exercise of the utmost care, it can be done.

RAILROADS—ASSISTANT OF PASSENGER IS A PASSENGER.—If the father of an invalid daughter has an agreement with a railroad company that its cars will stop long enough for him to put her aboard the cars, and to alight therefrom in safety, the relation of carrier and passenger exists between him and the company, while he is assisting her on the cars and departing therefrom.

NEGLIGENCE—PLEADING—AVERMENT OF FREEDOM FROM NEGLIGENCE.—In an action for damages for injuries caused by negligence, the plaintiff's general averment of his own freedom from negligence is controlling upon the question of contributory negligence, unless the court is able to say, as a matter of law, from the facts pleaded, that the plaintiff contributed to his own injury.

RAILROADS—PASSENGER ALIGHTING—CONTRIBUTORY NEGLIGENCE.—The question as to whether or not a passenger, in alighting from a train of railroad cars, in obedience to the direction or command of a conductor or brakeman thereon, is guilty of contributory negligence, depends upon the particular circumstances of each case.

RAILROADS—DIRECTION TO PASSENGER TO ALIGHT. The words "instruct," "direct," and "command," used in a complaint for damages for injuries caused by the conductor of a railroad train negligently misguiding a passenger in alighting from the cars, do not necessarily indicate that the passenger was put under "duress," or that he was "coerced." They may justify the jury in finding that he acted under and pursuant to the conductor's direction.

RAILROADS—SERVANTS.—A PULLMAN CONDUCTOR who directs or commands a passenger to alight from the cars of a railroad company is a servant of the company.

J. E. Iglehart, E. Taylor, S. B. Davis, J. C. Robinson, and S. M. Reynolds, for the appellant.

J. Jump, J. E. Lamb, J. C. Davis, C. McNutt, and J. G. McNutt, for the appellee.

295 DAVIS, J. The substance of the material averments contained in the complaint is stated by counsel for appellant as follows:

The complaint charges that appellee, for the purpose of assist-

ing his invalid daughter on the cars of appellant, at ²⁰⁶ the city of Terre Haute, on May 4, 1891, went to the station in said city, and to said cars, and with the agreement with appellant that the said cars would stop long enough to enable him to place his daughter on the train, and to alight therefrom in safety. Relying on the said agreement and promise, he placed his daughter on the train, and proceeded to leave the same without delay. But before he could leave the car, the said train was negligently and wrongfully caused to be slowly moved forward. That he thereupon notified the agents, employés, and servants of appellant in charge of said train, to stop the same that he might get off. They agreed and undertook to do so, and one of them pulled the signal cord for that purpose, but it had not been properly connected, and the signal attempted was not given, and the train did not slow or stop, but continued in motion; and at a time after the pulling of the signal cord, within which the train could have reasonably been stopped, had the signal reached the engineer, the agent who attempted to give the signal to stop negligently and wrongfully directed and commanded appellant to alight from the train while it was in motion.

This was in the night, and it was very dark, by reason of which appellee could not see, and did not know that the train was in motion, and stepped therefrom as directed and commanded.

He believed the signal had actually been given, and received by the engineer, and that, in obedience thereto, the engineer had stopped the train, and especially the car he was on. In stepping from the car, by the motion thereof, he was thrown to the ground and injured.

All the facts stated constituted negligence on the part of appellant, and claim is made that there was no fault or contribution on the part of appellee.

To this complaint a demurrer was filed, which was overruled, and exception taken.

²⁰⁷ It is insisted that the demurrer to the complaint should have been sustained.

The contention of counsel for appellant is, that the facts alleged in the complaint affirmatively show that the unreasonable and inexcusable act of appellee in attempting to get off the moving train, under the circumstances, was the proximate cause of his injuries; that the general averment that he was without fault or negligence does not negative the proposition, which it is urged is disclosed on the facts stated in the complaint, that the danger was not known, or could not have been known, by

appellee, in the exercise of reasonable care and prudence, and thereby have been avoided.

It is well settled that, under the allegations in the complaint, the relation of passenger and carrier existed between appellee and appellant, at the time of the acts complained of; that a carrier is required to exercise the highest degree of care to secure the safety of its passengers, and is responsible for the slightest neglect, if an injury is caused thereby; and that a carrier's duty is not ended with carrying a passenger safely from one point to another, but such carrier must set the passenger down safely, if, in the exercise of the utmost care, it can be done: *Louisville etc. R. R. Co. v. Crunk*, 119 Ind. 542; 12 Am. St. Rep. 443; *Sherlock v. Alling*, 44 Ind. 184; *Thayer v. St. Louis etc. R. R. Co.*, 22 Ind. 26; 85 Am. Dec. 409; *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346; 49 Am. Rep. 168.

It has been held that it is negligence for an officer of a railroad to induce a passenger to leave a train while in motion: *Bucher v. New York Cent. etc. R. R. Co.*, 98 N. Y. 128; *Filer v. New York Cent. R. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327.

The important question for our present inquiry is, whether the complaint shows that appellee was not in fault.

It has been held that knowledge of danger is not always conclusive evidence of contributory negligence, although the fact of such knowledge may have an important bearing ²⁹⁸ upon that question: *Ohio etc. Ry. Co. v. Trowbridge*, 126 Ind. 391; *Evansville etc. R. R. Co. v. Crist*, 116 Ind. 446; 9 Am. St. Rep. 865; *Poseyville v. Lewis*, 126 Ind. 80.

It has also been decided that it is not negligence *per se* for a passenger to step from a moving train, especially where the passenger is acting under the directions of the trainmen: *Louisville etc. R. R. Co. v. Crunk*, 119 Ind. 542; 12 Am. St. Rep. 443; *Bucher v. New York Cent. etc. R. R. Co.*, 98 N. Y. 128; *Filer v. New York Cent. etc. R. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327.

The general averment that the appellee was without fault is controlling, unless it clearly and affirmatively appears, from the other facts alleged in the complaint, that he was guilty of contributory negligence. The court must be able to say, as a matter of law from the specific averments, that appellee was guilty of contributory negligence, or else the general averment that appellee was free from fault will make the complaint good as to that point: *Kentucky etc. Bridge Co. v. Quinkert*, 2 Ind. App. 244; *Rushville v. Adams*, 107 Ind. 475; 57 Am. Rep. 124; *Pittsburgh etc. Ry. Co. v. Wright*, 80 Ind. 182; *Franklin v. Harter*, 127 Ind. 446; *Louisville etc. Ry. Co. v. Stommel*, 126 Ind. 35;

Pennsylvania Co. v. O'Shaughnessy, 122 Ind. 588; Elkhart v. Witman, 122 Ind. 538.

The averments in substance are, that while appellee was on the train, the same moved slowly forward, whereupon appellee asked the trainmen to stop the train, that he might alight in safety; that the trainmen undertook to stop the train, and that one of them pulled the whistle rope to signal the engineer to stop; "that at a time after pulling said signal rope—within which the train might and could reasonably have stopped, had the signal reached the engineer"—said agent, who had pulled the signal rope, directed appellee to alight; that it was in the night-time, and was very dark; that, by reason thereof, appellee could not see, and did not know that said train was in motion, and stepped therefrom as directed, and in obedience ²⁹⁹ to such direction; that said appellee at the time believed that the said signal attempted to be given had been actually given, and had reached the engineer, and he further believed that said engineer had, in obedience to said supposed signal, stopped said train.

It may be stated as a general proposition that when the conductor or brakeman, on the train, who is presumed to be familiar with the danger incident to getting on or off slowly moving trains, directs a passenger, who may be ignorant of such danger, to get off the train, although in motion, such passenger will ordinarily naturally presume that the conductor or brakeman knows that it is entirely safe, or he would not give the direction: Filer v. New York Cent. R. R. Co., 49 N. Y. 47; 10 Am. Rep. 327; Cincinnati etc. R. R. Co. v. Carper, 112 Ind. 26; 2 Am. St. Rep. 144; Louisville etc. R. R. Co. v. Kelly, 92 Ind. 371; 47 Am. Rep. 149; Kentucky etc. Bridge Co. v. Quinkert, 2 Ind. App. 244.

The question whether such act is of itself contributory negligence depends in each case on the surrounding circumstances: Terre Haute etc. R. R. Co. v. Buck, 96 Ind. 346; 49 Am. Rep. 168.

The act of getting on or off a moving train should not be encouraged. If the passenger is aware of the danger, or the danger could be known to him, in the exercise of reasonable care and prudence, such act will ordinarily constitute contributory negligence.

In view of the general averment that appellee was without fault, the court cannot say, as a matter of law, on the specific facts alleged in the complaint, that appellee was, under the circumstances stated, guilty of contributory negligence on the occasion when he was injured: Terre Haute etc. R. R. Co. v. Buck, 96 Ind. 346; 49 Am. Rep. 168; Pool v. Chicago etc. Ry. Co., 56

Wis. 227; Chicago etc. R. R. Co. v. Barnes, 2 Ind. App. 213; Columbus etc. Ry. Co. v. Farrell, 31 Ind. 408, and authorities hereinbefore cited.

In the case of Cincinnati etc. R. R. Co. v. Peters, 80 Ind. 168, there was no general averment that the plaintiff was free from contributory negligence.

³⁰⁰ Our conclusion is, that the court did not err in overruling the demurrer to the complaint.

The next question discussed relates to the sufficiency of the evidence to sustain the verdict. The basis of the argument of counsel for appellant is stated by them as follows:

"It will be remembered that the substantial charge is, that it was agreed that appellant should stop the train that he might alight, that he did not know that the train was in motion, and that he 'stepped therefrom as instructed, directed, and commanded, and in obedience to said instruction, direction, and command.'

"The instruction, direction, and command, if any, and the obedience thereto, was the proximate cause of the injury, and, if recovery in this case can be had, it must rest on such grounds, provided appellee is free from contribution.

"There was no such instruction, direction, or command, nor was there anything said by any of the alleged servants, which, by any rule of construction, can be made to express or imply any such charge."

The evidence tends to show that appellee's daughter, Nora Wilson, was suffering from "quick consumption" of the lungs, from which she died within about two months from the time appellee was injured, and that she was in an almost helpless condition at that time; that appellee purchased two sleeping-car tickets of appellant's agent at Terre Haute, as well as two regular tickets, with the intention and purpose of sending his daughter South, for her health. At the time he purchased the sleeping-car tickets, he notified appellant's agent that he wanted a whole section of a sleeper, because he wanted to send an attendant with his daughter, who was sick. On the night of May 4, 1891, appellee went to the station, and, with the help of a hackman, assisted his daughter on the train, she being almost helpless; none of the trainmen offered him ³⁰¹ any assistance; the conductor admitted that he knew that some of the party were not going on the train, but were to get off before the train started; appellee was seen by the trainmen assisting his sick daughter on board. As soon as appellee had got on the train, and had taken his daughter to her seat, she called his attention to the fact that

the train had started, appellee himself not having noticed the motion of the car. He was then in the center of the car, and "left at once," and "went right out to the front end of the car." There were two men standing in the front end of the car, and appellee said, "I want to get off here." One of the two men, the Pullman conductor, reached up and pulled the bellrope, without saying a word. After pulling the bellrope, the conductor opened the door leading from the body of the car onto the platform, and opened the side door (the train was vestibule) leading down to the steps; the conductor then stood facing appellee, and said, "You can get off now," and appellee went right out at once. Some little time had elapsed between the pulling of the signal rope and the time that the conductor said, "You can get off now." It happened that the signal cord did not give the signal, and the engineer, therefore, had not made any attempt to stop the train. The train was moving so slowly that appellee did not feel the motion, and it was "about as dark as it usually gets." Appellee was led by all of the surrounding circumstances to believe that the train had stopped, but he knew that the step was a long one, as there was no platform at that place, "and took precaution on that account to get off, holding to the railing of the end of the car," and, notwithstanding his care, he was, in getting off, thrown on his shoulder and severely injured.

On these facts counsel for appellant say: "The language used, 'You can get off now,' was neither instruction, direction, or command. At best, it was but the expression of an opinion by the party who spoke the words. ³⁰² In *Vimont v. Chicago etc. R. R. Co.*, 71 Iowa, 58, it was held by the Iowa court that the words, 'jump off quick, if you are going to,' did not constitute a requirement to leave the train, and were nothing more than words of advice. To the same effect, the words, 'to get off quickly', were construed in *Lindsey v. Chicago etc. R. R. Co.*, 64 Iowa, 407. In *Jeffersonville R. R. Co. v. Swift*, 26 Ind. 459, the words were, 'you could if you would,' or 'you might if you would.' The court, on page 473, said: 'He did not tell him to leap, and the words used could scarcely, by a fair construction, be understood as advising him to leap, much less as a command to do so.'"

Counsel then argue that his act constituted contributory negligence, and cite *Cincinnati etc. R. R. Co. v. Peters*, 80 Ind. 168; *Chicago etc. R. R. Co. v. Randolph*, 53 Ill. 510; 5 Am. Rep. 60; *South etc. R. R. Co. v. Schaufler*, 75 Ala. 136.

We cannot agree with counsel on these questions. The authorities cited, it may be conceded, correctly enunciate the prin-

ciples applicable to the particular cases in which the decisions were made.

The words "instruct," "direct," and "command," are used in the complaint in this case to indicate that appellee was acting on the judgment, and under the guidance of the officers in charge of the train, and that he was negligently misguided by them. The words are not used to indicate that appellee was put under "duress," or that he was "coerced."

Under all the attending circumstances, the conduct and words of the conductor were sufficient to justify the jury in finding that appellee acted under and pursuant to his direction.

³⁰³ In *Bucher v. New York Cent. R. R. Co.*, 98 N. Y. 128, the court held it was negligence for the officers of a railroad company to induce a passenger to leave a train while in motion. In *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168, the supreme court held that a railroad company was liable for injuries sustained by a passenger, on account of the wrongful invitation to him to alight, although such invitation was, in that case, implied from the conduct of the company.

The words and acts of the conductor combined, and in connection with all of the circumstances, tended to prove an invitation and direction to appellee to alight.

Under the facts and circumstances in support of which testimony was introduced, we can say that there was evidence tending to prove that appellee was not in fault: *Cincinnati etc. R. R. Co. v. Carper*, 112 Ind. 26; 2 Am. St. Rep. 144; *Beach on Contributory Negligence*, 2d ed., 450, 451.

It was proper in this case to consider the Pullman conductor as the servant of appellant: 14 Am. & Eng. Ency. of Law, 806, note 1; *Thorpe v. New York Cent. R. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325; *Railroad Co. v. Walrath*, 38 Ohio St. 461; 43 Am. Rep. 433; *Pennsylvania Co. v. Roy*, 102 U. S. 451.

The only other error to which our attention has been invited relates to the instructions given and refused. The objections made on this branch of the case are general. No error has been pointed out either in the instructions given or refused. We have read the instructions which were given, and are of the opinion that they fully and correctly state the law applicable to the evidence in the case. The evidence tends to sustain every material averment contained in the complaint.

We find nothing in the record indicating that a correct result was not reached in the court below.

Judgment affirmed.

CARRIERS—RAILROADS—PASSENGERS.—The law imposes upon railroad companies and other carriers the duty of exercising the highest care, skill, and diligence in the transportation of passengers, and holds them responsible for the consequence of the slightest negligence resulting in injury to the persons sustaining that relation to them: *Note to International etc. Ry. Co. v. Welch*, 40 Am. St. Rep. 833.

RAILROADS—ALIGHTING OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.—It is the duty of a railroad company, or other carrier, to allow passengers sufficient time in which to alight: *Note to Louisville etc. R. R. Co. v. Crunk*, 12 Am. St. Rep. 453; *Hurt v. St. Louis etc. Ry. Co.*, 94 Mo. 255; 4 Am. St. Rep. 374, and note. Whether or not a railway company is liable in damages for injuries sustained by a passenger in attempting to leave one of its trains whilst in motion depends upon whether, under all the circumstances, it was prudent for him to make the attempt: *Note to Walker v. Vicksburg etc. R. R. Co.*, 17 Am. St. Rep. 425. It is negligent and unwarrantable conduct on the part of the conductor of a train to advise a passenger to leave a moving train, or to leave in such a way as would expose him to danger: *Note to Olson v. St. Paul etc. R. R. Co.*, 22 Am. St. Rep. 752.

RAILROADS—SICK PASSENGERS—ASSISTANTS.—If a person rightfully enters a railway train at a station to assist in carrying a sick passenger to a seat in the car, and the train is started before he has had a reasonable time to get off, at a rate of speed so slow as to enable him to alight in safety, but while he is about to step from the platform the speed of the train is suddenly and greatly increased through the negligence of the persons in charge of the train, and he is thrown off and injured, the company is liable: *Louisville etc. R. R. Co. v. Crunk*, 119 Ind. 542; 12 Am. St. Rep. 443. This case holds, so far as alighting from the train is concerned, that a railroad company owes the same duty to one assisting a passenger that it does to the passenger himself: See comments upon this case in the monographic note to *Little Rock etc. Ry. Co. v. Lawton*, 29 Am. St. Rep. 55; and compare *Railway Company v. Salzman*, 52 Ohio St. 558; 49 Am. St. Rep. 745.

NEGLECT—PLEADING.—A general averment in a complaint that the injured party was himself free from fault or negligence is sufficient, unless overcome by the specific averment of other facts from which the inference must be drawn that he was guilty of contributory negligence: *Louisville etc. Ry. Co. v. Hanning*, 131 Ind. 528; 31 Am. St. Rep. 443, and note.

MASTER AND SERVANT—PULLMAN CAR PORTER.—A porter or other employé of the Pullman Car Company, where the car of such company forms a part of a regular train, is to be regarded as the servant of the company running such train: See monographic note to *Brown v. Smith*, 22 Am. St. Rep. 461, showing when the relation of master and servant exists.

REED v. REED.

[6 INDIANA APPEALS, 317.]

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS—WIFE'S RIGHT OF ACTION.—A married woman can maintain an action against a third person for the alienation of her husband's affections.

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS—COMPLAINT.—It is a necessary averment, in a complaint by a married woman against her mother in law for alienating the affections of plaintiff's husband, that the acts were done maliciously, as all legal presumptions, in such cases, are that the parent will act only for the best interests of the child.

J. S. Bays, for the appellant.

W. C. Hultz, for the appellee.

³¹⁷ REINHARD, C. J. This action was by the appellant against the appellee for damages for the alleged alienation of the affections, society, and support of appellant's husband. The complaint was in two paragraphs, to each of which a demurrer was sustained. The correctness of this ruling is the only question made by this appeal.

The appellee seeks to uphold the ruling of the trial court, upon the authority of *Logan v. Logan*, 77 Ind. 558, which decides that a married woman cannot maintain such an action. The later cases, however, declare a contrary rule: *Haynes v. Nowlin*, 129 Ind. 581; 28 Am. St. Rep. 213; *Postlewaite v. Postlewaite*, 1 Ind. App. 473.

³¹⁸ As the paragraphs of the complaint are tested by a demurrer addressed separately to each, it behooves us to inquire into the sufficiency of each.

It does not appear from the averments of the second paragraph of the complaint that the appellant's act of causing the alleged alienation was done maliciously. In a case of this character, we regard this as a necessary averment: *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397. See, also, *Hutcheson v. Peck*, 5 Johns. 196; *Bennett v. Smith*, 21 Barb. 439. The reason for this rule must be apparent. It is charged in each paragraph that the appellee is the mother of the appellant's husband. The law has a tender regard for the ties of kinship subsisting between parent and child, and it will not disregard these ties, although the child be married and of full age. When trouble and disagreements arise between the married pair, the most natural promptings of the child direct it to find solace and advice under the parental roof. All legitimate presumptions in such cases must be that the parent will act only for the best interests of the child. The law recognizes the right of the parent, in such cases, to advise the son or daughter, and when such advice is given in good faith, and results in a separation, the act does not give the injured party a right of action. In such a case, the motives of the parent are presumed good until the contrary is made to appear: *Burnett v. Burkhead*, 21 Ark. 77; 76 Am. Dec. 358.

These rules have generally been applied in cases where the suit was brought by the husband for the alienation of his wife, and we see no reason why they should not, with proper modifications, prevail where the wife is the plaintiff: See *Bishop on Marriage*

and Divorcee, sec. 1359, et seq; Bigelow on Torts, 3d ed., 153; Bennett v. Smith, 21 Barb. 439; White v. Ross, 47 Mich. 172.

The first paragraph of the complaint charges that the acts complained of were done by the appellant "with the malicious intent of depriving the plaintiff of her said husband, ³¹⁹ and of his aid, support, and association." The second paragraph contains no such averment. We are of the opinion that the first paragraph states a good cause of action, but that the second paragraph is bad.

Judgment reversed.

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS.—If a wife is authorized to sue for her own benefit for personal wrongs suffered by her, or if the statute entitles her to sue and be sued as if she were unmarried, she can maintain an action against a third person for alienating her husband's affections: *Seaver v. Adams*, 66 N. H. 142; 49 Am. St. Rep. 597, and note; *Hodgkinson v. Hodgkinson*, 48 Neb. 269; 47 Am. St. Rep. 759; but her complaint is bad unless it states that the acts were maliciously done: See monographic note to *Clow v. Chapman*, 46 Am. St. Rep. 475, on wife's action for alienation of husband's affections.

TAYLOR v. DAHU.

[6 INDIANA APPEALS, 672.]

MECHANIC'S LIEN—RIGHT TO, BECOMES VESTED, WHEN—STATUTES.—The right to hold a mechanic's lien becomes vested at the time the material is furnished; and in determining whether or not such right exists, the courts will look only to the statute in force at that time.

MECHANIC'S LIEN—NOTICE TO OWNER, OF MATERIALS FURNISHED.—In an action to enforce a mechanic's lien, the materials having been furnished to the contractor, for the purpose of being used in a certain structure, while a statute requiring the owner to be given actual notice of that fact was still in force, the complaint is insufficient if it does not allege that such notice was given.

STATUTES—AMENDMENTS—REPEAL.—If a new law is amendatory of an old one, the sections of the old law not amended will stand. It is only where the sections, as amended, contain such new matter as to cover the subjects embraced in all the old sections, including those not amended, and where such sections as amended are positively repugnant to the provisions in the sections not amended, and the entire new act is evidently intended to supersede and take the place of the old one, that the latter repeals the former.

MECHANIC'S LIEN—STATUTES—REPUGNANCY—CONSTRUCTION.—If a new act concerning mechanic's liens makes no change and contains no provision respecting the subject of actual notice to the owner of the furnishing of materials to the contractor, and does not, therefore, cover the entire subject matter of the old statute, which does require such notice, the new statute is not repugnant to the old one, and does not repeal it by implication. In such a case, it is the duty of courts to construe the statutes so as to give effect to both.

STATUTES—REPEAL.—If the title of an act declares one section of a former statute to be repealed, and the body of the act declares another section to be repealed, the repeal fails as to the section mentioned in the title.

J. W. Morgan, for the appellants.

F. T. Hord and M. D. Emig, for the appellee.

¶73 REINHARD, J. The sustaining of the demurrer to the appellants' complaint is the only error relied upon. It is averred, in the complaint, that one Marsh was the contractor for the construction of a building for the appellee; that on the second day of February, 1891, appellants furnished lumber and material to Marsh on said building, and that the same was used by Marsh in the construction thereof, and that appellants, within the prescribed time, filed in the recorder's office a notice of intention to hold a lien on said appellee's property for the materials furnished said Marsh in building the same for appellee. The complaint seeks to foreclose the alleged lien of the materialmen.

There was no averment that the appellee was given actual notice that such materials were furnished to said Marsh.

The court below held the complaint insufficient for the want of such allegation of notice as provided in section 5 of an act approved March 6, 1883, which is as follows:

"Sec. 5. To enable the mechanics or other persons furnishing material or performing labor, as above provided, to a contractor, to acquire such lien, he must, at or before the time he furnishes the material or performs the labor, notify the owner or his agent that he is furnishing the materials or performing the work for the contractor": Elliott's Supplement, sec. 1692.

If the section just cited was in force at the time of the furnishing of the materials sued for, the demurrer was properly sustained; if not, the ruling was error.

The contention of appellants is, that the section quoted was repealed by the act approved March 9, 1889: Elliott's Supplement, sec. 1705, et seq.

It will be noticed, by examination of the act just cited, **¶74** that the title of the act declares section 5 of the former act repealed, but, in the body of the act (sec. 5), it is section 4, and not section 5, that is repealed: Elliott's Supplement, sec. 1709.

It is manifest, therefore, that the section under consideration was not repealed directly by the later law of 1889, and, consequently, was in force when the materials were furnished, unless it had been repealed by implication, in the act of 1889.

By the act approved February 24, 1891, the section was expressly repealed: Acts 1891, pp. 28, 29. That act contained an emergency clause, and, therefore, became operative at once, upon its passage and approval, on the date last named.

It appears, from the complaint, that the materials were fur-

nished the contractor on the second day of February, 1891. It is the further contention of the appellants that, as the law gives the materialman sixty days' time within which to file his notice of intention to hold a lien, the appellants had until the second day of April, 1891, to do so, and that if they filed such notice after the twenty-fourth day of February, 1891, the date of the approval of the repealing act, they were not required to give actual notice to the appellee.

The complaint shows that the notice of lien was recorded on the thirteenth day of March, 1891, which, as we have seen, was after the repealing act had gone in force.

The first question we shall undertake to decide, therefore, is the last one presented by appellants' brief, viz: Did the appellant acquire a valid lien by virtue of his recorded notice, without actual notice to the appellee, conceding that section 5 of the act of 1883 was not repealed earlier than February 24, 1891?

If the act of 1883 was in force when appellants furnished the articles for which they sue, they had no remedy against the owner of the property, unless, at or before the time they furnished such articles to the contractor, they gave notice ⁶⁷⁵ thereof to the owner. Their remedy was against the contractor only.

In our opinion, the remedy subsequently given to materialmen, as against the owners of property, did not operate retroactively in favor of appellants. The right to hold a lien becomes vested at the time the material is furnished, and, in determining whether or not such right exists, the courts will look only to the statute in force at that time: *Goodbub v. Hornung*, 127 Ind. 181.

True it is, that the statutes giving liens affect only the remedy. But here we find a party claiming a remedy against one who was not a party to the contract, and who, for aught we know, may have paid the value of the materials received by him to the contractor. The repeal of the section requiring the materialman to give notice to the owner in a sense creates a new liability upon the part of the latter. Had the appellants notified the appellee of their intention to hold him liable, at or before the time the materials were furnished, he would have had an opportunity of protecting himself by withholding from the payment to the contractor the amount such owner was required to pay the materialmen. To hold him liable to the appellants might result in requiring him to pay for the same articles twice, without negligence or fault on his part. For these and other reasons that might be given, the repealing statute cannot be accorded a retroactive effect, and we think that the law in force at the date of the furnishing of the materials must determine the appellee's lia-

bility. If the act of 1883 was then in force, the appellants could not acquire a lien upon the appellee's property, unless they had complied with the terms of the statute, by giving him actual notice, as therein provided: *Caylor v. Thorn*, 125 Ind. 201; *Parker v. Dillingham*, 129 Ind. 542.

Section 5 of the law of 1883 was, therefore, in force at the time the materials were furnished the contractor, unless ⁶⁷⁶ the section was repealed, by implication, by the act of 1889. Was it so repealed?

The position of appellants' counsel is, that the section is in conflict with the act of 1889, construed as a whole; that the latter act covers the entire subject matter of the old, and was, manifestly, intended to take its place. If this position is well taken, the contention of counsel must prevail. We are, however, of the opinion that the premises are not well founded. The entire act of 1889, in so far, at least, as it relates to the subject matter of notice, is amendatory. The old law provides for two kinds of notices by a materialman to the owner, viz: Notice of intention to hold a lien, to be filed in the recorder's office, and actual notices to such owner. The new law re-enacts the old matter relating to the notice to be filed in the recorder's office, and adds some amendments not connected with the subject of actual notice, nor inconsistent therewith. It makes an attempt to repeal section 5 expressly, but fails. The new act makes no change, and contains no provision whatever respecting the subject of actual notice, and does not, therefore, cover the entire subject matter of the old, and is not repugnant to the same. Where such is the case, inasmuch as repeals by implication are not favored, it is the duty of the courts to construe them so as to give effect to both: *Sosat v. State*, 2 Ind. App. 586, and cases cited.

In the present case, as we have seen, the new law is amendatory of the old. As a general rule, where this is the case, the sections of the old law not amended will stand. It is only where the sections, as amended, contain such new matter as to cover the subjects embraced in all the old sections, including those not amended, and where such sections, as amended, are positively repugnant to the provisions in the sections not amended, and the entire new act is evidently intended to supersede and take the place of the old one, that the latter repeals the former: See *Longlois v. Longlois*, 48 Ind. 60.

⁶⁷⁷ The legislature of 1891, recognizing the existence of section 5 of the act of 1883, expressly repealed it. While it is true that legislative interpretation, by an assembly subsequent to the

one that enacted the law, is not binding upon the courts, and is generally of but little controlling force, it is not entirely without its influence.

Our conclusion is, that the section under consideration was in full force at the time the appellants delivered to the contractor, in this case, the materials for which they seek to hold the appellee liable; that the appellee was entitled to actual notice of the fact that appellants had furnished such contractor with the materials sued for, and the complaint, failing to aver such notice, is defective. There was, therefore, no error in sustaining the demurrer.

Judgment affirmed.

MECHANIC'S LIEN — NOTICE—STATUTES.—The right to a mechanic's lien becomes vested at the time the material is furnished and the necessary steps are taken, under the statute then in force, to perfect the lien. This right cannot be affected by a subsequent statute: *Kirkwood v. Hoxie*, 95 Mich. 62; 35 Am. St. Rep. 549, and note; *In re Ah You*, 88 Cal. 99; 22 Am. St. Rep. 280. The lien does not attach until notice is given in conformity with the statute: *Green v. Green*, 16 Ind. 253; 79 Am. Dec. 428. A repeal by implication does not exist, unless there is a positive repugnancy between the provisions of the new law and those of the old, and even then the law is repealed by implication only pro tanto to the extent of the repugnancy: *State v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663.

CASES OF THE SUPREME COURT

OF
IOWA.

WHITTAM v. ZAHORIK.

[91 Iowa, 22.]

ELECTIONS—BALLOTS—OPPOSING CANDIDATES.—If there is more than one candidate on each political ticket for an office, each voter decides for himself whom he regards as opposing candidates. It cannot be said, as a matter of law, that one person is a candidate against another, simply from the fact that their names are printed in the same order, and opposite each other, on the ballot.

ELECTIONS—AUSTRALIAN BALLOT LAW.—If several candidates for a similar office are to be elected, and are placed on both the democratic and the republican ticket on the same ballot, and a cross is placed in the circle at the head of the democratic ticket, and one or more crosses are placed in squares before the name or names of republican candidates for such office, the ballot must be counted, under the "Australian Ballot Law," for the republican candidate or candidates only.

ELECTIONS—AUSTRALIAN BALLOT LAW—CONSTRUCTION.—When a cross is placed in the circle preceding the party appellation, the ballot so marked must be counted as cast for all of the candidates named after that title, excepting that, when only the name or names of one or more candidates on another ticket are also marked, the ballot is to be counted for the candidate so marked, to the exclusion of candidates for the same office on the ticket whose party appellation is marked, whether their names are also marked or not.

ELECTIONS.—IF IDENTIFYING MARKS ARE PLACED on a ballot without the knowledge or consent of the voter, it does not render the ballot void, nor prevent it from being counted; but if it is done by the voter in preparing his ballot, it is a violation of law, and the ballot should not be counted.

ELECTIONS—BALLOT REGULATIONS.—It is within the power of the legislature to prescribe reasonable regulations which the voter must follow in preparing his ballot; and, unless he conforms to such regulations, his ballot is void.

ELECTIONS—UNDER THE "AUSTRALIAN BALLOT LAW," a ballot which is not marked with a cross or crosses made substantially thus, "X," and placed substantially within the circle or square or squares printed on the ballot at places designated by the statute, is void.

ELECTIONS—CROSS-MARKS.—UNDER THE "AUSTRALIAN BALLOT LAW," a ballot which is not marked substantially within a

circle or square with a character which is substantially a cross (X), or which has no cross in any circle or square, is void, and should not be counted.

ELECTIONS—INTENTION OF VOTER.—In casting a ballot under the "Australian Ballot Law," it is not sufficient that the intent of the voter is plain and clear; it must also be expressed in the manner provided by law.

ELECTIONS—IDENTIFICATION MARKS.—If an unauthorized mark is inadvertently placed upon a ballot by a voter, and it is not of a character to be used readily for the purpose of identification, the ballot should be counted; but if it is made deliberately and may be used as a means of identifying the ballot, it should be rejected.

Rickel & Crocker, for the appellant.

Heins & Heins, for the appellee.

²⁴ ROBINSON, J. Three justices of the peace were to be elected in and for Rapids township, in Linn county, at the general election held in the year 1892. The republican party of that township nominated, as candidates for the office named, Isaac N. Whittam, the contestant, C. W. Burton, and George H. Pollins, and caused their names to be placed upon the ballots which were cast at that election. The democratic party of the township nominated, as candidates for the same office, Joseph Moore, William H. Storrs, and J. E. Zahorik, the incumbent, and their names were also placed on the official ballots. Those were printed, as required by section 14 of chapter 33 of the acts of the twenty-fourth general assembly. As the result of the election, the democratic nominees were declared elected. No question is made in regard to the election of any of them, excepting the incumbent. The total number of votes cast for the contestant, which are unquestioned, was two thousand two hundred and fourteen, and the number cast for the incumbent, and not questioned, was two thousand two hundred and ten. In addition, one hundred and ninety-six ballots were cast which are in dispute. Of those, ²⁵ twenty-six offered by the contestant and fifty-four offered by the incumbent were received in evidence, and ninety-two offered by the contestant and twenty-four offered by the incumbent were rejected. One of the ballots offered by the incumbent was counted for him, and also for the contestant. The district court thus counted two thousand two hundred and forty-one votes for the contestant, and two thousand two hundred and sixty-four, or a majority of twenty-three, for the incumbent.

Section 14 of the election law, to which we have referred, contains the following: "The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party appellation or title of such

party or group, as designated by them in their certificates of nominations or petitions, or, if none be designated, then under some suitable title. . . . The ballots shall be on plain white paper, through which the printing or writing cannot be read. The party appellation or title shall be printed in capital letters, not less than one fourth of an inch in height; and a circle one-half inch in diameter should be printed at the beginning of the line in which such appellation or title is printed. The names of the candidates shall be printed in capital letters, not less than one-eighth of an inch, nor more than one-fourth of an inch, in height, and, at the beginning of each line in which the name of the candidate is printed, a square shall be printed, the sides of which shall not be less than one-fourth of an inch in length. The list of candidates for the several parties and groups of petitioners shall be placed in separate columns on the ballots, in such order as the authorities charged with the printing of the ballots shall decide. Each of the columns containing the list of candidates, including the party appellation, shall be separated by a distinct ²⁰ line. The act contains certain provisions in regard to printing and furnishing the ballots, the duties of the members of the election board, the arrangement of the place of voting, and other matters which we need not specify. Section 22 contains the following: "On receipt of his ballot, the voter shall forthwith, and without leaving the inclosed space, retire alone to one of the voting booths so provided, and shall prepare his ballot by making in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by writing in the name of the candidate of his choice in a blank space on said ticket, making a cross (X) opposite thereto; . . . provided, however, if he shall desire to vote for all the candidates of one political party, or group of petitioners, he may place such mark at the appropriate place, preceding the appellation or title under which the names of the candidates of such party, or group of petitioners, are printed; and the ballots so marked shall be counted as cast for all the candidates named after that title; provided, further, that the voter may place such mark at the appropriate space preceding the appellation or title of any one party, or group of petitioners, and may also mark, at the appropriate place preceding the name or names of one or more candidates printed under the appellation or title of some other party, or group of petitioners, and a ballot so marked shall be counted as cast for all candidates named under the appellation or title which has been so marked, except as to the officers to which he has placed such mark preceding the name or names of

some other candidate or candidates printed under the title of some other party, or group of petitioners, and, as to such, it shall be counted as cast for the candidate or candidates preceding whose name or names such mark may have been placed."

The appellant complains of the ruling of the district court in rejecting as evidence seventy-seven ballots, ²⁷ each of which was marked with a cross in the circle preceding the party appellation, "Republican" or "Democratic," and in each of which the voter had also placed a cross in the square preceding the name of one or more of the candidates for justice of the peace printed under the other party appellation. The following illustrate the form of the ballots, and some of the various markings so made:

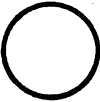
1st Illustration.

 REPUBLICAN. Township Ticket. FOR JUSTICES OF THE PEACE. ☒ ISAAC N. WHITTAM ☐ C. W. BURTON ☐ GEORGE H. POLLINS	 DEMOCRATIC. Township Ticket. FOR JUSTICES OF THE PEACE. ☐ JOSEPH MOORE ☐ WM. H. STORRS ☐ J. E. ZAHORIK
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2d Illustration.

 REPUBLICAN. Township Ticket. FOR JUSTICES OF THE PEACE. ☒ ISAAC N. WHITTAM ☒ C. W. BURTON ☐ GEORGE H. POLLINS	 DEMOCRATIC. Township Ticket. FOR JUSTICES OF THE PEACE. ☒ JOSEPH MOORE ☐ WM. H. STORRS ☐ J. E. ZAHORIK
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3d Illustration.

 REPUBLICAN. Township Ticket. FOR JUSTICES OF THE PEACE. ☒ ISAAC N. WHITTAM ☐ C. W. BURTON ☐ GEORGE H. POLLINS	 DEMOCRATIC. Township Ticket. FOR JUSTICES OF THE PEACE. ☒ JOSEPH MOORE ☒ WM. H. STORRS ☐ J. E. ZAHORIK
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4th Illustration.

 REPUBLICAN. . . <i>Township Ticket.</i> FOR JUSTICES OF THE PEACE. ☒ ISAAC N. WHITTAM ☐ C. W. BURTON ☐ GEORGE H. POLLINS	 DEMOCRATIC. . . <i>Township Ticket.</i> FOR JUSTICES OF THE PEACE. ☐ JOSEPH MOORE ☒ WM. H. STORRS ☐ J. E. ZAHORIK
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On none of the seventy-seven ballots were the names of more than three candidates for justice of the peace marked by placing crosses in the squares. It is claimed by the appellee that in all these ballots more names were marked for that office than there were persons to be elected; hence, that the ballots should not be counted for any of the candidates. It will be noticed that section 22 provides three distinct methods of preparing ballots, as follows: 1. By making a cross in the appropriate place opposite the name of each candidate for whom the voter desires to vote; 2. If he shall desire to vote for all the candidates of one political party, or group of petitioners, by making a cross in the appropriate place preceding the appellation or title under which the names of the candidates of such party or group are printed; 3. By making a cross in the appropriate space preceding the appellation or title of any one party, or group of petitioners, and also by making a mark at the appropriate place preceding the name or names of one or more candidates, printed under the appellation or title of some other party, or group of petitioners. The cross is used, in all cases, to show affirmatively the choice of the voter. When it is placed in the square opposite the name of the candidate, it indicates with certainty that the voter desires his ballot to be counted for that candidate. When it is placed in the circle opposite the title of a party, or group, it indicates that the voter wishes his ballot to be counted ²⁰ for all the candidates of that party, excepting as he has otherwise indicated by marking in one or more squares opposite the names of one or more candidates of another party or of other parties. When he has made a cross in the circle opposite the appellation of one party, and has also made a cross in the square opposite the name of a candidate of another party, he has shown a desire to vote for all the candidates whose names are printed under the party appellation marked, excepting the candidate for the office for which he has marked the name of the candidate of another party, and that he wishes

his ballot counted for that candidate whose name he has marked. In such case, the specific marking controls the general, and the ballot must be counted for the candidate whose name is marked by a cross in the opposite square, and not for the candidate for the same office whose name is printed under the party appellation the circle of which is marked. The provision of the statute applicable to such a case is mandatory and plain. The ballot "shall be counted for the candidate or candidates preceding whose name or names such mark may have been placed." Where but one candidate for an office is to be elected, no difficulty can arise in counting such a ballot. But section 25 of the act under consideration provides that "if a voter marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office." In this case three candidates were to be elected, and it is said that where the voter marked the circle opposite the title of one party, and a square opposite the name of a candidate for justice of the peace of another party, he marked four names for that office; and that, under the provisions of section 25 quoted, his ballot should not be counted for that office. If that is the law, the intent of the voter as to one ^{so} of the candidates, expressed plainly in the manner provided by the law, must be disregarded. In the first illustration of the ballots under consideration which we have given, a cross was placed in the circle opposite the word "Democratic." None of the squares opposite the names of candidates for justice of the peace printed under that appellation are marked, but the square opposite the name of the contestant on the republican ticket is marked. The facts, that the party appellation of one ticket and the name of the contestant on the other were marked, and that the name of the contestant was opposite and on the same line as that of Moore, do not show that the voter intended to vote against Moore and for the other democratic nominees. There is no sufficient ground for saying that one person is a candidate against another, because their names are printed in the same order, and opposite each other, on the ballot. When there is more than one candidate on each ticket for an office, each voter decides for himself whom he will regard as opposing candidates. That is shown by the markings on the second and third illustrations we have given, where names arranged in the same order and printed in the same line were both marked.

The question presented is, How many names of candidates for the office of justice of the peace are marked on the two tickets?

The methods by which the voter may indicate his choice of candidates are two: 1. By making a cross in the appropriate place preceding the party appellation; 2. By making a cross in the appropriate place preceding the name of a candidate. In the first method, the party ticket is marked, and the names of the candidates for whom the voter wishes to cast his ballot are indicated, but, strictly speaking, it cannot be said that the names on the ticket are marked. By the second method, the ballot is marked, it is true, but it is done by marking ³¹ the names of the candidates for whom the ballot is to be cast. In one method, the ticket may be said to be marked; in the other, the names of candidates; and both methods may be used on one ballot. We conclude that, within the meaning of the law, the name of but one candidate was marked on the ballot abstracted in our first illustration. But the statute says that, where a ballot is marked with a cross in the circle preceding a party appellation, it "shall be counted as cast for all candidates named under the appellation or title which has been so marked, except as to the officers to which he has placed such mark preceding the name or names of some other candidate or candidates printed under the title of some other party, or group of petitioners." In the first illustration, the voter marked the circle of the democratic ticket, thereby indicating that he intended to vote for the three candidates for justice named on that ticket, excepting as that intention was affected by marking the name of the contestant on the other ticket. But we are wholly unable to determine for which of the democratic candidates the voter intended to cast his ballot. As marked, it is a ballot for four candidates, where but three can be elected. One of the four is clearly pointed out in the manner provided by the law as a candidate for whom the ballot must be counted, but there is nothing to indicate any preference of the voter in regard to the candidates on the democratic ticket. It is a case where it is impossible to determine the voter's choice for two of the places to be filled, not because he has marked more names than there are persons to be elected, but because he has cast his ballot for three persons for places to which but two can be elected. His ballot was intended to be cast for the contestant, and that intention has been expressed in the manner provided by law. It should, therefore, be counted for him, ³² but cannot be counted for any other candidate for the office of justice of the peace.

2. It is said that there is no authority for making a cross in the circle and also in a square of the same ticket, as was done in the second, third, and fourth illustrations we have given. We

think it is clear that the statute does not contemplate that plan of voting. When the cross is placed in the circle preceding the party appellation, the ballot so marked "shall be counted as cast for all the candidates named after that title," excepting, only, that when the name or names of one or more candidates on another ticket are marked, the ballot is to be counted for the candidates on the other ticket, whose names are so marked, but the ticket in which the circle preceding the title is marked is to be counted as cast for all candidates whose names are printed upon it, excepting those for offices for which names on another ticket were marked and counted as stated. Hence, when a voter has marked his ticket by placing a cross in the circle opposite the title, he does not add to the legal effect of that marking by placing crosses in squares opposite the names of candidates on the same ticket. It may be claimed where, as in this case, more than one person was to be elected to an office, and the number of names of candidates marked by the voter is the same as the number of persons to be elected, that he thereby clearly indicates his choice of candidates, and that his ballot should be counted for the candidates whose names are marked, even though some of the names so marked are on the ticket, the title of which is marked. Thus, in our second and third illustrations, it appears that each voter placed a cross in the circle preceding a party title, and also marked the name of one candidate for justice of the peace on that ticket and two on the other. As the making of the cross indicates the choice of the voter, and three candidates are indicated, there ^{is} appears to be force in the claim that effect should be given to the manifest intent of the voter. But the statute applicable to that case is mandatory, and requires the ballot to be counted for all the candidates named on the ticket, the circle of which is marked, subject to the exceptions we have stated. It cannot be said, with reference to the ballot set out in our second illustration, that Whittam and Burton were candidates for two of the three places against Storrs and Zahorik, and, therefore, that the ballot should not be counted for the last two, and yet it would be necessary to so hold in order to count the ballot for Moore.

In the third illustration, to give effect to what appears to have been the intention of the voter, it would be necessary to find that Burton and Pollins were candidates against Moore and Storrs. In the fourth illustration, the circle of one ticket is marked, and the name of one candidate for the office in question is marked on each ticket. In that case, to give effect to the

apparent intention of the voter, and count the ballot for but two candidates, it would be necessary to reject two names on the ticket the circle of which is marked, but there is no authority whatever for so doing. The voters who cast some of the ballots in controversy marked the circle, and also the name of a candidate for every office to be filled, marking some names on one ticket and some on the other. Suppose, in such a case, the voter had desired not to vote for any candidate for one of the offices to be filled. By failing to mark the name of any candidate for that office, he would have indicated with reasonable certainty that he did not wish his vote to count in filling it, but he would have failed to express his intention in the way pointed out by statute—that is, by omitting to mark a circle, and by marking only the names of those candidates for whom he wished to vote. In the case supposed, the statute would have required the unmarked name on the ticket bearing the marked circle to be counted. It follows from what we have said that our second, third, and fourth illustrations show ballots which, under the law, were cast for more candidates than there were places to fill, and which cannot be counted, except for persons whose names were marked on tickets the circle of which was unmarked.

3. It also follows from what we have said that a ballot marked with a cross in the circle opposite a party title, and with a cross in the square opposite the name of a candidate for the office in question printed in the other ticket, should have been counted only for the candidate on the other ticket whose name was so marked, and, if the names of more than one candidate printed on the other ticket were so marked, that the ballot should have been counted for all of them whose names were so marked. Of the ballots under consideration, twenty-one, each marked with a circle preceding the title "Democratic," and marked with a cross in the square opposite the name of the contestant, were rejected. They should have been received and counted for the contestant.

Twenty-three ballots, each of which was marked with a cross in the circle preceding the word "Republican," with a cross in the square opposite the name of the contestant, and with a cross in the square opposite one or more names of candidates for justice on the democratic ticket other than the incumbent, were properly rejected. Two ballots, each marked with a cross in the circle before the word "Republican," and with a cross in the square opposite the name of the contestant, and another in the square before the name of the incumbent, were offered by the contestant, and rejected. They should not have been counted

for him, but could have been counted for the incumbent, had he offered them. One ballot, marked with a cross in the circle before the ³⁵ word "Democratic" and a cross in the square before the name of the incumbent, and with another in the square before the name of a republican candidate other than the contestant, was properly rejected. Thirty ballots, each of which was marked with a cross in the circle before one of the party titles, and, in addition, with a cross in the square preceding the names of one or more candidates for justice other than the contestant or incumbent, were properly rejected.

4. The contestant objects to certain ballots which were received and counted for the incumbent, on the ground that they were not marked as required by the statute, or were marked in violation of the statute. Section 14 requires the ballots to be printed with a circle at the beginning of the line in which the party title is printed, and a square at the beginning of each line in which the name of a candidate is printed. Section 22 requires the voter to prepare his ballot "by making in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by writing in the name of the candidate of his choice in a blank space on said ticket, making a cross (X) opposite thereto; and, in case of a question submitted to the vote of the people, by making in the opposite margin or space a cross (X) against the answer he desires to give." If the voter desires to vote for all the candidates of one particular party, or group of petitioners, "he may place such mark at the appropriate place, preceding the appellation or title under which the names of the candidates of such party, or group of petitioners are printed." If the voter wishes to vote for candidates on different tickets, he "may place such mark at the appropriate space preceding the appellation or title of any one party, or group of petitioners," and may also mark "at the appropriate place preceding the name or names of one or more candidates printed under the appellation or title of some other party, or group of petitioners." ³⁶ Ballots marked as provided by the statute must be counted, and there is no authority for counting any which are not so marked. Section 27 contains provisions designed to compel secret ballots, and provides that "any person who shall mark, or cause in any manner to be marked, on any ballot, any character for the purpose of identifying said ballot," shall be punished by fine or imprisonment, or by both.

This provision is designed to prevent identifying marks by any person, including the voter, and prohibits such marking by

necessary implication. If it is done by someone without the knowledge or consent of the voter, as, by one of the election officers, it should not prevent the counting of the ballot, but, where it is done by the voter in preparing his ballot, it is a violation of the law, and, not being such a marking as the law sanctions, the ballot should not be counted. Whether a ballot should be counted does not depend solely upon the power to ascertain and declare the choice of the voter, but also upon the expression of that choice in the manner provided by the statute. In that respect, the statute under consideration has made a radical change in the law. The only mark which is recognized as competent to express the choice of a voter is a cross (X), and it is not only necessary to use a cross, but it must be placed at the appropriate margin or place. It is clear that the margin or place so intended is in the circle at the beginning of the line in which the party title is printed, or in the square at the beginning of each line in which the name of a candidate is printed. That is shown by the language of the statute which we have quoted, and by the description and illustration of the manner of voting on a question submitted to a vote of the people given in section 16. It is within the power of the general assembly to prescribe regulations which the voter must follow in preparing his ballot,²⁷ and those provided for in the statute under consideration are reasonable, and abundant provision is made to enable the voter to know and follow them. We conclude that a ballot which is not marked with a cross or crosses made substantially thus, "X," and placed substantially within the circle or square or squares printed at the places designated, should not be counted: See *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254; *Bechtel v. Albin*, 134 Ind. 193; *Sego v. Stoddard*, 136 Ind. 297; *In re Vote Marks*, 17 R. I. 812; *In re Ballot Marks*, 18 R. I. 822. Of the ballots received and counted for the incumbent, six were not marked with a cross in any circle or square. One had a cross near the left of the name of the democratic candidate for vice-president; one had a cross near to but outside of the circle opposite the word "Democratic"; one had a circle and cross therein made under the word "Democratic"; one had a cross only under that word, one had a cross above that word, and one had a circle, without a cross, under it. All these ballots should have been rejected. Twenty-seven ballots counted for the incumbent, and marked Exhibits 58, 59, 70, 77, 124, 125, 129, 136, 138, 141 (2), 142, 143, 144, 146, 147, 148, 150, 151, 152, 153, 155, 160, 162, 163, 164, and 165, should have been rejected. Nearly all of them were marked only in the party

circle, and most of those so marked contained crosses made with more than two intersecting straight lines, and a few had other marks. Some of these ballots were probably marked without any intention on the part of the voter of identifying them, but all could have been readily used for that purpose, and none were the crosses required by the statute. Exhibit 128 had a mark drawn from the party circle to the first letter "N" of the appellation "National Ticket." ²⁸ Exhibit 137 had the number "12" in the upper left-hand corner. Exhibit 145 had a cross in the party circle, and another to the left of it. Exhibit 149 had a cross in the party circle, and a circle inclosing a cross made just below and at the right of the end of the word "Democratic." Exhibit 161 had a cross in the democratic circle, and the circle of the people's ticket was entirely filled with marks, perhaps placed therein to cancel a cross made by mistake. All these should have been rejected. In one ballot a cipher was placed in the square; in another a check mark (v) was placed in the circle and each square of one ticket; and, in another ballot, a cross was made in the party circle, and the word "Yes" written in the squares of one of the tickets. In each of these cases the choice of the voter was plain, but he did not express it in the manner provided by the statute, excepting in the last one, where identifying marks were also used. These ballots should have been rejected. Each of four ballots was marked only with a straight line in the party circle, and should have been rejected. It is not practicable to adopt a rule in regard to identifying marks which would be applicable in all cases. It will not do to say that all ballots which bear marks not authorized by law should be rejected. All voters are not alike skillful in marking. Some are not accustomed to using a pen or pencil, and may place some slight mark on the ballot inadvertently, or a cross first made may be clumsily retraced. It is evident that in such cases, and in others where the unauthorized mark is not of a character to be used readily for the purpose of identification, the ballots should be counted, but where the unauthorized marks are made deliberately, and may be used as a means of identifying the ballot, it should be rejected.

²⁹ 5. The appellee complains that ballots similar in marking to some of those we hold should have been excluded were offered by the contestant and counted for him, but as the incumbent does not appeal, we cannot determine the question he thus presents. The conclusions announced show that the district court rejected votes which should have been counted for the contestant, and counted votes for the incumbent which should have

been rejected, sufficient in number, if the count was otherwise properly made, to have authorized a judgment for the contestant.

The errors committed are not shown to have been without prejudice to him, and the judgment of the district court is therefore reversed.

ELECTIONS—METHOD OF VOTING UNDER "AUSTRALIAN" SYSTEM.—Under the "Australian ballot system," an elector desiring to vote an entire ticket need only put a cross at the head of the ballot; but, if there is a single candidate on the ticket for whom he does not wish to vote, he must omit the cross at the top and place it opposite the name of every candidate voted for, in order that his ballot may not be counted for the candidate falling under his displeasure: *Allen v. Glynn*, 17 Col. 338; 31 Am. St. Rep. 304, and note.

ELECTIONS—INTENT IN MARKING BALLOTS FOR IDENTIFICATION.—Under the New York ballot law prohibiting marks of identification from being placed on ballots, it is necessary, in order to condemn a ballot, to prove that it was marked, either by the voter or by another with his knowledge, with his intent, or the intent, known to him, of such other person, that it might be afterward identified: *Extended note to Taylor v. Bleakley*, 49 Am. St. Rep. 249.

ELECTIONS—POWER OF LEGISLATURE.—It is within the power of the legislature of a state to prescribe the manner in which the right of suffrage shall be exercised: *State v. McElroy*, 44 La. Ann. 796; 32 Am. St. Rep. 355, and note; *Taylor v. Bleakley*, 55 Kan. 1; 49 Am. St. Rep. 233, and note.

ELECTIONS—AUSTRALIAN BALLOT LAW—MARKING BALLOTS.—Ballots not marked with a cross (X) substantially in or upon the square or place designated by the Australian ballot law should not be counted: *Taylor v. Bleakley*, 55 Kan. 1; 49 Am. St. Rep. 233, and note 240; *Farvin v. Winberg*, 130 Ind. 561; 30 Am. St. Rep. 254.

GIPPS BREWING COMPANY v. DE FRANCE.

[91 IOWA, 108.]

CONFLICT OF LAWS—CONSTRUCTION OF CONTRACT.—A written contract dated in one state, offering to furnish beer at a certain place in another state, from time to time, as ordered, "kegs not returned to be paid for," and accepted at the latter place, is a contract made in the latter state, and, if void under the laws thereof, entitles the buyer to recover all payments made thereunder, without deduction for kegs not returned.

PLEADING.—AN AMENDMENT TO A PETITION containing nothing but statements in the nature of conclusions of law, is properly stricken out.

Bishop & Wilcoxon, for the appellant.

McVey & Cheshire, for the appellee.

¹⁰⁰ ROBINSON, J. On the twenty-eighth day of March, 1891, the parties to this action entered into an agreement in writing, of which the following is a copy:

"Peoria, Ill., March 26, 1891.

"Mr. Charles De France, Des Moines, Iowa.

"Dear Sir: We propose to sell you our keg bottled beer, in refrigerator cars, delivered on track in Des Moines, from time to time, as you may order, on the following terms and conditions for the term of one year, viz: Keg beer (our best brands), six dollars per barrel. Bottled beer 'Amberlin,' in cases, two dozen quarts, one dollar and sixty cents per case. Bottled beer, 'Export,' in cases, two dozen quarts, one dollar and forty cents per case. After the first two cars, cash to accompany each subsequent order; thus allowing a credit for two cars. All empty kegs, cases, and bottles are to be shipped back promptly, and at the end of six months from date, and, on the first settlement, all empties not in sight must be paid for at the following rates:

$\frac{1}{2}$ barrels C	\$ 2 25 each.
$\frac{1}{2}$ (kegs) C	1 50 each.
$\frac{1}{2}$ (ponies) C	1 00 each.
Cases C	25 each.
Bottles (quarts) C	50 per doz.

"If mutually agreed, this proposition may be renewed for a longer period.

Yours respectfully,

"GIPPS BREWING COMPANY."

"Des Moines, Iowa, March 28, 1891.

"I accept the above proposition.

"CHARLES DE FRANCE."

"Des Moines, Iowa, March 28, 1891.

"We, the undersigned, hereby guaranty the faithful performance of all the stipulations and conditions of the above agreement, and the payment of all money due ¹¹⁰ said Gipps Brewing Company, of Peoria, Illinois, from said Chas. De France, by reason of said agreement.

S. G. COGSWELL,

"F. C. NORFOLK."

During the spring and summer of that year, the plaintiff shipped to the defendant at Des Moines, beer, barrels, kegs, and cases of the aggregate value, as fixed by the agreement, of six thousand and thirty-two dollars and sixty-seven cents, and money was paid, and cases returned, to the value of three thousand three hundred and forty dollars and fifteen cents. The plaintiff seeks to recover the remainder of the agreed price. The defendant alleges that the agreement between the parties was to be performed in this state; that it was for the sale of intoxicating liquors; that defendant was not authorized, under the laws of this state, to purchase or to own, or keep with intent to

purchase or own, or keep with intent to sell intoxicating liquors; that the agreement was in violation of the laws of this state; and that the liquors in question were sold to him under the agreement, in violation of law. The defendant further alleges that on the night of August 16, 1891, his place of business was destroyed by fire, and that in it were beer barrels, kegs, and cases owned by the plaintiff, which the parties agreed were of the value of one thousand five hundred and seventy-two dollars and seventy cents, which were also destroyed; that the fire was without fault on his part; and that he is not liable to the plaintiff for its property, which was burned as stated. In his counterclaim, the defendant asks to recover the amount of the payments for beer he has made under the agreement, which is admitted to be two thousand five hundred and seventy-nine dollars and fifty cents. The judgment rendered was for what remained of that amount after deducting therefrom the value of the barrels, kegs, and cases burned.

¹¹¹ 1. Before the trial was commenced, the plaintiff filed an amendment to its petition, in which it alleged that the contract inserted in the petition, and which we have set out, was not the contract for the sale of the merchandise for the value of which this action is brought, but only an agreement as to what the prices should be for merchandise defendant should order from time to time, and was only intended to be the basis or price list for such sales as the parties to it should afterward agree upon; that no sales were made until orders were sent to and accepted by the plaintiff; and that the agreement was binding upon the parties thereto as to the price of the merchandise sold for one year. A motion of the defendant to strike the amendment from the files was sustained, and of that ruling the plaintiff complains. It is not alleged that the agreement first made was set aside, or in any manner modified by a subsequent one, and the amendment appears to have been intended to interpret the agreement, and to state its effects. Its statements were in the nature of conclusions of law, and it was properly stricken from the files.

2. It is admitted that, if the contracts of sale in question were Iowa contracts, they were in violation of the laws of this state, and that appellant cannot recover for the liquor sold. It is contended by the appellant that the sales were made in the state of Illinois, and are governed by the laws of that state, which permit sales of the character of those in question. It will be observed that the contract set out does not purport to

effect any sale whatever. On the part of the plaintiff, it is an offer to sell beer of certain kinds in specified packages, at stated rates, on terms indicated. It did not bind the defendant to make purchases, but was designed to induce him to do so, and to make definite the terms and conditions upon which he could rely. The orders he gave were based upon ¹¹² that agreement, and were governed in all respects by it. That is shown beyond question by the correspondence and dealings between the parties. When beer was shipped to the defendant, an expense bill, but no bill of lading, was sent to him. There is nothing that shows that the beer was delivered to him on the cars at Peoria, where it was shipped. The place and manner of delivery were fixed by the contract, and were to be "in refrigerator cars, delivered on track in Des Moines, from time to time," as defendant should order. It was his right to insist upon delivery in Des Moines, and he could not be compelled to accept the beer elsewhere. Nor is there anything in the record to show that he waived his rights in that respect. The charges for transportation were paid, in the first instance, by the defendant at Des Moines, but were deducted from the contract price of the beer. The agreement fixing the terms of sale was forwarded to Des Moines, and there signed. It contained, in effect, a continuing offer to sell beer on the terms stated: See *Muscatine Waterworks Co. v. Muscatine Lumber Co.*, 85 Iowa, 112; 39 Am. St. Rep. 284; *Judd v. Day*, 50 Iowa, 247. That offer was accepted when a letter was written or telegram sent, ordering beer to the extent of the order, and the acceptance took effect from the time the letters were mailed and the telegrams were sent: *Ferrier v. Storer*, 63 Iowa, 487; 50 Am. Rep. 752; *Tegler v. Shipman*, 33 Iowa, 198; 11 Am. Rep. 118. The beer ordered was delivered at Des Moines, as required by the contract.

We conclude that the sales were made in this state, and that they are governed by its laws which were in force at that time. Our conclusion is sustained to some extent by the following authorities: *Sedgwick v. Cottingham*, 54 Iowa, 512; *Hooper v. Chicago etc. Co.*, 27 Wis. 82; 9 Am. Rep. 439; *Suit v. Woodhall*, 113 Mass. 391; *Wasserboehr v. Boulrier*, 84 Me. 165; 30 Am. St. Rep. 344; 2 Benjamin on Sales, sec. 1040; 21 Am. & Eng. Ency. ¹¹³ of Law, 528, note 1. Cases are cited by the appellant which are claimed to hold a different rule, but we think that in most, if not all, of them, the controlling facts were unlike those in this case, and that different principles were involved. When the sales in question were made, the defendant had not obtained the right to purchase and deal in intoxicating liquors. The

sales were in violation of the law, and no recovery therefor can be had.

3. Section 1550 of the code provides that: "All payments or compensation for intoxicating liquor sold in violation of this chapter, whether such payments or compensation be in money . . . or anything else whatsoever, shall be held to have been received in violation of law, and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver, in consideration of the receipt thereof, to pay on demand to the person furnishing such consideration the amount of said money." Under this provision, the defendant is entitled to recover the money he has paid on account of the sales in question. He complains of the ruling of the court which deducted from that amount the value of the beer barrels, kegs, and cases in which beer had been shipped to him, which were burned. The contract in suit, in terms, requires the defendant to return the property destroyed, or pay therefor the prices specified. That provision cannot be separated from the remainder of the agreement, but was a necessary part of it. The defendant was not dealing in the property therein described, excepting so far as was necessary to carry on his illegal business. It was sent as necessary to complete the sales, and for no other purpose; and the provision for its return, and for payment if it was not returned, was merely to fix the liability which the defendant would incur by reason of the sales, as an incident of them. It was said in *Reynolds v. Nichols*, 12 Iowa, 402, to be ¹¹⁴ well settled "that any promise, contract, or undertaking, the performance of which would tend to promote, advance, or carry into effect any object or purpose which is unlawful, is in itself void, and will not maintain an action." If the provision under consideration were separable, it would be void, because intended to promote an illegal purpose; but we think the agreement as expressed in the writing must be regarded as entire and indivisible, lacking only an order to give it effect, and that it is wholly illegal. It follows that it imposed no obligation on defendant to return the property in question. He had collected and stored it, and in law held it as a mere depository for the plaintiff, and was not liable for damage or loss which occurred without fault on his part. We are of the opinion that the court rightly instructed the jury to return a verdict for the defendant, but that it erred in not requiring a verdict for the full amount of the payments he had made to plaintiff.

On the appeal of the plaintiff, the judgment is affirmed. On the appeal of the defendant, it is reversed.

SALES IN VIOLATION OF LAW—CONFLICT OF LAWS.—A vendor who sells intoxicating liquors in one state, where such sale is valid, to a purchaser who intends to sell them at retail in another state where such sale is illegal, cannot maintain an action for their price in the latter state, if such action is prohibited by statute: *Knowlton v. Doherty*, 87 Me. 518; 47 Am. St. Rep. 349; *Graves v. Johnson*, 156 Mass. 211; 32 Am. St. Rep. 446, and extended note.

WORLEY v. STATE INSURANCE COMPANY.

[91 Iowa, 150.]

INSURANCE.—THE VACANCY of a house alone does not avoid a policy of insurance prohibiting vacancy of the "premises" and covering both such house and a barn.

INSURANCE—VACANCY.—A policy of insurance for several years on premises to be occupied by tenants prohibiting the vacancy of the premises is not rendered void by short vacancies caused by the lapse of a reasonable time in changing tenants.

INSURANCE—PREMATURE SUIT.—A policy of fire insurance providing for payment within sixty days after notice and proof of loss, is controlled as to the time of commencing an action for the loss by a statute providing that no action shall be begun on any policy within ninety days after notice of loss; and, unless proof of loss is waived, an action begun before the expiration of the ninety days is prematurely brought.

INSURANCE.—A MORTGAGEE to whom a policy of fire insurance is assigned as security, who appears in an action to recover for a loss under the policy, and disclaims all interest in it, estops himself from ever claiming under the policy, and enables the insured to maintain the action.

A. Hollingsworth and J. C. Davis, for the appellant.

O. B. Ayers, and Craig, McCrary & Craig, for the appellee.

152 GIVEN, J. 1. We first consider the case as presented on plaintiff's appeal. The question is, whether the court erred in sustaining defendant's motion, on the second ground thereof. There is no conflict whatever in the evidence as to the condition of the insured property at the time of the fire, and, therefore, there was no question of fact, as to its being vacant or not, to submit to the jury. It was for the court to determine, as a matter of law, whether, under the terms of the policy and the undisputed facts, the policy had become void. Numerous cases are cited wherein the policy was conditioned against the property becoming vacant, or unoccupied, or vacant and unoccupied, and wherein it is determined that the facts did or did not constitute a breach of the condition. The language of this policy is so different that those cases have but little application.

The second ground of defendant's motion is, that it appeared without dispute that at the time of the fire the house was vacant. The property insured was the dwelling-house, and the barn in the

rear of it. The condition of the policy is: "Or if there is any change in the occupant or occupancy of the premises insured, or if they become vacant, . . . this policy shall be void." Forfeiture is claimed, not because of any change in the occupant or occupancy, but because the house became vacant. While it was entirely competent for the parties to have agreed upon a forfeiture in case any part of the insured premises should become vacant, such is not this contract, but it is, "Or if they [the insured premises, ¹⁵³ the house and barn] become vacant," the policy shall become void. It is not claimed that the barn was vacant. The plaintiff was keeping a cow, horses, harness, vehicles, feed, etc., therein, and using it as such barns are generally used. It seems entirely clear that the condition of the policy is against the premises insured (the house and barn) becoming vacant, and not against one or the other becoming vacant: *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605; *McQueeney v. Phoenix Ins. Co.*, 52 Ark. 257; 20 Am. St. Rep. 179; *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202; *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513. The only case cited by appellee on this point that requires special mention is *Connecticut Fire Ins. Co. v. Tilley*, 88 Va. 1024; 29 Am. St. Rep. 770. That insurance was on sixteen tenement houses, at one hundred and eighty-seven dollars and fifty cents on each, aggregating three thousand dollars. They were constructed in eight double houses, with lanes between, each of the sixteen being a separate and distinct tenement. The policy provided, "if the premises become unoccupied," etc. The court held that the insurance and condition as to nonoccupancy related to each house, and not to the whole, as one house. It does not appear, as in this case and in *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202, that the premium paid was a gross sum, or that the houses were intended to be occupied together, as are houses and barns such as those covered by the policy in suit.

2. The facts concerning the house are these: The fire occurred on Saturday night, January 30, 1892. On Wednesday preceding, one Shepherd, who occupied the house as plaintiff's tenant, moved out. Some time prior, plaintiff had occupied two rooms as a lodging, Shepherd's family occupying the other rooms. When plaintiff went elsewhere to lodge, he left a stove, two chairs, some picture frames, stepladder, pick, shovel, and hatchet in his rooms, ¹⁵⁴ which remained in, and were destroyed with the house. Some weeks before Shepherd moved out, plaintiff rented the house to one Williams; and, on the Friday

and Saturday preceding the fire, plaintiff, Mr. Williams, and some of Mr. Williams' family were engaged in repairing and cleaning the house, with the view to Mr. Williams moving into it on the Monday following. The policy expressly provides that the house was "to be occupied by a tenant, as a family residence only," and it was for three years. It must surely have been contemplated by the parties that there would be changes of tenants during the life of the policy, and that some time would intervene between the going out of one and the coming in of another. The condition against the premises becoming vacant must have been made in view of this probability, and it was not intended that the lapse of a reasonable time in changing tenants should render the policy void. Shepherd moved out on Wednesday, and returned the key to plaintiff on Thursday. Friday and Saturday, plaintiff and Williams, his tenant, occupied the house, cleaning and repairing it preparatory to Williams' moving in on Monday. Surely, the house was not vacant, within the meaning and intention of the parties, as expressed in the policy: *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472; 59 Am. Rep. 444. Our conclusion is, that the court erred in sustaining defendant's motion on the second ground thereof.

3. We next consider the case as presented on defendant's appeal: On March 17, 1892, notice and proofs of the loss occurring January 30th were served on defendant's local agent at Keokuk, the agency from which the policy issued, and on March, 20th, said notice and proofs were received through the mail by the defendant. This action was commenced May 20, 1892—less than ninety days from the time that notice and proofs of loss were given. Section 1734 of McClain's code provides that no action shall be begun ¹⁵⁵ on any policy of insurance within ninety days after notice of the loss has been given. This policy provides for the payment of the loss "within sixty days after due notice and satisfactory proof of same are received at its office in Des Moines." Plaintiff contends that by this provision the defendant waived the statutory requirement, and that, as payment was to be made within sixty days, an action could be commenced after the lapse of that time, and before the expiration of the ninety days. In *Taylor v. Merchants' etc. Ins. Co.*, 83 Iowa, 402, wherein the policy provided for payment within sixty days after notice and proof of loss, this court held that the statute was controlling as to the time of commencing an action, and that the action, having been begun before the expiration of ninety days, was prematurely brought. Pending arguments on defend-

ant's motion for a verdict, plaintiff, with leave, filed an amendment to his petition, alleging that on February 11, 1892, defendant waived notice and proof of loss. This allegation was denied, and no evidence whatever offered to sustain it. There being no evidence, the allegation of waiver cannot be considered, in passing upon the first ground of defendant's motion, even if it be true, as stated by plaintiff in argument, that evidence was not offered because of the ruling on the second ground of the motion. We think the action was prematurely begun, and that the motion should have been sustained, on the first ground thereof.

4. Nannie M. Smith, having sold the insured property to plaintiff, assigned to him all her title and interest in the policy, defendant consenting thereto. Nannie M. Smith held a mortgage from plaintiff on the land and buildings, which mortgage had, prior to the fire, been assigned to George Engelhart, and on which six hundred dollars was unpaid. Plaintiff introduced in evidence a writing signed by said Engelhart, wherein he stated that he considered the real ¹⁵⁶ estate ample security for his mortgage, and waived all claim under the policy. Pending the argument on defendant's motion, said Engelhart, by leave of court, filed his petition of intervention, disclaiming any interest in the policy. With such a disclaimer on file, Mr. Engelhart would surely be barred from ever claiming under the policy. The disclaimer required no proof, and, whatever might be the rule in its absence, with it in the case, the third ground of defendant's motion was properly overruled.

It follows from the conclusions reached that on both appeals the judgment of the district court is reversed.

INSURANCE—TEMPORARY VACANCY OF PREMISES.—To constitute occupancy of a dwelling-house, within the meaning of a fire insurance policy, it need not be used continuously. The family may be absent for health, pleasure, business, or convenience, for reasonable periods: *Moody v. Insurance Co.*, 52 Ohio St. 12; 49 Am. St. Rep. 699. See the discussion of this subject in the extended notes to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 392, and *Cook v. Continental Ins. Co.*, 35 Am. Rep. 443.

INSURANCE—VACANCY OF PREMISES—CHANGE OF TENANT.—Under a policy of insurance on leased premises, which contains a condition prohibiting a vacation of occupation without the written consent of the insurer, a reasonable time must be allowed to carry out a change of tenants without imposing upon the insured the penalty of either an intended or permitted vacation of the insured premises: *Doud v. Citizens' Ins. Co.*, 141 Pa. St. 47; 23 Am. St. Rep. 263, and note; *Roe v. Dwelling House Ins. Co.*, 149 Pa. St. 94; 34 Am. St. Rep. 506, and note.

MILFORD v. MORRIS.

[91 Iowa, 198.]

SURETYSHIP—SETTLEMENT WITH PRINCIPAL—ESTOPPEL AGAINST SURETY.—If, at the end of an officer's first term, a settlement is made with him by the obligor in the first bond, without the production of any money, and by the acceptance of a worthless draft, while facts exist which should put the obligee on inquiry as to a prior defalcation by the officer, the sureties on such officer's bond for a second term are not estopped from showing that a defalcation for which they are sought to be charged occurred prior to the making and approval of their bond; and upon making such proof they are not liable.

SURETYSHIP—INDORSEMENT ON BOND—NOTICE TO SURETY.—An indorsement or recital not on a bond at the time it is signed by sureties, but put on afterward, is not notice to them.

P. E. C. Lally, T. J. Garrison, and J. J. Russell, for the appellants.

J. P. Conner, for the appellee.

¹⁹⁸ **KINNE, J.** 1. On the third Monday of September, 1890, defendant Morris was elected treasurer of plaintiff, and on the 23d of said month duly qualified as such officer by the execution and delivery to plaintiff of a bond containing the usual conditions, and which was signed by the other defendants as sureties. It is claimed that, at the termination of his term of office, he was owing plaintiff, as such treasurer, the sum of two thousand two hundred and ninety-six dollars and ¹⁹⁹ twenty-eight cents, which he failed and refused to account for and turn over to his successor in office. The answer of the sureties admitted the corporate capacity of plaintiff, and denied all other allegations of the petition. It also stated that all moneys which Morris had in his possession or under his control as treasurer of plaintiff at the time the bond was accepted and approved, as well as all moneys received by him as treasurer of plaintiff, from the time said bond was accepted until the expiration of his term of office on the third Monday of September, 1891, had, prior to the commencement of his suit, been paid out on orders drawn by plaintiff on him. That on the 23d of September, 1890, said Morris, as treasurer of plaintiff for the year preceding said 23d of September, 1890, made his annual report as treasurer to the board of directors of plaintiff, wherein he credited himself with a balance of three thousand one hundred and sixty-three dollars and sixty-three cents as then due from him to plaintiff for the preceding year. That about the time he made said report, and before the bond sued on had been accepted, plaintiff's board examined his accounts, and settled same,

finding the balance due as above stated. That at the time Morris made the report, and at the time of said settlement, he did not have in his possession, or under his control, said sum, or any part of it; but in settlement submitted to said board certain drafts, checks, and bills of exchange as representing said amount. That said drafts, checks, and bills of exchange did not represent money, and were of no actual value, but were obtained for the purpose of settlement by said treasurer. That at no time between the time of making said report and settlement and the acceptance of said bond did Morris have in his possession, or under his control, said three thousand one hundred and sixty-three dollars and sixty-three cents, or any part of it, but had, long prior to ²⁰⁰ the time of making said report, converted the same to his own use. That said board when it made said settlement and accepted said bond, knew that said treasurer did not have said money in his possession or under his control. That said moneys are the same moneys sued for in this action. That no part of the money shown by said report and settlement was ever in the possession or control of said treasurer at or since the execution, delivery, and acceptance of the bond sued on. They further aver that, since they signed the bond, it has been materially altered, whereby defendants' obligations have been changed, and that said alteration consisted in indorsing on the face thereof the following: "Teachers' fund on hand, two thousand eight hundred and two dollars and eighty-two cents; contingent fund, three hundred and sixty dollars and eighty-seven cents; total, three thousand one hundred and sixty-three dollars and sixty-nine cents." That said indorsement was made without the knowledge or consent of defendants. Defendant Morris, in a separate answer, denied all of the allegations in the petition. The cause was tried to the court, and a decree entered for plaintiff for the amount claimed and for costs.

2. The defense in this action, in brief, is that the defalcation on the part of the treasurer occurred during his term of office prior to the execution of the bond sued on; that the sureties are not concluded by the settlement because the money was not produced, and it was therefore not such a settlement as the law contemplated; that the bond was materially altered after defendants signed it. This court has held that when an officer charged with the custody of public funds is re-elected one or more times, and serves two or more terms, sureties upon a subsequent bond become *prima facie* liable for such balance of the previous account as is chargeable to their principal: District Tp. of Fox v. Mc-

Cord, 54 Iowa, 346; ²⁰¹ Kelly v. State, 25 Ohio St. 569; Kagay v. Trustees, 68 Ill. 75; Pine County v. Willard, 39 Minn. 125; 12 Am. St. Rep. 622. The question, then, arises, May the sureties show that the defalcation existed prior to the time Morris settled with the board, or are they concluded by his report? Appellee relies upon Boone County v. Jones, 54 Iowa, 699, 37 Am. Rep. 229, in support of his contention that appellants are estopped from showing that Morris did not have the money which he charged himself with, at the beginning of his last term of office. In that case, it appears that the treasurer's accounts for the year 1876 had been closed by his charging himself with amounts to balance, which balances were by him carried forward with his accounts as treasurer for 1877 as so much cash on hand. This settlement appears to have been made in January, 1877. The bond was executed in November, 1876. At the settlement Jones made an accounting. Just what sort of a showing he made to the board that he had the money called for on hand does not appear. It was proposed to show that for the term for which defendants were his bondsmen Jones had paid out more money than he had received, and that the deficit occurred before the bond was given.

All this was excluded, on the ground that the treasurer and his sureties were bound by the settlement of 1877, and other subsequent settlements. The facts in Boone County v. Jones, 54 Iowa, 699, 37 Am. Rep. 229, are somewhat different from those in the case at bar. In that case, settlements were had after the bond was given; in the case at bar, the settlement was made before the bond was given. Again, Boone County v. Jones, 54 Iowa, 699, 37 Am. Rep. 229, was rested in part on the fact that, in the absence of evidence to the contrary, it would be presumed that the board of supervisors did their duty, and made such a settlement as the law required. That case is, then, distinguishable from the one at bar, for, in this, the board of directors, in making ²⁰² settlement with Morris, did not require him to produce the money which his books showed he owed the district, but settled with him for his first term's indebtedness upon the presentation of a draft covering the amount. If the settlement made in the case at bar was such a one as the law contemplates, then, under Boone County v. Jones, 54 Iowa, 699, 37 Am. Rep. 229, the sureties might be estopped from questioning the facts as shown by the officer's books. Our statute provides that the board of supervisors, at their regular meetings in January and June of each year, "shall make a full and complete

settlement with the county treasurer," as they must also when he goes out of office: Code, secs. 913, 917. As to school treasurers, it is provided that the board of directors "shall, from time to time, examine the accounts of the treasurer, and make settlement with him": Code, sec. 1732. The language of the two sections is, in substance, the same. It was held in *Webster County v. Hutchinson*, 60 Iowa, 724, that sureties of a county treasurer were not concluded when the books had been balanced without the proper settlement having been made—that is, without the production of the funds shown to be on hand. A few days before the settlement in the case at bar was made, Morris had presented in settlement of the amount conceded to have been due from him some money, a draft, a grain ticket, and his personal check on a bank. He claimed that he had the money, but it was not safe to bring it to a meeting held in the night. At the next meeting, when the settlement was effected, Morris produced a draft on a solvent bank for an amount greater than he owed the district. This draft was treated by the board as money, and, on the faith of it, the settlement was accomplished, and the bond sued on approved. The evidence shows that, before making this ²⁰⁸ settlement, the board knew that it was talked that Morris was behind in his accounts. It may be conceded that, when the settlement was effected, the board thought Morris had the money, but we think, in view of the fact that they knew it was currently rumored that he was short, that but a few days before he had attempted to make a settlement by tendering some money, a draft, a wheat ticket, and his personal check, they should be held to the exercise of vigilance in making a settlement with him. The settlement made was not such as the law contemplates. Not a dollar in money was produced. The board took the treasurer's word that he had the money. They treated the draft as money. Knowing as they did, that he had been elected for another term, and hence would not be compelled to turn over the amount due from him to another, it was their duty to be especially careful to see that the treasurer, in fact, had the funds on hand. We do not say that there might not be cases where the board would be justified in treating a draft on a solvent bank as cash in effecting a settlement with its officer, as when they knew he had in the bank, subject to his credit, the amount represented by the draft; but, in this case, the board made no investigation to ascertain whether Morris had, in fact, a dollar in the bank. As a matter of fact, he did not have in said bank over one-sixth of the amount represented by the draft. He borrowed the draft for the very pur-

pose of deceiving the board. He only obtained it on the promise to return it after he had accomplished his purpose. There is entirely too much carelessness on the part of boards in settling with such officers, and the only safe rule is, in all cases, to compel the officer to actually produce the money. True, even in such a case, the officer may borrow the money for the purpose of making a settlement; but, if he produces it, and the board have no ²⁰⁴ reason to doubt it is his, and settle with him so believing, they have discharged their duty. Not having settled, as the law contemplates, by a production of the money, we hold that the sureties were not estopped from showing that the defalcation for which they are sought to be charged in fact occurred prior to the making and approval of their bond. There does not seem to be any real contention over the fact that the defalcation did occur before the execution of the bond sued on. The evidence seems to us to show that to be the fact. Hence these sureties are not liable in this action.

3. It is said that, when the bond was signed by these sureties, there was indorsed upon it, in the handwriting of Morris, the amount which should have been in his hands as treasurer, and that defendants were chargeable with notice of the amount of money on hand. The evidence, we think, abundantly shows that this indorsement was not on the bond at the time these sureties signed it, but was put on afterward. It was, therefore, no notice to them. In view of our holding as to the settlement, it is not necessary to consider the effect of the claimed alteration of the bond after it was signed by the sureties.

For the reasons given, the judgment is reversed.

OFFICIAL BONDS.—A county treasurer held the office for two successive terms, and failed, at the end of the second term, to account for or turn over to his successor all the funds then properly chargeable to him. In such a case, the sureties upon his bond for the second term are prima facie responsible for the deficiency, and if they would relieve themselves from liability, upon the ground that the deficiency occurred during the previous term, the burden is cast upon them to show that fact: *County of Pine v. Willard*, 39 Minn. 125; 12 Am. St. Rep. 622. This question is the subject of the extended note to *Crawn v. Commonwealth*, 10 Am. St. Rep. 843-860.

OFFICIAL BONDS—ALTERATION.—**LIABILITY OF SURETIES:** See *Hagler v. State*, 31 Neb. 144; 28 Am. St. Rep. 514, and note, and *King County v. Ferry*, 34 Am. St. Rep. 880, and note.

FOSTER v. TIERNEY.

(31 IOWA, 252.)

MECHANICS' LIENS. — AN ARCHITECT WHO PREPARES PLANS and specifications for a building that is not erected, or an improvement that is not made, is not entitled to a mechanic's lien therefor, although he does some work upon the land needed for information in preparing his plans.

Action to foreclose a mechanic's lien. Defendants demurred to the petition, and the demurrer was sustained. Plaintiffs appealed.

Park & Odell, for the appellants.

Cummins & Wright, for the appellees.

254 GRANGER, C. J. A ground of the demurrer is, that it appears that the contemplated improvements were not made, nor were the plans and specifications used; and the legal proposition is presented whether or not, under such circumstances, a mechanic's lien would attach. By section 3, chapter 100, of the acts of the 255 sixteenth general assembly, it is provided: "Every mechanic or other person who shall do any labor upon . . . any building, erection, or other improvement upon land . . . shall have for his labor done, or materials, machinery, or fixtures furnished, a lien upon such building, erection, or improvement, and upon the land belonging to such owner on which the same is situated." It is important to observe for what a lien is granted. It is for labor upon a building, erection, or improvement upon land. It is not granted merely for labor upon land. It is not contended that anything more was done in this case than the preparation of the plans and specifications, which involved some labor in and about the building and premises. The work done was only to get information necessary to prepare plans for contemplated improvements or changes. We have no hesitancy in saying that the measurements and work done about the building give to the plaintiffs no greater right to a lien than would the preparation of the plans and specifications without such work and measurements, if designed for the same premises. It is, then, a question whether or not an architect, who prepares plans and specifications for a building that is not erected, or an improvement that is not made, has a lien therefor. Take the case of a building for which such plans are made, and which is not erected, and there is nothing to which the lien can attach but the naked land. Can it be said that work

has been done upon the building? The law contemplates that the lien is to attach to the building and the land upon which it is situated. Reading the entire law of the state on the subject of mechanics' liens, and it nowhere expresses, nor does it seem to leave to legitimate inference, a right to such a lien for work, unless it has been done upon, or in aid of, a building or improvement which such work has aided in producing. We are cited by appellants to a number of ²⁵⁶ authorities in support of their claim, but all of them seem to be in harmony with our view; that is, in all the cases cited, where a lien is held to attach, there is something done in the way of a building or improvement to give rise to the lien. In Indiana, where the lien attaches to the building, it is held that the foundation of a barn constituted a building, within the meaning of the statute: *Scott v. Goldinghorst*, 123 Ind. 268. See, also, *Charnley v. Honig*, 74 Wis. 163; *Kelley v. Rowane*, 33 Mo. App. 440. In the case of *Knight v. Norris*, 13 Minn. 473, the building was nearly completed, and then abandoned, and the claims of the architect for plans and specifications and superintending the work of construction were adjudged a lien on the premises. We are without any authority in support of the lien claimed in this case, and we do not think that it should be held to exist.

The judgment of the district court is in harmony with this conclusion, and it is affirmed.

MECHANICS' LIENS—RIGHT OF ARCHITECT TO LIEN.—An architect who prepares the drawings, plans, and specifications for a building, and superintends the erection thereof, is within the protection of a statute which creates a lien in favor of "every mechanic, or other person, who shall perform any work or labor . . . upon any building or improvement on land": *Hughes v. Torrerson*, 96 Ala. 346; 38 Am. St. Rep. 105; contra, see *Thompson v. Baxter*, 92 Tenn. 305; 36 Am. St. Rep. 85. See, also, the extended note to *Stryker v. Cassidy*, 32 Am. Rep. 264-267.

NEGLEY v. COWELL.

[91 IOWA, 256.]

APPELLATE PRACTICE—ERRONEOUS INSTRUCTIONS.—It is reversible error to submit a material question of fact to the jury which is not presented by the pleadings, and upon which there is no evidence, when the jury might have found a different verdict had the instruction complained of not been given.

TRESPASS.—MEASURE OF DAMAGES for willful trespass in cultivating the land of another is the fair market value of the crop thus produced.

J. W. Luke, and Taylor & Evans, for the appellant.

E. P. Andrews, for the appellee.

257 GRANGER, C. J. 1. The issues formed, upon which the trial was finally had, were upon a substituted petition, in which there was an averment of damage for trespass in the use of a pasture. Under an order of the court for a more specific statement, the petition was amended so as to specify the damages for each of the years, and for what the damage is claimed; and it is a matter of much doubt whether, under the petition as amended, the issues involved a claim for damage on account of pasturage. Appellant urges that the issues present no such a claim, and the appellee urges that they do. The substituted petition, which supplants all prior pleadings of plaintiff, claims, in the aggregate, damages in the sum of three thousand dollars. The amendment, which itemizes the damages for each of the four years, and gives the aggregate damages for each year, makes no claim whatever for pasturage, and it presents a total aggregate of just the amount claimed in the substituted petition; and it 258 seems quite manifest that by the amendment it was intended to make specification of the particulars for which damage was claimed. We think the effect of the amendment was to eliminate from the issues the claim for pasturage. The court, however, in its statement of the issues to the jury, presented, as an item of plaintiff's claim, one for pasturage. In its instructions on the measure of damage, the court said to the jury that, if plaintiff should recover, her damage would be the fair market value of the crop and hay, "and the fair and reasonable value of the pasture land actually used and occupied by him during said time." Appellant claims that the presentation of the issue to the jury is prejudicial error, both on the ground that there is no such issue in the pleadings, and because there is no evidence whatever on which to base the instruction. We do not see how to avoid the conclusion. If, by any construction of the pleadings, the issue could be preserved, the conclusion must be the same, because there is no evidence whatever to justify the instruction as to damage. The only evidence claimed by appellee on that subject is the putting in evidence of the original petition, in which there was a claim for such damage. But such evidence would in no sense tend to prove the fact of such an occupancy or use. It was only plaintiff's averment of facts, to be established by proofs. The pleadings were put in evidence by the defendant, and the record shows

that the purpose of their use was to show that the issues being tried were the same as other issues that might affect this case. It was not an attempt to prove the admissions of the opposite party from the record.

It is contended by appellee that the instruction is without prejudice, or is not reversible error. It is not a case in which there was an instruction as to some incidental ²⁵⁹ fact, as to which there was no evidence, where it appears that without the instruction the result could not have been different. The complaint here is as to an independent item of recovery, and one of considerable importance. It is surely a material question. In *Whitsett v. Chicago etc. Ry. Co.*, 67 Iowa, 150, it is said: "This court has often held that it is error to submit a material question of fact to the jury on which there is no evidence." In the same case it is said: "It is equally erroneous to submit a question which is not presented by the pleadings": See cases there cited. See, also, *White v. Spangler*, 68 Iowa, 222; *Johnson v. Miller*, 69 Iowa, 562; 58 Am. Rep. 231. This court has made an exception to this rule in cases where the jury, "upon the undisputed facts, could have found no other verdict than that they did find": *Blair Town etc. Land Co. v. Hillis*, 76 Iowa, 246; *Phelps v. Walkey*, 84 Iowa, 120. It cannot be said, in this case, that the jury could not have found a different verdict, had the instruction complained of not been given. A very considerable portion of the section of land was not used for crops or hay, and from the fact that the court, upon the question of damage, gave precisely the same instruction as to pasturage that it did as to hay and crops, the jury must have understood that, if there was a basis for recovery for one, there might have been for the other, or, at best, that there was evidence on which a recovery could be based. Even though we might find that the evidence warranted a recovery for the amount of the verdict, from the proofs as to other items of damage, still we cannot say, in view of the record, that the jury could not have done otherwise under the instructions as given. The instructions certainly authorized a finding of damage for pasturage. If the instruction was directed to a material fact, upon which the ²⁶⁰ general verdict would depend, the case might be quite different, for it might then appear that it had support from undisputed facts, as in *Newell v. Martin*, 81 Iowa, 238. But, in this case, the recovery might have been greater or less than the amount returned, and the discretion of the jury would have been controlled, and hence it

cannot be said what particular items were allowed by the jury in its estimate.

2. Upon the measure of damage, the court instructed that plaintiff was entitled to the fair market value of the crops and hay, and of this complaint is made. It is conceded that this court has held to such a rule; but we are asked to reconsider the question, and announce a rule giving only compensatory damages. The rule given by the court in this case is based upon the fact that the trespass giving rise to the damage was a willful one. In so far as the question of damage is considered therein, the case of *Keirnan v. Heaton*, 69 Iowa, 136, is parallel to this, and the rule there announced is full authority for the rule given in this case. The theory of the rule seems to be, that a crop produced by a trespassing act is the property of the owner of the soil, and the trespasser has no such interest in it that he can deprive the owner of it, or of its possession, and that the owner of property is entitled to its value, if converted by another. Such a rule is reasonable, and has good support on authority. As directly bearing on the question of the interest in property of one who, by his wrongful acts, produces or adds to its value, see *Murphy v. S. C. & P. R. Co.*, 55 Iowa, 473; 39 Am. Rep. 175, and authorities cited.

There are no other questions that we think it necessary to consider, in view of a new trial. There is a claim that the first and fifth instructions are in conflict, but the suggestions here will be sufficient to avoid it hereafter.

The judgment is reversed.

INSTRUCTIONS.—AN ISSUE UPON WHICH THERE IS NO EVIDENCE need not be submitted to the jury: *Beard v. Illinois Cent. Ry. Co.*, 79 Iowa, 518; 18 Am. St. Rep. 381. It is not error to refuse an instruction when there is no evidence to which the same is applicable: *Evansville etc. R. R. Co. v. Guyton*, 115 Ind. 450; 7 Am. St. Rep. 458.

TRESPASS—MEASURE OF DAMAGES.—The measure of damages in trespass for cutting grass and selling it on execution against a debtor without lawful authority is the value of the grass after it has been converted into hay: *Benjamin v. Benjamin*, 15 Conn. 347; 39 Am. Dec. 384. The measure of damages for timber cut by a trespasser on the land of another is the value of the timber standing: *Michigan Land etc. Co. v. Deer Lake Co.*, 60 Mich. 143; 1 Am. St. Rep. 491, and extended note. To the same effect see *Powers v. Tilley*, 87 Me. 34; 47 Am. St. Rep. 304.

STEVENS v. MURPHY.

[91 Iowa, 356.]

TAX DEEDS—NOTICE TO TERMINATE REDEMPTION.—A tax deed issued by an officer who has no evidence on file in his office to show that the person serving notice to redeem from the tax sale is the holder of the certificate of sale or his agent or attorney is void.

In October, 1884, a parcel of land was sold for taxes and purchased by one Dvorsky, who assigned the certificate of sale to one Novak on August 10, 1887. On December 21, 1887, the treasurer sold for taxes, and by conveyances defendant Murphy be-
rurer of Johnson county issued to Novak a deed, in pursuance of
came the owner of the title arising from such tax sale. On
August 23, 1887, Novak caused a notice to be served on
plaintiff, Stevens, whose land had been sold for taxes.
The affidavit indorsed on the back of such notice recited that
J. J. Lorack received and served such notice on Stevens on Aug-
ust 23, 1887. At the time of such service, Lorack was not in
the employ of Novak, except for the purpose of making such
service. On October 15, 1890, plaintiff brought this suit to re-
deem from the tax sale and to have the tax deed declared void.
Judgment for plaintiff, and defendants appealed.

Ranck & Wade, for the appellants.

Baker & Ball, for the appellee.

³⁵⁷ GRANGER, C. J. The issues of the case are such that, if the return of service of the notice is sufficient, ³⁵⁸ the tax deed is valid. If not sufficient, the deed is invalid, and the right of redemption still exists. It should be noticed that nothing in the notice or return shows, in any way, that Lorack was an agent or attorney for Novak. No question is made as to the fact of service of the notice, but merely as to the sufficiency of the return thereto. It is provided that the period of redemption shall not expire "until ninety days after the service of said notice of the right of redemption." But the service is not complete upon the mere fact of service upon the party in one of the methods prescribed, which are those for the service of an original notice; but, to complete the service, the notice must be filed with the treasurer, and there must be with it an affidavit showing the particular mode of service, and it must be "signed and verified by the holder of the certificate of purchase, his agent or attorney." All of these facts are essential to vest the treasurer

with authority to execute a deed, and the manner of the proof of the facts to give such authority is prescribed by the statute. The deed in this case did not issue upon any showing that the service was made by an agent or attorney. The treasurer could no more assume such a fact than he could other important facts required to appear in the return. It can be said in this case, as it was in *Ellsworth v. Van Ort*, 67 Iowa, 222: "When the treasurer executed the deed in question, then he had no competent evidence *on file in his office* that the notice had been served." We italicize the words "on file in his office" to more particularly indicate the proof that will justify the execution of a deed. It is further said, in the same connection, in that case: "And, in the absence of such evidence, we think he had no authority to execute the deed." And, further, it is said: "The service is not deemed complete until it is filed with the treasurer." The holding in that case means that, before the treasurer can issue the deed, all the facts ³⁵⁹ essential to the authority to do so shall appear in the files of his office. The fact that the proof of service was made by one authorized to make it, is claimed to be important. If it should be conceded, as it is claimed in this case, that Lorack was actually an agent for Novak, it could make no difference, for the fact only appears by oral proofs in this case. This view is aided to some extent by *American Missionary Assn. v. Smith*, 59 Iowa, 704; *Sweeley v. Van Steenberg*, 69 Iowa, 696, and *Ellsworth v. Cordrey*, 63 Iowa, 675. There is nothing in *Babcock v. Bonebrake*, 77 Iowa, 710, not in harmony with the rule announced in this case.

The judgment is affirmed.

TAX SALES—NOTICE OF EXPIRATION OF TIME TO REDEEM.—It will be presumed that notice of the expiration of the time for redemption was properly served when a tax deed has issued, and the statute makes it prima facie evidence of the regularity of all proceedings prior to its execution: *Soukup v. Union Investment Co.*, 84 Iowa, 448; 35 Am. St. Rep. 317, and note. See, especially, the notes to *Hurd v. Brainer*, 28 Am. St. Rep. 20, and *Miller v. Miller*, 31 Am. St. Rep. 233.

WILLIAMS v. JUDD-WELLS COMPANY.

[91 Iowa, 373.]

MECHANICS' LIENS—SEVERAL BUILDINGS.—If labor and materials are furnished for several houses on different lots under a single contract, a general mechanic's lien may be filed against all of the houses and lots; and the plaintiff may, on proper plea, prove what part of the labor and material was used in each building, and obtain separate liens therefor.

Action to enforce a mechanic's lien. Judgment for plaintiffs, and the defendant appealed.

Stone & Dawson, for the appellant.

G. A. Holmes and Ross & Ross, for the appellees.

³⁵⁰ GRANGER, C. J. 1. Appellant's particular complaint is, that the "statement and lien seek to charge the eleven other buildings, and the lots on which they are situated, with a lien for the material furnished on each one, and to charge each one with a lien for all the material furnished for the remainder." By the contract under which the lien is claimed, plaintiff was to do work on forty houses in the city at a certain price per yard of plastering and a certain price per thousand for brick in the wall. The contract included the twelve houses in question. The houses were on lots some of which are contiguous and others not. All the work and materials were paid for, except such as were furnished for the houses in question, for which there is in reality a balance due as claimed. We think the fact that the lien as filed is general as to the twelve houses and eleven lots on which they are situated does not render the lien void, as claimed by appellant, and the conclusion has support in *Bowman Lumber Co. v. Newton*, 72 Iowa, 90. In that case, two buildings were erected on different lots, and the material was furnished under ³⁵¹ a single contract, and so furnished that the items for the different buildings could not be designated, and the lien filed was general, as in this case. It is there said that the law "does not prohibit the establishment of liens upon two buildings. The fact that part was for one building and part for another is a question which is not material to the person seeking to enforce the lien." In *Lewis v. Saylor*, 73 Iowa, 504, *Bowman Lumber Co. v. Newton*, 72 Iowa, 90, is referred to, and it is said that "it is not meant by that holding that the plaintiff would be entitled to a lien upon one building for material which it was shown went to another. All that was meant is, that if the question is of

any materiality to the defendant, the burden will be upon him to show how the material was expended."

To us the rulings in those cases seem very conclusive of this case. If such a lien is good as to two houses, why not as to twelve? The principle seems precisely the same. The only distinguishing fact that we discover is one that might change the burden of proof to show how the material was used or the labor expended. In those cases, the material was purchased and used by the defendant, and the burden is there placed on him to show where it was used. In this case, the plaintiff placed the material and labor, and, if we follow the rule suggested in *Lewis v. Saylor*, 73 Iowa, 504, and place the burden on the plaintiff, because of his having knowledge of the fact, we only state a rule that has been complied with, for the plaintiff assumed that burden, and made a full showing of the amount for each house, and the decree is based thereon. The case of *Roose v. Billingly et c. Commission Co.*, 74 Iowa, 51, is disposed of alone on a failure to sufficiently describe the property on which the lien was sought, or a failure of proofs. The conclusiveness of our own decisions renders it unnecessary to review the authorities of other states.

2. There is a claim that "the liens cannot now be separated." The argument is based on holdings in other states, not applicable, under the holdings cited, to the law of this state. We notice *Chapin v. Persse et c. Paper Works*, 30 Conn. 461; 79 Am. Dec. 263. The case holds, under the law of that state, that a joint lien cannot be claimed upon separate houses. We do not hold to that rule, and we see no reason why, if the justice or equities of the case will be aided by it, separate liens may not be established under a general claim. Such a rule avoids multiplying suits, or may do so; and it is difficult to imagine a prejudicial consequence to result from such a course of procedure.

3. It is said that the lien is bad because the title to the property was not all in the same owner. The issues, as made by the petition and answer, present no such a question. The case seems to have been submitted on a demurrer to the petition and answer subject thereto by consent, and later in the abstract it is said: "The demurrer was submitted to the court with the evidence of the case." Such a procedure is not that contemplated by the statute. Without saying whether or not such a submission should be entertained, it is sufficient to say that no question is before us as to the demurrer, for no ruling was made on the demurrer below, nor was any exception taken or preserved, which is essential for a review of a law question: *Hanna v. Hawes*, 45

Iowa, 437. The same considerations are conclusive of a complaint that the contract was not made with the owners of the property. It was made with the owners of a part of it.

The judgment is affirmed.

MECHANICS' LIENS—SEVERAL BUILDINGS.—Where three separate, independent buildings on the same lot, belonging to the same person, are built at the same time, one who furnishes material and performs labor under one contract, keeping no account of the amount due from each house, cannot file and enforce a mechanic's lien covering the entire lot and all the buildings, under a statute creating a lien upon every building in the construction or repair of which labor is done or materials furnished. The statute must be construed as giving a lien on each building separately, and, unless the claimant can state the amount due from each, he must fail: *Wilcox v. Woodruff*, 61 Conn. 578; 29 Am. St. Rep. 222, and note.

DITMAN BOOT AND SHOE COMPANY v. KEOKUK AND WESTERN RAILROAD COMPANY.

[91 Iowa, 416.]

CARRIERS—REMOVAL OF BAGGAGE.—The baggage of a passenger, upon reaching its destination, must be called for within a reasonable time, or the liability of the carrier as an insurer ceases. The reasonable time within which the owner must call for it, is directly upon its arrival, making reasonable allowance for the crowded condition of the depot at the time. The lateness of the hour makes no difference if the baggage is put upon the platform.

CARRIERS—REMOVAL OF BAGGAGE.—If it is customary for passengers to leave their baggage at a depot over night and for the carrier to close the depot soon after the arrival of a certain train, and heavy baggage, which the owner cannot get at once without special request and the payment of excess baggage charges, arrives on such train, it is for the jury to determine, in case such baggage is destroyed during the night, whether such owner exercised reasonable care in leaving his baggage in the depot over night.

CARRIERS—REMOVAL OF BAGGAGE.—If it is customary for a carrier to close its depot so soon after the arrival and departure of an evening train, that baggage handlers did not customarily go to the depot at night, and, if the only way that baggage arriving on that train could be obtained was by special request, surrender of check, and having it left outside of the depot, the owner of baggage so arriving is not guilty of negligence in leaving it in the depot over night without effort to remove it. In case of its destruction during that time, he may recover its value from the carrier.

F. T. Hughes and J. T. P. Powers, for the appellant.

J. C. Davis and A. Hollingsworth, for the appellee.

⁴¹⁷ **GRANGER, C. J.** The liability which plaintiff seeks to establish against the defendant is not that of a warehouseman, but that of a common carrier; and the contention of the appel-

lant is, that the neglect of the agent of plaintiff to remove the trunks on the night of his arrival, whereby they were, by the company, placed in the depot, changes its obligation from that of a common carrier to that of a warehouseman; while the plaintiff contends that the obligation of a common carrier ceased only after a reasonable time for their removal, and ⁴¹⁸ what would be a reasonable time depends upon circumstances and the custom and manner in which the company transacted its business in relation to such baggage at that particular station. Complaint is made of the following instruction, which will indicate the issue of fact presented: "7. As stated in these instructions, the liability of a common carrier for the baggage of a passenger terminates as such, and its liability as a warehouseman commences, upon the expiration of such reasonable time, under all the circumstances of the case, after the arrival of such baggage at its place of destination, as will enable the passenger, in the exercise of ordinary diligence, to receive and take charge of his baggage by himself or others for him. And, in determining what is such reasonable time, the jury should take into consideration all the circumstances shown by the evidence bearing upon that question; the general and usual custom or manner in which defendant transacted its business in relation to such baggage, at the depot in question, in regard to the delivery of such baggage; the time in the evening when defendant, by its agent, usually closed the depot of defendant, and left it for the night, and especially the night or the evening in question; the time and opportunity which said R. B. Grant had for receiving said baggage from defendant at its depot or platform for the purpose of removing the same on the night in question." In the eighth instruction, the court said to the jury that, as a matter of fact, Grant did not, on the evening of his arrival, attempt to remove the baggage from the depot; and left it for the jury to find whether it was left for an unreasonable time, and said to the jury that, if it was, there could be no recovery. Appellant, speaking of parcels of baggage, says, in argument: "The duty of a railroad company as carrier in this country is to transport and deliver to the owner or consignee at its station, and the duty of such owner ⁴¹⁹ or consignee to be there at the arrival of trains, ready to receive and take them away." From this, it will clearly be seen wherein it is claimed that this instruction is erroneous, as it permits the jury to find whether or not the leaving of the trunks overnight was an unreasonable time. The authorities are harmonious that the baggage of a passenger, on reaching its destination, must be called for in a reasonable time,

or the liability of the company as an insurer ceases: 2 Redfield on Railways, sec. 171. In the same section it is said: "And the reasonable time within which the owner must call for it is directly upon its arrival, making reasonable allowance caused by the crowded state of the depot at the time, and the lateness of the hour makes no difference, if the baggage be put upon the platform." In Louisville etc. R. R. Co. v. Mahan, 8 Bush, 184, the general rule is announced, and it is said: "What constitutes such reasonable time and opportunity is a mixed question of law and fact, necessarily dependent upon the peculiar surroundings of each particular case." That was a case where baggage arriving at half past eight in the evening, not called for, was burned in the depot that night. The company was held not liable.

In the opinion, importance is attached to the fact that no circumstances were shown, for which the company was responsible, rendering it impossible for the owner to remove the baggage on its arrival. In this case, it is averred in the petition that "it was the usual and ordinary custom, as between the defendant and the traveling public, and especially between defendant and said R. B. Grant, to permit baggage that arrived on the evening train to remain in said depot over night"; and, further, "owing to the lateness of his arrival, the want of facilities to remove said baggage, and because defendant's agent did not keep the said depot open a sufficient length of time," ⁴⁸⁰ the plaintiff was entitled until the morning of the 17th as a reasonable time to remove said baggage." The rule of the instruction was directed to the issue formed upon these averments, and it will be seen that the facts are not those upon which the general rule, as we have stated it, rests. Mr. Grant, the agent, testified that he had been going to Kahoka for about twelve years with his sample trunks, on the defendant's road; and that in the winter time, in the month of December, in the evening, there are no facilities at the depot to remove baggage of the kind in question. He said: "As I have been able to observe, they always leave baggage of the character of my goods at the depot until the next morning. I know the customs and habits of the Keokuk & Western Railroad Company as to closing this depot after the departure of the train for the east. It is closed thirty or forty minutes after this western train gets in." "Did you ever attempt to get your baggage out after it arrived at the depot in the evening, during the last four or five years?" "Yes, sir." "Did you succeed?" "No, sir. The depot was closed. The agent was gone home, or somewhere else." The weight of the trunks was from three hundred and fifty to four hundred

pounds, on which there was an extra charge for baggage, and a receipt or waybill given. The testimony of other traveling salesmen corroborates that of Mr. Grant as to not being able to get such baggage from the depot after 8 o'clock in the evening, and as to the custom of leaving it until morning. The testimony of other witnesses is substantially to the same effect. As we understand, before these trunks could be delivered, they must be weighed by the agent at Kahoka, and the weight and collection for excess charges be filled in the waybill surrendered by Grant on receiving his baggage, and the waybill be stamped by the agent. They were not to be delivered as baggage usually is, upon the surrender of a check held by a passenger. Other evidence on the ⁴²¹ part of the defendant is to the effect that the depot was open at such times, and the facilities for getting the baggage good. The testimony is clearly such as to justify the instruction, and make the question of fact one for the jury.

If the facts were found with the plaintiff, there can be no doubt that the obligations of the company as a common carrier would continue until a proper hour for delivery in the morning. It is a case where the delay is at the instance, and for the convenience, of the company. It is urged that it appears that, if the checks had been given to the "bus driver," the baggage could have been obtained that night. There is some testimony to that effect, but, when all the testimony is considered, it is a matter of doubt, unless special pains were taken. A Mr. Ferguson, who was a hotel porter at Kahoka at the time, was asked: "When was it usual and customary to remove the baggage from the depot at Kahoka that arrived on the eastern and western bound trains the evening before?" "Why, the next morning." "Did you have occasion to be at the Kahoka depot in the evenings?" "Yes, sir." "Do you know how soon after the passenger train went east that depot was closed?" "Within ten or fifteen minutes after, I presume. At times it was open late. . . . Have had occasion to get baggage from Kahoka depot at night, when requested. We had to go and notify the agent and deliver the checks." "Notify him what?" "That we wanted the baggage. The checks would be taken off the trunks, and they would be left standing out on the platform." "State whether or not you have come down for baggage, and found the trunk or baggage left out on the platform, and the depot closed." "Yes, sir." That such a course of procedure on the part of the company is not in accord with the law under which its liability as a common carrier is to cease is certain. No passenger is required to surrender ⁴²² his checks, and have his

baggage thus exposed. Under all the authorities, the agent must remain a reasonable time to deliver the baggage. The conclusion in this case is warranted that, because of a custom of the company to close its depot in so short a time after the departure of these evening trains, that draymen and others handling baggage did not go to them, and the custom obtaining of getting such baggage by special requests, and surrendering the checks, and having the baggage left out of the depot. No passenger was required to conform to such a regulation. These considerations indicate our views as to complaints as to the ninth and tenth instructions given by the court.

The judgment is affirmed.

CARRIERS—REMOVAL OF BAGGAGE.—The liability of a common carrier of passengers for their baggage intrusted to his care terminates within a reasonable time after the arrival of the baggage at the point of destination, where the carrier is ready to deliver the same to the passenger according to the terms of the contract: *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 738, and note with the cases collected; *Mote v. Chicago etc. R. R. Co.*, 27 Iowa, 22; 1 Am. Rep. 212; and the lateness of the hour of arrival will not excuse a passenger from immediately calling for his baggage: *Quimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646, and note. See, also, the notes to *Minor v. Chicago etc. Ry. Co.*, 88 Am. Dec. 671, and *Chicago etc. R. R. Co. v. Boyce*, 24 Am. Rep. 272.

DAVIS v. SEELEY.

[91 Iowa, 583.]

MALICIOUS PROSECUTION—DAMAGES FOR MENTAL ANGUISH.—In an action for malicious prosecution, the plaintiff may show, on the question of mental anguish as an element of actual damage, that when arrested he had a dependent family, one of whom was sick, crippled, and in need of his care and attention.

MALICIOUS PROSECUTION—EVIDENCE TO ENHANCE DAMAGES.—In an action for malicious prosecution, evidence that an excessive bail bond was required of the plaintiff at the time of his arrest is inadmissible to enhance his damages, without proof that defendant induced the exaction of such bond, especially when plaintiff immediately gave bond and regained his liberty.

MALICIOUS PROSECUTION.—EXEMPLARY DAMAGES may be recovered in actions for malicious prosecution without special plea, whenever malice is charged and proved.

EXEMPLARY DAMAGES ARISE from the malicious doing of an act, and need not be specially pleaded and claimed when malice is shown.

APPELLATE PRACTICE—EXCESSIVE VERDICT.—A verdict which is plainly excessive, so much so that it cannot be accounted for, except upon the ground of passion or prejudice, must be set aside on appeal.

W. B. Seeley, Casey & Stewart, and J. C. Davis, for the appellant.

O. C. Herminghausen and A. H. Stutsman, for the appellee.

⁵⁸³ KINNE, J. 1. Plaintiff was charged by defendant with having burned an unoccupied dwelling-house, the property of defendant. Defendant caused an information to be filed charging plaintiff with the commission of the crime. He was arrested thereon, and, upon preliminary hearing before a justice of the peace, was ⁵⁸⁴ discharged. The plaintiff then instituted this suit against the defendant for malicious prosecution. On the trial, plaintiff, as a witness, was asked how much of a family he had, what the condition of his family was at the time; also as to having a crippled son, who was under medical treatment, and with whom he sat up nights. Defendant moved to exclude all of this evidence, as being incompetent, immaterial, and irrelevant, a motion being made to each item of evidence separately. The motions were overruled and exceptions taken. It is said that the only purpose of offering this testimony was to show special damages based upon an injury resulting to the plaintiff's family; that no such claim was made in the petition, and that it could not be entertained, even if pleaded. That this evidence was not admissible for the purpose above stated is clear: *Hampton v. Jones*, 58 Iowa, 319. And see, also, *Welch v. Jugenheimer*, 56 Iowa, 14; 41 Am. Rep. 77; *Huggins v. Kavanagh*, 52 Iowa, 369; *Bunyan v. Loftus*, 90 Iowa, 122. We think, however, that this evidence was properly admitted. Mental pain and suffering is an element of actual or compensatory damages in this class of cases: *Parkhurst v. Masteller*, 57 Iowa, 480. Whatever may, then, legitimately tend to show the character and extent of such pain and anguish is clearly admissible. It needs no argument to show that one's mental condition may, and generally will, be affected more or less by his immediate surroundings. If, as in this case, a man is arrested and charged with a crime, and he has a family depending upon him for support, one of whom is sick and needing his care, it would be natural that such circumstances should tend to increase his mental anguish.

⁵⁸⁵ 2. The court admitted in evidence the record of the examining magistrate made on the preliminary examination. Among other things contained therein was a record of the fixing the penalty of the bond at five thousand dollars, and of the order discharging the defendant in that proceeding. The purpose of introducing this record entry, so far as it concerned the

bond, was evidently to show that the penalty of the bond was excessive, and therefore the damages should be increased. We do not find that the defendant herein was instrumental in inducing the justice to fix the penalty of the bond. He had no control over that matter. It was within the power of the justice to exact such a bond as he deemed just and proper, and, in the absence of a showing that he was by the defendant herein persuaded to demand a bond in an unreasonable sum, he cannot be charged with responsibility for the act of the justice in that respect. Nor does it appear in this case that the amount fixed as a penalty in the bond could have added to the injury to the plaintiff, as he was never confined in jail, but immediately gave bond, and regained his liberty: *Montgomery v. Sutton*, 58 Iowa, 700.

The court erred in admitting so much of this record as pertained to the bond. This record of the justice was admissible for one purpose only—to show the defendant's discharge. The instruction asked by the defendant, which directed the jury to consider this record only for the single purpose of establishing the fact that the plaintiff was acquitted of the charge made against him, should have been given, as the evidence was improper for any other purpose. There is a controversy as to whether or not that part of the record which recited that the costs were taxed against the prosecuting witness went to the jury, or was excluded. As the case must be reversed ⁵⁹⁶ for error in admitting the record relating to the bond, it is not essential that we determine the fact as to the record relating to costs. It would have been error to have admitted the record entry in so far as it related to the taxing of costs.

3. No claim for exemplary damages is made in the petition, and appellant insists that, under such a condition of the pleadings, it was error for the court to instruct the jury that such damages might be awarded. We have said that exemplary damages are not the subject of a claim, in the sense that it is necessary to claim them in the petition in cases of this character: *Gustafson v. Wind*, 62 Iowa, 284. The petition in this case charges that the defendant, in causing the plaintiff to be arrested and prosecuted, did so maliciously. Now, in such case, where malice is charged, and the jury find it established by the evidence, they are warranted, under the instructions of the court, in allowing exemplary damages. Such damages arise from the malicious doing of the act: *Irwin v. Yeager*, 74 Iowa, 175; *Williamson v. Western Stage Co.*, 24 Iowa, 171; *Johnson v. Chicago* etc. Ry. Co., 51 Iowa, 29; *Jones v. Marshall*, 56 Iowa, 739.

It is not necessary to claim them in the petition: 1 Sutherland on Damages, sec. 422; Alabama etc. Co. v. Arnold, 84 Ala. 159; 5 Am. St. Rep. 354.

4. Two special interrogatories were submitted to the jury. one of them asked the jury to find if defendant, believing there was sufficient cause for the prosecution, made a fair statement of the facts within his knowledge to an attorney before filing the information, and the other asked the jury if the attorney advised defendant that he had sufficient ground to file the information. Both were answered in the negative. The answer to the last interrogatory is claimed to be in conflict with the evidence, and we are satisfied the ⁵⁸⁷ claim is well founded. In fact, the evidence did not justify either answer given by the jury. The fact inquired about was of a determinative character. If found in the defendant's favor, it was a complete defense. The evidence was practically without conflict that defendant was advised that he had sufficient ground for filing the information. The answer shows that this important and uncontradicted evidence was ignored by the jury. Their answer shows an entire disregard of duty. As, for other reasons, the case must be reversed, we need give this matter no further consideration.

5. We are asked to say that the verdict—three thousand dollars—is excessive. The actual amount expended by plaintiff and the value of time lost did not exceed one hundred dollars to one hundred and fifty dollars. He was not incarcerated. He was detained under arrest but a short time, while he was procuring bond. From his own testimony, it does not appear that he was much affected by the charge made and the arrest. The evidence very satisfactorily shows that he was a man of bad moral character, and that his reputation for truth and veracity was likewise bad. Surely, one possessing such a character and reputation could not be damaged to the extent that an upright man might be. In view of this entire record, the verdict is grossly excessive, so much so that it cannot be accounted for, except upon the ground of passion or prejudice.

For reasons given, the judgment below will be reversed.

MALICIOUS PROSECUTION — EXEMPLARY DAMAGES. — To warrant the giving of exemplary damages, the courts generally require that the evidence be such as to justify the inference of actual malice, or the "prosecution to have been pursued by the defendant for his private ends and with reckless disregard of the rights of the plaintiff"; Extended note to *Ross v. Hixon*, 28 Am. St. Rep. 164.

MALICIOUS PROSECUTION—DAMAGES FOR MENTAL SUFFERING.—The indignity of being charged with a crime, and the mental suffering occasioned to the accused thereby, are proper matters to be

considered by the jury and compensated by their verdict: Extended note to *Ross v. Hixon*, 26 Am. St. Rep. 163.

EXEMPLARY DAMAGES—WHEN ALLOWABLE GENERALLY. This question will be found fully discussed in the notes to *Stuyvesant v. Wilcox*, 31 Am. St. Rep. 587; *Alabama etc. R. R. Co. v. Sellers*, 30 Am. St. Rep. 22; *Lucas v. Michigan Cent. R. R. Co.*, 39 Am. St. Rep. 521, and the extended note to *Spellman v. Richmond etc. R. R. Co.*, 35 Am. St. Rep. 870-883.

PRICE v. PRICE.

[91 IOWA, 683.]

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTION.—A statute placing the wife upon an equality with her husband with respect to the protection of her property and personal rights, entitles her to maintain an action for the alienation of her husband's affections, and loss of his support and companionship.

HUSBAND AND WIFE—ALIENATION OF HIS AFFECTION. Proof that a separation between husband and wife has been caused by the unwarranted interference of his relatives, accompanied by threats to disinherit him, is sufficient to enable a wife to maintain an action against, and to recover from, such relatives for alienation of her husband's affection.

HUSBAND AND WIFE—ALIENATION OF AFFECTION—EVIDENCE.—In an action by a wife against the relatives of her husband to recover for the alienation of his affection, conversations between him and the defendants while husband and wife were residing with them are admissible in evidence to explain the relation of the parties to the suit, and the motives which induced them to act.

HUSBAND AND WIFE—ALIENATION OF AFFECTION.—EVIDENCE OF AMOUNT OF DEFENDANT'S PROPERTY is admissible in an action by a wife to recover for the alienation of her husband's affection, to show the weight of threats by defendant to disinherit the husband unless he separated from his wife.

HUSBAND AND WIFE—ALIENATION OF AFFECTION—JOINT LIABILITY.—If the parents of a husband act in concert to bring about a separation between him and his wife, they are jointly liable to her for the alienation of his affection, although each of them does not participate in all of the acts of the other.

C. C. & C. L. Nourse, for the appellants.

Bishop & Wilcoxon and Hume & Dawson, for the appellee.

604 **ROBINSON, J.** On the fourteenth day of April, 1888, the plaintiff married George L. Price, who is a son of the defendants. She alleges, that soon after the marriage, the defendants, by means of conversations and letters, communicated to her husband false, defamatory, and slanderous matter concerning her character and reputation, and made threats and promises to him for the express purpose, and with the malicious intent, to destroy the affection existing between them, and to excite ill-will and hatred on his part for her, for the purpose of causing him to abandon her; that the defendants offered him valuable property and large sums of money if he would abandon her, and threat-

ened to disinherit him if he did not do so; that in consequence of the course pursued by the defendants, her husband became angry with and jealous of her, and cursed, ^{and} choked, wounded, and otherwise illtreated her, and abandoned her, in destitute circumstances, when alone among strangers and without help, and deprived her of her home, of the social intercourse and confidence of her friends and of her husband, and of his care, love, confidence, protection, help, and support, and caused her mental and physical pain and suffering.

1. The judgment in this case was rendered in June, 1891, and the appeal was taken in the next September. At the October term, 1892, of this court, the appellee filed a motion to affirm the judgment of the district court, on the ground that the appeal had been abandoned. That motion was supported and resisted by affidavits and a partial transcript of the record, and was submitted with the cause for our determination. It is claimed that, when the motion was filed, the appellants had neither filed nor served any abstract or argument; but, to excuse their failure to comply with the rules in that respect, they show that negotiations for a settlement had been pending for some time, and that a stipulation of settlement had been signed by the parties to the action. A complete abstract has since been filed, with an argument for each party, and the cause is now ready for determination on the merits. The stipulation of settlement was not signed by all the parties interested in the judgment, and never became effectual to end the case. There is, now, no reason for disposing of it otherwise than on the merits, and the motion to affirm is overruled.

2. The court charged the jury, in effect, that the plaintiff was entitled to recover "for the loss, if any, she has sustained, of the love, affection, companionship, support, and society of her husband," wrongfully caused by the defendants. The appellants insist that no action for such loss can be maintained under the laws of this state, that no right of action on such grounds existed at common law, and ^{and} that none is given by the statutes of this state. The authorities are not in accord in regard to the rights of the wife, at common law. It was said in *Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79, that the common law gave to the wife no cause or right of action for the loss of the society and support of her husband in a case of this kind. That conclusion was based largely upon the fact that, under the common law, the title to the personal property of the wife was vested in the husband; that he was entitled to her labor, or the proceeds of it; and that an injury to her was, in contemplation of the law,

an injury to him alone. In *Doe v. Roe*, 82 Me. 503, 17 Am. St. Rep. 499, the right of the wife to maintain an action for the alienation of her husband's affections, and for depriving her of his comfort, society, and support, was denied. But in *Bennett v. Bennett*, 116 N. Y. 584, it was said that, at common law, the right of action for a wrong committed on a married woman belonged to her, and, although it was necessary for her husband to join in an action to recover damages caused by it, yet it was, in effect, her action. An elaborate discussion of authorities bearing on this question will be found in *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397.

The tendency of legislation in this country is toward making husband and wife equal in law, giving to each the rights possessed by the other, and the legislation of this state is designed to accomplish that end, in most respects. Section 2211 of the code provides that "a wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right, and she may prosecute and defend all actions at law or in equity for the preservation and protection of her rights and property as if unmarried." Section 2562 is as follows: "A married woman may, in all cases, sue and be sued without joining her husband with her, to the same ⁹⁹⁷ extent as if she were unmarried, and an attachment or judgment in such actions shall be enforced by or against her as if she were a single woman." Other provisions of the statute give to a married woman the right to acquire and dispose of both real and personal property to the same extent and in the same manner that the husband can property held by him in his own right, and provide that either the husband or wife owning property in the possession or under the control of the other may maintain an action therefor in the same manner and to the same extent as though unmarried. The wife is liable for civil injuries which she commits, and her husband is not responsible therefor, except in cases where he would be jointly liable if the marriage relation did not exist. The property of each is exempt from the debts of the other, excepting in a few cases, and the wife may contract and incur liabilities which may be enforced by and against her as though she were unmarried: Code, secs. 2202, 2204, 2205, 2212, 2213. It is said in *Foot v. Card*, 58 Conn. 1, 18 Am. St. Rep. 258, that from time immemorial the law has regarded the right of the husband "to the conjugal affection and society of his wife as a valuable property, and has compelled the man who has injured it to make compensation," and that husband and wife have equal rights in this; that each owes to the other the

fullest possible measure of conjugal affection and society. In this state, the husband is entitled to the earnings of the wife, when she is not engaged in business on her own account, and is required to provide for the wife a reasonable support, according to their rank and station in society: *Thill v. Pohlman*, 76 Iowa, 638; *Van Doran v. Marden*, 48 Iowa, 188. But the marriage state is not one entered into for the purpose of labor and support alone. Considerations of the highest character, as the comfort and happiness of the parties to the marriage contract, and the welfare of ~~the~~ their children, give to each the right to the affection, companionship, and society of the other, and whoever wrongfully deprives either of that right may be held responsible. As it is a valuable property right when due to the husband, it must be so regarded when due to the wife. That being true, the recovery by her of damages caused by its loss, as well as for loss of support, is authorized by section 2211 of the code. Nor is the right of recovery by the wife limited to cases where the loss is wrongfully caused by charges affecting her chastity, as suggested by the appellants. Our conclusion is not only in harmony with, and authorized by, the legislation of this state, but it finds support in numerous decisions of courts of other states: *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397; *Bennett v. Bennett*, 116 N. Y. 584; *Holmes v. Holmes*, 133 Ind. 386; *Haynes v. Nowlin*, 129 Ind. 581; 28 Am. St. Rep. 213; *Seaver v. Adams*, 66 N. H. 142; 49 Am. St. Rep. 597; *Foot v. Card*, 58 Conn. 1; 18 Am. St. Rep. 258; *Warren v. Warren*, 89 Mich. 123; *Cooley on Torts*, 228, note. In *Peters v. Peters*, 42 Iowa, 182, it was held that the wife cannot maintain an action against her husband for damages caused by an assault and battery, and that section 2211 of the code refers to and authorizes actions against parties other than the husband. The case of *Calloway v. Laydon*, 47 Iowa, 456, 29 Am. Rep. 489, arose under a statute enacted to regulate the sale of intoxicating liquors. The facts involved in those cases were, in legal effect, so unlike those involved in this case that the opinion in neither of those cases can properly be regarded as in conflict with the conclusion we have reached in this case.

3. The appellants contend that the verdict was not sustained by the evidence, and that it is contrary to the charge of the court. At the time of their marriage, the plaintiff was twenty-three and her husband was nineteen years of age. She was a dress-maker, ~~and~~ and had done considerable work, but her health was not good. She had made her home with her mother and a younger brother in Des Moines, but it appears that her mother

was in debt, her household goods mortgaged, and that they had but scanty means of support. After the marriage, the plaintiff and George made their home with her mother, but, in a short time, they all went to the home of the defendants, in the same city, with some expectation of living there for a time. Trouble soon arose between them and the defendant Henry Price, and they sought another place of residence. There is irreconcilable conflict in the evidence, but we are of the opinion that the jury were authorized to find that the material facts were substantially as follows: The defendants never fully approved the marriage of the plaintiff to their son. During the few days that the two families were together at the home of the defendants, Henry Price complained that plaintiff's health was not good, that she would soon be a burden to his son; and that plaintiff and her mother had not disclosed to him their financial condition, and the state of plaintiff's health, before the marriage. He stated that he thought the plaintiff and George should separate; that it would be better if George were free, for in that case he would have a part of the estate, but he did not intend that any of his money should go outside of his family. For several months after their marriage, George lived a part of the time with the plaintiff and her mother, and a part of the time with defendants. He worked for several different firms and persons, and contributed something to the support of the plaintiff, but he did not remain long with any one employer. The defendants were active during that time in trying to induce him to leave the plaintiff. In the fall of 1888, George made his home most of the time with the defendants, meanwhile visiting the plaintiff occasionally. About 700 the 1st of December he went south, and finally to Keokuk, and there secured work in a hotel. For about a month after he left Des Moines, the plaintiff did not hear from him, or know where he was; and, when she applied to defendants for information, they professed to be as ignorant as she was in regard to him, although they corresponded with him, and knew where he was and what he was doing. On the second day of January, 1889, George wrote to his wife, expressing much affection for her, and asking if she wished to be with him. Her answer appears to have been prompt, as he wrote to her again three days later, acknowledging the receipt of a telegram and a letter from her. His second letter was affectionate in terms, and in it he expressed a desire for her to be with him, said he would send for her in a few weeks, and cautioned her not to tell anyone where she was going, mentioning especially his own family. He wrote other letters of the same character, and the plaintiff soon joined

him in Keokuk. They lived together there until about the 4th of February, 1889, when he left her.

During the first part of the time they were in Keokuk, George was kind and affectionate to the plaintiff, and they lived happily together. He received letters from the defendants during that time, and finally received one which the plaintiff did not read. When that was received, George told the plaintiff he was going to leave her, as the defendants wished him to do. He left the next day, but, before going, she obtained from him, without his knowledge, and kept, several letters he had received from the defendants. After an absence of a few days, he returned, and demanded the letters. She refused to surrender them, and he used profane language to her, seized her, struck her, choked her, knocked her down, threatened to kill her if she did not produce the letters, and said he wished he had minded his father before and left her. He then left ⁷⁰¹ her in Keokuk, without means, and with a board bill for himself and herself unpaid. She finally paid the bill, and reached the home of her mother, in Des Moines, and commenced this action. Since that time he has called on her once or twice, and has written a few letters to her, asking her to return to him. Letter-press copies of them were taken by him, and there is little doubt that they were written for the purposes of this litigation. His conduct toward his wife has been most unmanly, and we are satisfied that, to a considerable extent, it was caused by the unwarranted interference of the defendants. The evidence in regard to the influence which the defendants exercised over their son while he and the plaintiff were together at Keokuk, to induce him to leave her, is not at all clear and satisfactory. But we are satisfied that the defendants had for months been endeavoring to separate the plaintiff and her husband, and we think the jury were authorized to find that the separation was accomplished by letters he received from them at Keokuk. His statements at the time he left her were to that effect, and his course cannot be attributed to any other probable cause. Two juries have found for the plaintiff, and the evidence is such that we are of the opinion that we should not disturb the judgment for lack of evidence to support it.

4. Objection is made to the ruling of the court in admitting evidence in regard to conversations between George and his father, and between his father and the mother of the plaintiff, when the two families were together at the home of the defendants. We think the evidence was properly received as tending to explain the relation of the parties to the suit, and the motives

which induced them to act. Objection is also made to evidence to show the property owned by defendant Henry Price. The evidence was properly admitted, not to enhance the amount of recovery, but to enable the jury to judge ⁷⁰² more accurately of the weight and probable effect of the property inducement which the defendants held out to their son to abandon the plaintiff.

5. It is said that a fatal objection to all the evidence is, that this action is against the defendants for a joint wrong, and that whatever of a wrongful nature was said or done by the defendants was not said or done jointly. We do not think this claim is sustained by the evidence. While it is true that each defendant did not participate directly in all of the conversations and acts of the other, yet there was evidence which tended to show that they acted in concert, and to accomplish a common object—the separation of their son from the plaintiff.

6. What we have said disposes of the controlling questions in the case. Others, including some based upon portions of the charge given, and the refusal of the court to give instructions asked, have been presented in argument, and carefully examined. We do not regard them as of sufficient importance to be stated at length. It is sufficient to say that we do not find in them any reason for disturbing the judgment of the district court.

It is therefore affirmed.

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS.—A wife may maintain an action against another woman for alienating his affections, provided the wife is allowed, by statute, to sue for her own benefit for personal wrongs suffered by her: *Seaver v. Adams*, 66 N. H. 142; 49 Am. St. Rep. 597; *Olow v. Chapman*, 125 Mo. 101; 46 Am. St. Rep. 468, and extended note fully discussing the subject.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

ROBINSON, APPELLANT.

[88 MAINE, 17.]

HUSBAND AND WIFE—TENANCY BY ENTIRETY—STATUTES—SEPARATE PROPERTY.—Tenancy by entirety is *sui generis*. It had its origin in the marital relation, and was founded upon the legal fiction of the absolute oneness of husband and wife; but the universal tendency of modern legislation has been to abrogate this theoretical unity of husband and wife, to recognize and maintain the legal identity of the wife, and to secure to her a separate, distinct, and independent right to the acquisition and enjoyment of property.

HUSBAND AND WIFE—TENANCY BY ENTIRETY—CHANGE OF LAW.—The rule of the common law, by which a devise or grant to husband and wife constituted them tenants by the entirety, the survivor taking the whole, has been changed in the state of Maine by legislation enlarging the rights of married women respecting the ownership of property.

HUSBAND AND WIFE—COTENANCY.—A husband and wife may hold property as tenants in common.

DEVISE—HUSBAND AND WIFE—DESCENT—DISTRIBUTION.—If a testator, by the residuary clause of his will, gives to his daughter and her husband the residue and remainder of his estate "in equal shares and proportions, and so to their respective heirs and assigns forever," but the husband dies before the testator, leaving a minor son and wife surviving, the daughter does not take the whole as tenant by the entirety. She takes only one-half of the residuary estate, and the other half, which the husband would take if he had survived, descends to the heirs of the testator, and is properly distributed to them.

N. and J. A. Morrill, for the appellant.

WHITEHOUSE, J. This is an appeal from the decree of a probate court.

The executor of the will of Charles P. McKenny filed a petition under the provisions of the Revised Statutes, chapter 65, section 27, as amended by chapter 49 of the laws of 1891, asking for an order of distribution which would protect him in paying out the residue of the estate in his hands. This involved a construction of the following residuary clause in the will:

"The residue and remainder of all my estate of which I may die seised and possessed, both real and personal, not herein otherwise disposed of, I give, bequeath, and devise the same to my son in law, Judyer Robinson, and my daughter Olive H. Robinson, wife of the said Judyer Robinson, in equal shares and proportions, and so to their respective heirs and assigns forever."

Judyer Robinson died before the death of the testator, leaving a minor son, and a wife who is the appellant and the same person called Olive H. Robinson in the will.

The decree of the judge of probate required one-half of the residuary estate to be paid to the appellant and the other half to be distributed among the heirs of the testator; and this decree was affirmed by the justice presiding in the supreme court of probate. The case comes to this court on exceptions to that ruling.

It is the opinion of the court that the ruling was correct and that the exceptions must be overruled.

It is contended by the learned counsel for the appellant that the residuary clause created a tenancy by the entirety, and that Olive O. Robinson is entitled to the entire residuary estate by right of survivorship. It is not controverted that the language employed by the testator must be construed as creating a tenancy in common if Judyer Robinson and Olive H. Robinson had not been husband and wife: *Stetson v. Eastman*, 84 Me. 366. But it is argued that the rule of the common law by which a devise or grant to husband and wife constituted them tenants by the entirety, the survivor taking the whole, has never been changed in this state by the abolition of joint tenancies or the legislation enlarging the rights of married women respecting the ownership of property. It is accordingly contended that if the words "in equal shares and proportions" found in the residuary clause were advisedly employed for the purpose of making certain the intention of the testator to create a tenancy in common, this intention, however clearly expressed, cannot be allowed to prevail against the early rule of the common law that husband and wife, being regarded as one person in law, are not competent to take either as joint tenants or as tenants in common under any form of grant or devise in fee made to them during coverture.

We are unable to concur in this view. The rule of the common law undoubtedly existed as claimed by the appellant. It is thus stated in 2 Blackstone's Commentaries, 181: "If an estate in fee be given to a man and his wife, they are neither properly joint-tenants nor tenants in common; for husband and wife being considered as one person in law,

they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*; the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." And it is true that prior to the act of 1844, chapter 117, and subsequent legislation in this state securing to the wife the enjoyment of her separate estate, this common-law rule was recognized by our court: *Greenlaw v. Greenlaw*, 13 Me. 186; *Harding v. Springer*, 14 Me. 407; 31 Am. Dec. 61. But it is worthy of remark that no recognition of it or reference to it can be found in the cases reported in this state since the act of 1844, entitled "An act to secure to married women their rights in property."

A tenancy by entirety is *sui generis*. The right of survivorship gives it an apparent resemblance to joint tenancy, but as already seen it differs from a joint tenancy in important particulars. All the authorities agree that it had its origin in the marital relation and was founded upon the legal fiction of the absolute oneness of husband and wife. At the common law the legal existence of the wife was merged in that of her husband. Her legal identity was suspended or held in abeyance during the existence of the marriage relation. Substantially all her property was vested in the husband during coverture, and her legal position was little better than that of a menial to her husband. Being but one person in the eye of the law, it was considered that they could not consistently have separate and conflicting property rights. Hence the rule that property conveyed to them during coverture should be held as an estate by entirety with the right of survivorship.

But the universal tendency of modern legislation has been to abrogate this theoretical unity of husband and wife, to recognize and maintain the legal identity of the wife and secure to her a distinct and separate right to the acquisition and enjoyment of property. By the law of this state, "A married woman of any age may own in her own right real and personal estate acquired by descent, gift, or purchase; and may manage, sell, convey and devise the same by will without the joinder or assent of her husband." Since the act of 1844 above named, a husband by marriage acquires no right to any property of his wife. "She may receive the wages of her personal labor, not performed for her own family, maintain an action therefor in her own name and hold them in her own right against her husband or any other person." She is liable for her debts and torts, and her property may be taken on execution therefor as if she were sole. She may

prosecute and defend suits at law or in equity in her own name without the joinder of her husband, for the preservation and protection of her property and personal rights, as if unmarried: Rev. Stats., c. 61.

It is manifest that these statutes have wrought great modifications and radical changes in the relative property rights of husband and wife. In contemplation of law they are no longer one person, and their interests in property are no longer identical but separate and independent. Under these statutes the wife is invested with greater privileges and weighted with greater responsibilities and liabilities than before. The rule of the common law creating estates by entirety is irreconcilable with both the letter and the spirit of these statutes. It never rested upon a rational or substantial groundwork. It had its origin in feudal institutions and social conditions which were superseded centuries ago by the more enlightened principles of a progressive civilization. It is now repugnant to the American idea of the enjoyment and devolution of property and to the true theory of the marriage relation. "The reason of the law," says Lord Coke, "is the life of the law; and cessante ratione lex ipse cessat." The fictitious basis of this rule having been removed the rule itself must fail. To declare that there is no authority in the court to effectuate a clearly expressed and unmistakable intention of a grantor or testator, against such an antiquated and exploded dogma, would be a poor tribute to the creative power of the law and the original conceptions of justice in modern courts. The common law would ill deserve its familiar panegyric as the "perfection of human reason," if it did not expand with the progress of society and develop with new ideas of right and justice. "Considering the influence of manners upon law," says Chancellor Kent, "and the force of opinion which is silently and almost insensibly conducting the course of business and the practice of our courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society as well as of the footsteps of time."

These views are sanctioned by approved text-writers and courts of the highest respectability in England as well as in this country.

In his "Treatise on Estates," Mr. Preston makes the confident assertion, based upon his own cultivated reason rather than upon reported cases at that time, that: "In point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and accordingly

when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties as other distinct and individual persons would do": 1 Preston on Estates, 132. This is cited as authority for the following statement in 4 Kent's Commentaries, 411: "It is said, however, to be now understood that husband and wife may, by express words, be made tenants in common by a gift to them during coverture."

In his note to 2 Blackstone's Commentaries, 181, Judge Sharswood says: "But when an estate is conveyed to a man and woman who are not married together, and who afterwards intermarry, as they took originally by moieties, they will continue to hold by moieties after the marriage. There is nothing, therefore, in the relations of husband and wife which prevents them from being tenants in common. There are great opinions in favor of the position that husband and wife may by express words be made tenants in common." So in 1 Washburn on Real Property, 444, the author says: "It is always competent, however, to make husband and wife tenants in common by proper words in the deed or devise by which they take, indicating such an intention."

In *Clark v. Clark*, 56 N. H. 105, it was held that a statute in that state enlarging the rights of married women practically abolished tenancies by entirety between husband and wife; and the legal unity of husband and wife, as respects the holding of property and making of contracts by the wife, was obliterated.

In *Cooper v. Cooper*, 76 Ill. 57, it was held that under the "Married Woman's law" of 1861 in that state, an act having a scope and purpose similar to our own above cited: "No reason can be perceived and none is suggested why a married woman should not hold property thus acquired in fee, and as a tenant in common with her husband, precisely as she might with any other person."

In *Hoffman v. Stigers*, 28 Iowa, 307, the court say: "If no contrary intent is expressed in the conveyance to them or the instrument under which they hold, the husband and wife take as tenants in common, and not in entirety. At common law they were so completely and essentially one that they could not take by moieties. . . . But the doctrine always stood upon what was little more than the merest fiction; and as this by our legislation has measurably given way to theories and doctrines more in accord with the true and actual relations of husband and wife, the rule itself must be abandoned": See, also, *Wilson v. Fleming*, 13 Ohio, 68; *Whittlesey v. Fuller*, 11 Conn. 337; In re

Dixon, Byram v. Tull (1889), L. R. 42 Ch. Div. 306; Warrington v. Warrington, 2 Hare, 54.

Under the residuary clause in the case at bar, the appellant took only a moiety of the residue of the estate. As Judyer Robinson died before the testator, the devise and bequest to him lapsed, and the moiety of the residue which he would have taken if he had survived descended to the heirs of the testator.

Exceptions overruled.

HUSBAND AND WIFE—TENANCY BY ENTIRETY—DEVISE.

An estate by entirety is founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife: *Stels v. Shreck*, 128 N. Y. 263; 28 Am. St. Rep. 476. The rule of the common law that a devise or grant to husband and wife constitutes them tenants by the entirety, the survivor taking the whole, remains the law of many of the states, notwithstanding legislation securing to the wife the enjoyment of her separate estate: See monographic notes to *Den v. Hardenbergh*, 18 Am. Dec. 380; *Enyeart v. Kepler*, 10 Am. St. Rep. 99; *Bramberry's Appeal*, 156 Pa. St. 628; 36 Am. St. Rep. 64, and note; *Phelps v. Simons*, 159 Mass. 415; 38 Am. St. Rep. 430; *Hiles v. Fisher*, 144 N. Y. 306; 43 Am. St. Rep. 762; *Harrison v. Ray*, 108 N. C. 215; 23 Am. St. Rep. 57; and, where land has been conveyed to husband and wife, each has been held to take by entirety, notwithstanding a statute providing that all conveyances of land made to two or more persons shall be construed to create estates in common, and not in joint tenancy: *Hemingway v. Scales*, 42 Miss. 1; 97 Am. Dec. 425. But this rule which has "always stood upon what was little more than the merest fiction" has been abandoned, in some of the states, for theories and doctrines more in accord with the true and actual relations of husband and wife; and it is held that if a devise is made to a man and his wife, they will take as tenants in common, and not by entireties: Notes to *Den v. Hardenbergh*, 18 Am. Dec. 381; *Enyeart v. Kepler*, 10 Am. St. Rep. 99; *Harrison v. Ray*, 23 Am. St. Rep. 59.

WARREN v. WESTBROOK MANUFACTURING COMPANY.

[88 MAINE, 56.]

WATERCOURSES—DIVISION OF STREAM BY ISLAND.—
RIPARIAN OWNERSHIP of three out of four shores of two channels upon the same river does not of itself establish a right to use three-fourths of all the water of the whole river.

WATERCOURSES—DIVISION OF STREAM BY ISLAND.—
MILLS—PARTITION OF WATER.—If water in a river is divided into two channels by a natural island, each channel having a dam across it, in line with each other, and falls affording valuable water power, and there is a controversy, between riparian owners, about a division of the water for the purpose of propelling the machinery of mills, the plaintiffs owning three out of four shores of the two channels, and the defendants owning the other shore, a court of equity will not undertake to divide, either wholly or partially, the water of the whole river, so that the plaintiffs may use three-fourths of the water, and the defendants only one-fourth of it, but will leave the parties to accommodate themselves to the division made by nature, where the plaintiffs' claim is based exclusively upon their riparian ownership, and without invoking any statute, contract, or prescriptive right.

WATERCOURSES—PARTITION OF WATER.—EQUITY HAS JURISDICTION to make partition of the use of water between opposite riparian proprietors when necessary to secure an equal use or enjoyment in their rights, and will exercise such power upon a bill properly framed and presented for that purpose.

WATERCOURSES—DIVISION OF STREAM BY ISLAND—MILLS—PARTITION OF WATER—BILL IN EQUITY—AMENDMENT.—If water in a river is divided into two channels by a natural island, each channel having a dam across it, in line with each other, and falls affording valuable water power, and there is a controversy, between riparian owners, about a division of the water for the purpose of propelling the machinery of mills, the plaintiffs owning three out of four shores of the two channels, and the defendants owning the other shore, a court of equity can and should make such division of the use of the flow of water between the opposite riparian proprietors as will secure to each a use or enjoyment equal to his rights, where the plaintiffs allege such ownership; that a dam, one across each channel, has existed for a hundred years; that for a long period the defendants used only their proper proportion of water, but that they have increased their use of the water far beyond their just proportion; that such increased use renders the whole power insufficient for the mills of all the riparian owners; and that, unless they can be assured of the steady and regular use of their full, rightful proportion of the water power, they cannot profitably operate their mills, and cannot venture to undertake further operations, by reason of the cloud thus thrown over their rights; and where the court is asked to partition the water in one of the channels, especially where the case has been before the court on two former occasions, without the rights of the parties having been adjusted; where the interests of the riparian proprietors upon both channels appear to be intertwined, if not amalgamated; where the interest, as thus intertwined, of each proprietor upon either channel spans the whole river across both channels; and where each has an interest in the regulation of the whole flow of all the water, into whichever channel it may turn; but the bill must be so amended as to present all claims of right in any part of the falls, and waters, arising from riparian ownership, contract, prescription, or any other source; and the prayer must be so amended as to include a division of the use of the water in each channel and the whole river, and any other action of the court necessary to finally and completely adjust the controversy.

Bill in equity for a partition of waters at Saccarappa Upper Falls. The Presumpscot river at that place was divided by a natural island, into two channels of approximately equal capacity, and the plaintiffs and defendants were the owners of all the land and water power at those falls. The defendant company owned the land forming the easterly half of the eastern channel. The plaintiffs were the sole riparian owners on the western half of the eastern channel, and on both sides of the western channel. In each channel were falls affording valuable water power. A dam was built across each channel. These dams were substantially in line with each other, and formed, with the island, a continuous dam across the whole river. There were several mills on the island, and other mills on each side of the main river opposite the island. The mills on the eastern mainland, and on the eastern side of the island, were supplied with water from the dam across the eastern channel. The mills on the western mainland, and on the western side of the

island, were supplied with water from the dam across the western channel. The whole river had been improved and used for many years by dams in each channel, and mills upon all the shores. Up to the year 1882, all the parties had used practically all the water they were entitled to; but after that time the defendant company enlarged its factory on the easterly bank of the easterly channel, and drew and used much more water than it was entitled to, against the protests of the plaintiffs, who were thereby obliged to shut down their mills, in whole or in part, many times, for want of water, to which they were justly entitled. The plaintiffs sought to have the water partitioned, as stated in the opinion, so that each party could enjoy it equal to his right. The case was heard on the bill and demurrers of the defendants severally, the parties stipulating that, if the demurrers were overruled, the defendants might answer further.

Hanno W. Gage, Charles A. Strout, Warren & Branders, and Warrens & Mason, for the plaintiffs.

J. W. Symonds, D. W. Snow, and C. S. Cook, for the defendants.

⁶³ EMERY, J. This controversy is over the use for mill purposes of the waters of the Presumpscot river, where it flows in two channels, eastern and western, around an island past the riparian lands of parties at Saccarappa Upper Falls. It is of several years standing, and has been unsuccessfully brought before the court on two former occasions at least. It should now be authoritatively and finally adjusted, if within the power of the court upon the allegations in this or an amended bill. A full statement of the physical, hydrographic facts is given in the case, *Warren v. Westbrook Mfg. Co.*, 86 Me. 32, to which reference is made.

When the controversy first came before the court, in the case, *Westbrook Mfg. Co. v. Warren*, 77 Me. 437, the now defendant alleged that it was entitled to use one-half of the water power of the river at those falls, and that all the other riparian owners, collectively, were not entitled to more than the other half. It did not seek to have the respective rights of the riparian owners in the water power determined, nor did it seek for any action of the court that would divide the use according to the right. Its demand was for a general injunction upon all the other riparian owners, against their using collectively more than half of the water power of these falls, and this without showing

that the damages recoverable at law would not be full compensation for any injury sustained. The court held that, under the allegations, this demand could not be granted.

The controversy again appeared in the case above cited, *Warren v. Westbrook Mfg. Co.*, 86 Me. 32. In that case the defendants in the first case appeared as plaintiffs. They alleged that they owned lands and mills on ^{es} both the mainland and island side of the western channel, and also the dam across that channel; that one of them owned land and mills on the island half of the dam across the eastern channel; that the defendant owned land on the mainland side of that channel, and also the mainland half of the dam across the channel. They further alleged that, by virtue of this riparian ownership of three out of the four shores of the two channels, they were entitled to use three-fourths of the sum of the waters of the two channels, or three-fourths of all the water of the whole river. They asked the court to divide the water of the whole river in that proportion, so that they could use three-fourths and the defendant only one-fourth. They based their claim for the desired judicial action exclusively upon their riparian ownership, above stated, and without invoking any statute, contract or prescriptive right.

The opinion was wearily long, but the only points decided were: 1. That a riparian ownership of three out of four shores of two channels upon the same river, does not of itself establish a right to use three-fourths of all the water of the whole river; and 2. That where no statute, contract, or prescriptive right is invoked, the court will not undertake to wholly or partially apportion the waters of the river between the two channels, but will leave the parties to accommodate themselves to the division made by nature. Early in the opinion the court gave this cautionary notice: "It should be continually borne in mind that we are considering the legal rights and duties based on the situation of the parties, and unmodified by any statutes, grants, contracts, or prescriptions. None of these latter matters are stated in the bill, and their possible modifying effects are not considered here."

This time the plaintiffs allege the various riparian ownerships substantially as before, and they now further allege that a dam (one across each channel) has existed under the successive riparian proprietors, in substantially the same place as the present dam, for one hundred years. They also allege that, for ninety years after the dams were built, one-half of the water of the river has flowed through each channel, and that the water ^{ed}

would continue to flow through the channels in that proportion but for the wrongful acts of the defendants; that prior to the year 1882, the defendants, and its predecessors in title, used less than one-half of the water power upon the eastern channel, and less than one-fourth of the whole power of the river, and that there was then sufficient power for the mills of all the riparian owners; that in the year 1882, the defendants greatly enlarged and increased its mills, and then began to use, and have persisted in using, and propose to use in the future, more than one-half of the water power on the eastern channel, and more than its due proportion of the water power of the river. They allege that this increased use by the defendants renders the whole power insufficient for the mills of all the riparian owners; that unless they can be assured of the steady and regular use of their full, rightful proportion of the water power, they cannot profitably operate their mills, and cannot venture to undertake further operations, by reason of the cloud thus thrown over their rights.

With these allegations, the plaintiffs ask the court to determine the right or proportional share of each party in the water power of the eastern channel, and to effect between the riparian owners upon that channel such a division of the use of the waterflow as will enable each to profitably utilize his rightful proportional share.

The defendants demur generally to the bill, and argue that it is a disguised attempt to induce the court to undertake a division of the whole water of the river between the two channels, an undertaking which the court has once declined. It is evident, and is frankly admitted by the plaintiffs, that a decree dividing and regulating the use of the water in either channel, may substantially affect the water power in the other channel; and that, to do full justice, the court may find it necessary to deal with the whole matter of all the water power at these falls.

The controversy demanding our attention is solely over the use of the flow of the water for the propulsion of machinery. The underlying question is whether, upon the case now presented, the court has and should exercise the power to ascertain, define, and mark out for each party the extent of his share or ^{as} right in the use of the common flow of the water; or, in other words, whether the court can and should make such a division of the use of the flow of water between opposite riparian proprietors, as will secure to each a use or enjoyment equal to his right.

The waters of a river, in flowing from its highland sources down to the sea, develop a force convertible into mechanical

power. The amount of this force depends upon the volume and momentum of the flowing water. The momentum depends on the height or distance of the fall of the water. To increase this volume and momentum, and make them sufficient and available for propelling machinery, dams are constructed, which accumulate the water of the river in larger volume and at a higher level than are natural. Where one party owns the whole dam and the land on both sides of the river, he has the right to the entire usufruct of all the power of the water as it accumulates at his dam. Where one party owns the land on one side of the river, and another party owns the land on the opposite side, (their lands coming together under the river midway between the two banks) and each owns the half of the dam on his land, then neither party is entitled to have the whole power of the accumulated water applied to his machinery. Each party has only an equal right with the other. Each has a right to use one-half of that power; but whatever part of that half he does not use, the other party can freely use. There is no proprietorship in the water, but only a right in its use, and one riparian owner may use so much as the other is willing to let go to waste: *Pratt v. Lamson*, 2 Allen, 275.

When the power is sufficient, from the volume or head of water, to propel at all times all the machinery both parties have set up, there is no occasion for any controversy. When, however, the power has become so reduced, or the machinery so increased that, for all or part of the time, the whole power of the water will not drive all the machinery, then the parties must in some way make a division of this reduced power, or its usefulness ^{as} to either will be destroyed. If each competes with the other in a race to first appropriate the limited power to his machinery, the accumulation and head of water will soon be dissipated, the efficient power of the water exhausted, and all hope of its restoration be destroyed.

In this state the opposite millowners upon our thousands of waterfalls have usually made this division of the use of the water power by mutual agreement. The division has been effected in various ways: by fixing hours or days for the alternate use of the water; by fixing the number and area of gates to be used at different stages of the water; by fixing watermarks for the cessation of all use until the agreed head of water is again accumulated; and by various other devices. Our judicial reports show a happy scarcity of litigation of this kind, and thus testify to an intelligent and well-developed sense of justice and fairness in this important class of our people. On this particular water-

fall, however (by reason, perhaps, of its peculiar character), the opposite millowners cannot agree upon any mode of dividing the now limited water power; and they disagree, also, as to their proportional rights in that power.

These differences having arisen concerning the use of an ancient and valuable water power, it would be a reproach to our jurisprudence, if the court did not possess and exercise the power to authoritatively adjust them. The alternative would be a destructive competition in the use of the water, until it was rendered valueless to the parties and to the community.

It is evident, also, that the power to be exercised by the court should be that of prevention, rather than that of redress. To make the water power of economic value, the rights to its use, and the division of its use, according to those rights, should be determined in advance. This prior determination is evidently essential to the peaceful and profitable use by the different parties having rights in a common power. To leave them in their uncertainty—to leave one to encroach upon the other—to leave each to use as much as he can, and leave the other to sue at law after the injury—is to leave the whole subject matter to possible waste and destruction.

⁶⁷ These considerations make firm ground for the exercise of the court's preservative and preventive jurisdiction in equity, as prayed for here. There are also abundant authorities: *Bardwell v. Ames*, 22 Pick. 333; *Ballou v. Hopkinton*, 4 Gray, 324; *Lyon v. McLaughlin*, 32 Vt. 423; *Adams v. Manning*, 48 Conn. 477; *Burnham v. Kempton*, 44 N. H. 78; *Lehigh Valley R. R. Co. v. Society etc.*, 30 N. J. Eq. 145; *Frey v. Lowden*, 70 Cal. 550; *Patten Paper Co. v. Kaukauna Water Power Co.*, 70 Wis. 659; *Arthur v. Case*, 1 Paige, 447; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9; *Lockwood Mills v. Lawrence*, 77 Me. 297; 52 Am. Rep. 763.

It is suggested that the peculiar physical features of this case are such, that the court cannot make a just and practicable division of the use of the water; that while the court may have the theoretical right, it has not the practical power to make the desired division. Whether this difficulty really exists can be better determined after the parties have presented their evidence. If the plaintiffs cannot then make clear to the court the practicability of their request, it may be properly denied.

It is urged that, while the prayer of the bill is limited in terms to a division of the use of the water flowing through the eastern channel, the court's action, even if confined within that limited prayer, will necessarily affect the flow in the western

channel, and may thereby enable the riparian owners on that channel to secure or retain some water power they otherwise would not have. The chance of such a result should not deter the court from attempting to do justice. Indeed, it may be an additional reason for the court's exercising its power more comprehensively and completely. As the case is now presented, the two dams make with the island practically one dam, and have been maintained as such for a hundred years. Each dam has for that time operated to increase the head at the other dam, by presenting an obstacle to the escape of the water around the island when flowed back by the other dam. The desired head of water at each dam has been kept up by both dams. The whole water of the river has been kept back and accumulated by the joint effect of both dams. Each riparian proprietor upon ^{as} either channel has used his riparian rights as they have been enlarged or diminished, or otherwise modified, by these ancient dams. The owner of each end of the eastern dam may have acquired a prescriptive right in the continued maintenance of the other end. The owners of the dam across each channel may have acquired a similar right in the continued maintenance of the dam across the other channel. In like manner, the long existence and use of these dams may have so affected the flow of the water through the different channels, that the natural flow is no longer the rightful flow: *Murchie v. Gates*, 78 Me. 300.

As the case is now stated, neither party seems to have a naked, natural, unmodified right, such as was considered and defined in the former opinion: *Warren v. Westbrook Mfg. Co.*, 86 Me. 32. Nor can the riparian owners upon either channel now successfully insist that they are in a state of nature, and totally independent of the riparian owners upon the other channel as to the flow, or use of the flow, of the water in their own channel. The interests of the riparian proprietors upon both channels now appear to be intertwined, if not amalgamated. Thus intertwined, the interest of each proprietor upon either channel spans the whole river across both channels. Each has an interest in the regulation of the whole flow of all the water, into whichever channel it may turn.

Under such circumstances, it may be that complete justice cannot be done, even between the opposite riparian owners upon the eastern channel, without determining the rights of all the parties upon both channels, and dividing among them the use of the whole flow of the river, according as their rights may finally appear.

In view of the matters suggested, as well as those directly alleged in the bill, and in view of the hitherto unsuccessful attempts of both parties to secure judicial relief from their embarrassments, we think the court should now attempt, after proper amendments, to adjust all the rights of all the parties in the whole water power in both channels, and to divide the use of the water power in each channel, so that each party may enjoy his full right in the premises. If this seems a departure⁶⁹ from the conservative course the court has hitherto pursued when asked to exercise its equity powers, as in *Jordan v. Woodward*, 38 Me. 423, *Westbrook Mfg. Co. v. Warren*, 77 Me. 437; *Haskell v. Thurston*, 80 Me. 129, we think the exigencies of this particular case fully justify it.

The demurrers *stricti juris* must be sustained, since by inadvortence, no doubt, the plaintiffs have made contradictory statements of the title of the easterly half of the eastern channel. This error, however, can be easily cured by amendment. The bill should also be further amended in statement to present all claims of right in any part of these falls, and waters, arising from riparian ownership, contract, prescription, or any other source. The prayer for relief should be amended to include a division of the use of the water in each channel, and in the whole river; and any other action of the court necessary to finally and completely adjust this controversy.

Demurrers sustained. Bill retained for amendment, and further proceedings. If amendments not filed within sixty days, bill to be dismissed.

PARTITION OF WATER.—In *Plumleigh v. Dawson*, 1 Gilm. 544, 41 Am. Dec. 199, it is said that property in water is indivisible; but the law is, that partition and division into proportionate parts may be made of water rights and of mill privileges: *Freeman on Cotenancy and Partition*, 2d ed., sec. 433.

DANFORTH v. DANFORTH.

[38 MAINE, 120.]

MARRIAGE AND DIVORCE—DESERTION—CONTINUITY OF ACT.—If a wife deserts her husband, and remains away from him for three consecutive years, and, during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete under a statute making "utter desertion continued for three consecutive years" a cause for divorce, and cannot be defeated by proof that on one occasion, within the three years, he visited his wife, and, for two or three nights, occupied the same bed with her, as this did not interrupt the continuity of her desertion.

Libel for divorce. The cause relied on was utter desertion, without reasonable cause, for three consecutive years next prior to the filing of the libel. The evidence showed that the libelee had deserted her husband, without reasonable cause, and had remained away for three consecutive years, though often requested to return, but it further showed that, within the three years, the libelant went to the house occupied by his wife, and there lodged with her, occupying the same bed as husband and wife for two or three nights. She still refused, however, without legal justification, to return, and the question was, whether the act last stated interrupted the continuity of her desertion.

W. T. Haines, for the libelant.

W. H. Newell and W. H. Judkins, for the libelee.

¹²¹ WALTON, J. The question is this: If a wife deserts her husband, and remains away from him for three consecutive years, and, during all that time, continuously and unreasonably refuses to return, will the fact that, within the three years, her husband once visited her and occupied the same bed with her for two or three nights, necessarily interrupt the desertion and bar his right to a divorce for that cause?

We think not. Desertion, such as will be a valid cause for a divorce, is not easily defined: *Stewart v. Stewart*, 78 Me. 548; 57 Am. Rep. 822, and cases there cited. And it may be equally difficult to define what will constitute an interruption or condonation of desertion. The authorities are conflicting and confusing.

In *Kennedy v. Kennedy*, 87 Ill. 250, where a wife, without justification, refused to go to a new home which her husband had prepared for her, and remained away for the statutory length of time necessary to create a valid ground for divorce, the court held that the fact that, on one occasion, he cohabited with her at her brother's house, did not interrupt the desertion or bar his right to a divorce.

And we have reached the same conclusion. "Utter desertion continued for three consecutive years," is one of the causes for which a divorce may be granted: Rev. Stats., c. 60, sec. 2. And we think that if a wife deserts her husband, and remains away from him for the full period of three consecutive years, and during all that time continuously and unreasonably refuses to return, his right to a divorce is complete, and cannot be defeated by proof that on one occasion, within the three years, he visited his wife, and, for two or three nights, occupied the same bed with her.

Such a visit is not illegal or improper. On the contrary, it has often been held to be the duty of the husband to visit his absent wife, and to endeavor by all proper means to effect a reconciliation. If he succeeds, and his wife returns to her home and to her duties as his wife, undoubtedly her prior desertion¹²² will be interrupted, or regarded as condoned, and cannot be added to a subsequent desertion for the purpose of completing the three years necessary to entitle her husband to a divorce. But if, in spite of his efforts, his wife persistently and unreasonably refuses to return, and continuously remains away from him for three consecutive years, we think her husband's right to a divorce is complete—that the mere fact that on one occasion he visited her, and for two or three nights occupied the same bed with her, does not interrupt the continuity of her desertion.

Case remanded for further hearing in the court below.

DIVORCE—DESERTION—CONTINUITY.—If a wife passes a night with her husband on three different occasions after their separation, the desertion of the husband is so broken as to bar her right to a divorce, where such cohabitation occurs within eight or ten months before the wife brings her action, and the statute requires abandonment for one year as a cause of divorce: *Woolfolk v. Woolfolk*, 96 Ky. 657.

BATH SAVINGS INSTITUTION v. HATHORN.

[88 MAINE, 122.]

A GIFT INTER VIVOS must be complete. The donor must divest himself of all dominion over the thing given, and the title to it must pass absolutely and irrevocably to the donee.

TRUSTS—GIFTS—DISTINCTION.—A voluntary trust is an equitable gift, and, like a legal gift inter vivos, must be complete. The distinction between them is of a technical nature. In a trust the real title vests in the donee, but the legal title, perhaps carrying control of the property, may be placed elsewhere; while in a gift, both the equitable and legal title instantly fall to the donee.

TRUSTS—PERSONALTY.—A **DECLARATION OF TRUST** as effectually passes the equitable title of the fund to the cestui as a gift inter vivos passes the legal title to the donee, if the donor creates an estate for his cestui that is no longer his own. The donor may retain the legal title, giving him the control, but for the benefit of the cestui, according to the terms of the contract. The trustee, though he retains the legal title, is merely an agent to administer the trust, and his control is subject to the direction of a court of equity.

AN EXPRESS TRUST OF PERSONAL PROPERTY may be created or declared by parol: but its terms must be clearly established and show an executed gift, so that the equitable title shall have passed as effectually to the donee as in the case of a gift inter vivos.

GIFT AND TRUST—HOW EXECUTED.—A gift must be executed by delivery; a trust by declaration. A voluntary trust is a gift, and requires all the essentials of a plain gift to sustain it.

TRUSTS, VOLUNTARY—SAVINGS BANK DEPOSIT—EVIDENCE.—An entry on the books of a savings bank in the name of a donor, "in trust for" the donee, with the expressed wish that the deposit should go to the donee upon the donor's decease, is sufficient to create a prima facie trust, though the donee had no notice of it. Such entry is not conclusive evidence, by itself, of an absolute, indisputable gift, and may be controlled by extrinsic evidence to show a contrary intention; but where such evidence is wanting, and all the declarations, acts, and conduct of the donor are consistent with the presumption arising from the entry itself, and show a completed trust in favor of the donee, it will be upheld as such.

Bill in equity. The Bath Savings Institution interpleaded against the defendant, Hathorn, as administrator of the estate of Henry Walker, deceased, and against Alice B. Files, to determine the title to a certain deposit in that institution. The agreed course of procedure between all parties was, that each defendant should file an answer, and that then a decree of interpleader should be filed. This was done, and it was stipulated that the answers should be taken as the pleadings in the case, that the cause should be set down for hearing on the bill, answers, and proof, and that Miss Files should be regarded as the plaintiff in the continuance of the suit. It thus became, practically, a suit in equity by Alice B. Files against the administrator of Henry Walker's estate. Mr. Walker, after making the deposit, as stated in the opinion, took the depositor's book to the bank occasionally to have the accrued dividends added. On one occasion, soon after the deposit was made, Miss Files' sister, Mrs. White, was visiting at his house, and saw the book among some other papers that he happened to be examining. She took it up, looked at it, and saw the form of entry. Mr. Walker then told her: "Yes, that is for Alice at my decease, and the next will be for you." Mrs. White, returning home from her visit soon afterward, communicated this information to Alice. A housekeeper, Mrs. Trott, who was in Mr. Walker's family several years before his death, saw the book on three different occasions, and Mr. Walker explained to her, when she spoke of its being in trust, that the book was for Alice. Just a few months before his death, after he had the July dividend added, he was examining the book, spoke of it as Alice's bank-book, and asked Mrs. Trott to guess how much it had gained. She guessed between ten hundred and eleven hundred dollars, and his reply was, "You are pretty good for guessing. You guessed pretty nearly right, and that will be a great help to Alice, won't it, Mrs. Trott?"

Orville D. Baker and Leslie C. Cornish, for Alice B. Files.

Charles W. Larrabee, for the defendant, Hathorn.

¹²⁴ HASKELL, J. Henry Walker of Woolwich, died solvent and intestate October 2, 1891, leaving brothers and sisters and nephews and nieces, but neither wife nor children. His wife died January 1, 1886. She was a cousin to the father of the plaintiff, Alice B. Files of Winslow, who knew the old people as uncle and aunt, and seems to have been always welcome at their house and a favorite with them.

On July 1, 1882, Mr. Walker deposited in the Bath Savings Institution seven hundred dollars, "in trust for Alice B. Files," saying, in substance, that he wished it to go to her at his decease. That deposit remained intact during Mr. Walker's life, and at his death amounted to something over one thousand dollars. He always retained the book, and it was found among his papers by his administrator, the defendant, who now claims the deposit as a part of his ¹²⁵ estate. The evidence shows that Mr. Walker intended the deposit for Alice at his decease, but never communicated his intention to her.

The authorities all say that a gift inter vivos must be complete. The donor must divest himself of all dominion over the thing given, and the title to it must pass absolutely and irrevocably to the donee: *Northrop v. Hale*, 73 Me. 66; *Dole v. Lincoln*, 31 Me. 422; *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308; *Augusta Sav. Bank v. Fogg*, 82 Me. 538.

A voluntary trust is an equitable gift, and, like a legal gift inter vivos, must be complete. A declaration of trust as effectually passes the equitable title of the fund to the cestui, as a gift inter vivos passes the legal title to the donee. The distinction between them is of a technical nature. In a trust, the real title vests in the donee, but the legal title, perhaps carrying control of the property, may be placed elsewhere; while, in a gift, both the real and legal title instantly fall to the donee. It is not necessary, therefore, that he who declares a trust should divest himself of the legal title, if, perchance, he so does it as to transfer the real or equitable title to the cestui; for then he creates an estate really no longer his own. He may retain the legal title, giving him the control, but for the benefit of the cestui, according to the terms of the trust. His control becomes subject to the direction of courts of equity, that always supervise the administration of trusts. They are the children of equity; they spring from it, and cannot survive without its aid and control. The trustee is merely an agent to administer them, and nothing more.

An express trust of lands can only be created by some writing signed by the party or his attorney (Rev. Stata., c. 73, sec. 11),

but a trust of personal property may be created or declared by parol. It is necessary, however, to clearly establish the terms of it, and show an executed gift, so that the equitable title shall have passed to the donee as effectually as a gift *inter vivos*: *Gerish v. New Bedford Inst. for Savings*, 128 Mass. 159; 35 Am. Rep. 365; *Dresser v. Dresser*, 46 Me. 48.

Says Lord Cranworth: "If a man chooses to give away anything ¹²⁶ which passes by delivery, he may do so, and there is no doubt that, in the absence of fraud, a parol declaration of trust may be perfectly good, even though it be voluntary. If I give any chattel, that, of course, passes by delivery; and if I expressly or impliedly say I constitute myself trustee of such and such personal property for a person, that is a trust executed, and this court will enforce it in the absence of fraud, even in favor of a volunteer. . . . The authorities all turn upon the question whether what took place was a declaration of trust or merely an imperfect attempt to make a legal transfer of the property. In the latter case, the court will afford no assistance to volunteers; but, when the court considers that there has been a declaration of trust, it is a trust executed, and the court will enforce it, whether with or without consideration": *Jones v. Lock*, L. R. 1 Ch. App. 25.

In this case, the deposit is in the name of the donor, "in trust for the donee." Standing alone, this entry does not work an absolute, indisputable gift in the form of a dry trust, that is, a trust without limitation or condition, that may be terminated at the will of the cestui; but extrinsic evidence is competent to control its effect: *Brabrook v. Savings Bank*, 104 Mass. 228; 6 Am. Rep. 222; *Clark v. Clark*, 108 Mass. 522; *Powers v. Provident Inst.*, 124 Mass. 377; *Stone v. Bishop*, 4 Cliff. 593; *Northrop v. Hale*, 72 Me. 275.

The evidence discloses that, at the time the donor made the deposit, he expressed a desire that the donee should have the money at his death. That certainly shows no intent to part with the legal title at an earlier day. He is said to have subsequently made talk of the same purport; but he neither informed the donee of the deposit, nor made any effort, nor did any act, to apprise her of it, or of his intention concerning it. The deposit on his part was both voluntary and secret. Information of it may have been communicated to her by others, but never at his request, nor with his knowledge. What evidence, then, operates to pass the equitable title in the deposit to her? He had consummated no contract with her. His intentions were kept in

his own breast. He could have withdrawn the money at any time,¹²⁷ and have made a new disposition of it, and she may not have been the wiser, so far as he knew. It is just as essential, to establish the trust sought to be set up here, to prove some act on the part of the donor that shall operate to pass the equitable title to the donee, as it is to prove delivery in a gift *inter vivos*. Both require the same essentials. In both, some title must pass from the donor, differing only in degree. A gift must be executed by delivery; a trust by declaration.

In *Augusta Sav. Bank v. Fogg*, 82 Me. 538, the donor deposited a sum of money in the name of the donee, subject to his own order, with intent that, at his death, it should go to the donee. No trust was claimed or shown. It was an unexecuted purpose, an ineffectual attempt at testamentary disposition.

In *Parcher v. Saco etc. Sav. Inst.*, 78 Me. 470, a depositor caused to be entered upon the bank ledger words in substance, "payable also to Mrs. Leavitt in case of my death," and it was held no gift.

In *Curtis v. Portland Sav. Bank*, 77 Me. 151, 52 Am. Rep. 750, the entry of "Subject also to" the donee was held to constitute no gift; but that a subsequent delivery of the bank-book completed the gift.

In *Barker v. Frye*, 75 Me. 29, a deposit in the name of the donee, subject to the donor during life, afterward changed by erasing words giving the donor any control of the fund, and after notice to the donee of the change and that the bank-book would be delivered to him the first time they met, and after his reply requesting that the book be sent to him, which the court says "was an acceptance of the gift," it was held that the gift was complete. The same doctrine is held in *Northrop v. Hale*, 73 Me. 66; *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308; *Drew v. Hagerty*, 81 Me. 231; 10 Am. St. Rep. 255; *Parkman v. Suffolk Sav. Bank*, 151 Mass. 218.

All of our cases require something more than a mere intention to give, a promise to give, or an expectation to give. Benevolence alone will not do. There must be beneficence also. The mystery sometimes supposed to exist about a trust cannot¹²⁸ change the nature of a transaction. A voluntary trust is a gift, and requires all the essentials of a plain gift to sustain it.

In *Dresser v. Dresser*, 46 Me. 48, a writing specifying the terms of a voluntary trust, and a delivery of the trust property, so that the dominion of the donor over it was thereafter lost, is a good example of a trust of this sort.

In *Alger v. North End Sav. Bank*, 146 Mass. 418, 4 Am. St.

Rep. 331, the donor made a deposit similar to the one under consideration. It was in his own name as trustee for the donee, his housekeeper, who claimed the deposit as a payment for her services. It was shown that shortly before his death he told her: "I put it in for you," "that money is yours," and the court held that the judge, who tried the case, was authorized to find a perfected gift, if he chose to do so.

Some of the cases are in conflict concerning the question now under consideration, more in the application of the law to the ever varying facts in the numerous cases than otherwise; but our own cases are all consistent, and squarely hold to the doctrine that a trust in personal property may be created by parol, and that a deposit in bank in the name of another may be explained or controlled by evidence outside the written terms of the deposit. In this case, the terms of the deposit clearly show an intended trust in favor of the donee, but may be controlled or limited by extrinsic evidence. This evidence confirms the trust, showing that it should cease at the death of the donor, and that the legal title should then pass to the cestui. When the deposit was made, the treasurer of the bank told the donor that, at his decease, the money would go to the donee, and the donor replied that was his wish. All the subsequent acts and declaration of the donor show the same intent. The gift cannot be upheld as an absolute gift *inter vivos*, nor as a gift *causa mortis*, for these gifts require a delivery of the res, a complete transfer of title. They differ from a gift in trust, in that they purport to, and must, pass the whole title, so that the donor can have no dominion or control over them. But a gift in trust withholds the legal title from the donee. It may be transmitted to a third person, or it may be retained by the donor, but, in ¹²⁹ either case, the equitable title has gone from him, and, unless the declaration of trust contains the power of revocation, or the wide discretion of chancery attaches (*Countts v. Acworth*, L. R. 8 Eq. 558; *Wollston v. Tribe*, L. R. 9 Eq. 44; *Everitt v. Everitt*, L. R. 10 Eq. 405; L. R. 7 Ch. App. 244; 15 Ch. Div. 570; *Lister v. Hodgson*, L. R. 4 Eq. 30; *Sharp v. Leach*, 31 Beav. 491; *Anderson v. Ellsworth*, 3 Giff. 154; *Toker v. Toker*, 31 Beav. 629; *Phillips v. Mullings*, L. R. 7 Ch. App. 247; *Smith v. Iliffe*, L. R. 20 Eq. 666; *Welman v. Welman*, 15 Ch. Div. 570, 578, 579; *Prideaux v. Lonsdale*, 1 De Gex, J. & S. 433), it leaves him powerless to extinguish the trust. Of course, the trust must be established by proof, and the fact that no evidence of a voluntary trust once created remains or can be shown does not alter the principle. Many rights fail of enjoyment from the lack of evidence that might once be adduced.

So a secret trust may be valid when it can be proved, but, if the donor conceals the evidence of it, and later appropriates the fund to his own use, it is simply a wrong on his part that prevails because of his perfidy, and goes unpunished and unnoticed because unknown. The cestui's rights are the same, although his remedy may have been destroyed.

In the case of *In re Smith*, 144 Pa. St. 428, 27 Am. St. Rep. 641, a lad of three years went to live with his uncle. When the lad was twelve, the uncle placed thirteen thousand dollars in bonds in an envelope, on which he had written and signed a declaration that he held them for his nephew. The bonds remained in the uncle's possession until his death, and the court held a completed gift in trust for the nephew.

In *Connecticut River Sav. Bank v. Albee*, 64 Vt. 571, 33 Am. St. Rep. 944, the court says: "A completed trust, although voluntary, may be enforced in equity. It is not essential that the beneficiary should have had notice of its creation, or have assented to it. The owner or donor of personal property may create a perfect or complete trust by his unequivocal declaration in writing, or by parol, that he himself holds such property in trust for the purposes named. The trust is equally valid whether he constitutes himself or another person the trustee."

In that case, a father deposited money in a savings bank in ¹⁸⁰ the name of his son, naming himself trustee. It appeared that one motive of the father was to avoid taxation; but, said the court, that fact does not negative the idea that he also intended to create a trust for the benefit of his son. It is perfectly consistent with it, and the retention of the pass-book is not inconsistent with such a purpose; he must have retained it as trustee.

Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447, is in point. One Bosworth deposited money in a savings bank in his own name as trustee for a stepdaughter. He did not tell her what he had done, nor show her the pass-book. He kept that himself. After his death, the court held that the stepdaughter was entitled to the money—that the transaction constituted a trust in her favor.

So is *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446. Susan Boone deposited five hundred dollars in a savings bank "in trust for Lillie Willard." Susan kept the pass-book, and Lillie had no knowledge of it until after Susan's death. Want of notice to Lillie and the retention of the pass-book by Susan were urged in defense; but the court held a gift in trust complete. This is an exhaustive case, and contains a review of authorities by Chief Justice Church prior to 1878.

So is *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69. A widow

deposited two hundred and fifty dollars in her own name, "as trustee of William A. Minor," the child of a neighbor. The child knew nothing of the deposit until after the depositor's death, and meantime did not have possession of the pass-book, and the court held the trust complete, and allowed a recovery of the money from the depositor's executor.

So is Gaffney's Estate, 146 Pa. St. 49. It appeared that Hugh Gaffney deposited five hundred and sixty dollars in his own name, as trustee for Polly Kim, and the court held the entry itself prima facie evidence of the trust and, unexplained, sufficient to uphold it.

In Gerrish v. New Bedford Inst., 128 Mass. 159, 35 Am. Rep. 365, the court says: "No particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another; that it is enough for the latter purpose if it be unequivocally declared in writing—or orally if the property be personal—that it is held in trust for the person named; that ¹⁸¹ when the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery."

The same case holds that notice to the beneficiary is unnecessary where the transaction is clear, but, when ambiguous, or susceptible of different interpretations, it removes the doubt and is decisive of the purpose of the donor. Some of the earlier Massachusetts cases seem to hold notice to the beneficiary essential to the validity of a trust, but, when considered in the light of this case, rather consider the notice a controlling, than an essential, element in the creation of a voluntary trust. The prevailing doctrine now is, that notice is unnecessary, but when shown has controlling effect.

In this case, the entry, "in trust for," is of clear and unmistakable import and sufficient to create a prima facie trust. It might have been controlled by evidence that would have shown a contrary intention, but such evidence is wholly wanting. Moreover, all the declarations, acts, and conduct of the donor are consistent with the presumption arising from the entry itself, and show that it expresses the true import of the transaction and creates a completed trust in favor of the donee.

Decree accordingly with costs against the estate.

Parol Voluntary Trusts in Personal Property, how Created.

To constitute a valid gift there must be a delivery of the property with intent on the donor's part to divest himself of title and possession: *Notes to Crook v. First Nat. Bank*, 35 Am. St. Rep. 26; *Larrabee v. Hascall*, post, p. 440. The distinction between gifts and declarations of trust is,

that there must be an expression of an intention to become a trustee, while words of present gift show an intention to give over property to another, and not to retain it in the donor's hands for any purpose: See monographic note to *Williamson v. Yager*, 34 Am. St. Rep. 190, on voluntary trusts arising from declaration of trustor. A declaration of trust is equivalent to a transfer of the legal title, but the declaration must be unequivocal: Note to *Williamson v. Yager*, 34 Am. St. Rep. 201, 202. If a voluntary trust has been fully executed, the mere retention of the document, which is evidence of it, by the grantor, will not impair the validity of the gift, unless there is clear and decisive proof that he never parted, or intended to part, with its possession: Note to *Williamson v. Yager*, 34 Am. St. Rep. 212. A voluntary trust of personalty is valid, though created by parol: Note to *Williamson v. Yager*, 34 Am. St. Rep. 190, 195. The mere circumstance of making a deposit "as trustee for" or "in trust for" another is not of itself conclusive evidence of a gift or voluntary trust, but may be explained by extrinsic evidence. If there is, however, some further act or circumstance showing a perfected gift of the legal or equitable interest, the gift or trust is regarded as complete: Note to *Williamson v. Yager*, 34 Am. St. Rep. 220, 221, where the conflicting authorities are discussed. If the deposit-book is retained by the donor, evidence of his declarations may be given to sustain the trust which is, *prima facie*, created by the entries in the book; and if a declaration of trust is intended, notice to the donee is not necessary to perfect his rights: *Williamson v. Yager*, 34 Am. St. Rep. 223, 224. It is essential to the creation of a valid express trust, that some estate or interest be conveyed to the trustee: *Nichols v. Emery*, 109 Cal. 323; 50 Am. St. Rep. 43.

An unexecuted trust of a savings bank deposit must be distinguished from a *prima facie* trust of such deposit. This is made clear by the case of *Norway Savings Bank v. Merriam*, 88 Me. 146. There, Mrs. Esther S. Reed, on April 27, 1892, had on deposit in the Norway Savings Bank, the sum of nineteen hundred and one dollars and twenty-three cents, standing in her own name. She surrendered her pass-book at that time, and had the whole deposit transferred to two new accounts. On one pass-book, and upon the books of the bank, there was entered, by her direction, the sum of nine hundred and fifty dollars and sixty-two cents, as follows: "Norway Savings Bank, in account with Esther S. Reed and Harry Q. Millett, or their survivor, in joint tenancy"; and upon another pass-book, and upon the books of the bank, there was entered, by her direction, the sum of nine hundred and fifty dollars and sixty-one cents, as follows: "Norway Savings Bank, in account with Esther S. Reed and Myra J. Millett, or their survivor, in joint tenancy." The two pass-books were delivered to Mrs. Reed, who afterward kept them among her private papers, where they were found, after her death, by her executor. Neither Harry Q. Millett nor Myra J. Millett ever had any knowledge of the transaction at the bank until after Mrs. Reed's death. Mrs. Reed never drew any portion of the principal or interest of the deposit, and the only change in the accounts was the crediting of the semi-annual interest. Myra J. Millett was an adopted daughter of Mrs. Reed, and Harry Q. Millett was the son of Mrs. Millett. Statements and declarations made by Mrs. Reed were introduced in evidence. They tended to show an intention upon her part that these

deposits should take the place of certain provisions in favor of Mrs. Millett and her son in Mrs. Reed's will made several years before the savings bank transaction, and that she intended to change her will striking out the bequests in their favor. She died without having made any change in her will. Under these facts and circumstances, the court held that the acts and declarations of Mrs. Reed were not sufficient to constitute a completed gift, or to create a voluntary trust; that she did not intend, by the transfer of her deposit to the new accounts, to make at that time fully executed gifts of either the legal or equitable title to the new deposits, but that she intended to make a testamentary disposition of the deposits, so that the persons named should each take, in case he or she survived her, what might be left of each sum after her death; that such attempted disposition was void, because contrary to the statute of wills; and that such deposits, therefore, belonged to her estate.

It was conceded that the acts of Mrs. Reed were not sufficient to constitute a gift of each of these deposits, because there was no delivery of anything as evidence of a gift; and the court, in arriving at the conclusion that such acts were insufficient to create voluntary trusts, applied the following principles of law: "The only important difference between a gift and a voluntary trust is, that in the one case the whole title, legal as well as equitable, the thing itself passes to the donee, while in the other, the actual, beneficial, or equitable title is transferred to a third person, or is retained by the person creating it, to hold for the purposes of the trust. But a gift of the equitable or beneficial title must be as complete and effectual in the case of a trust as is a gift of the thing itself in a gift *inter vivos*. 'It is just as essential, to establish the trust sought to be set up here, to prove some act on the part of the donor that shall operate to pass the equitable title to the donee, as it is to prove delivery in a gift *inter vivos*,' citing the principal case.

"The creation of a trust is but the gift of the equitable interest. But, on account of the difference in the form and purposes of the two transactions, it necessarily follows that different acts are essential in the two cases. While delivery and a surrender of all present and future dominion over the property given is absolutely necessary in a gift, these would be inconsistent with the very purposes of a trust, where a person creates himself as the trustee; possession and control in such a case remain in him who has the legal title, subject to the direction of courts of equity.

"But while delivery and surrender of possession are not necessary in the creation of such a trust as is here sought to be maintained, there must be other acts which are so far equivalent as the nature of the transaction will permit. A perfect or completed trust is created where the donor makes an unequivocal declaration, either in writing or by parol, that he himself holds the property in trust for the purposes named. He need not, in express terms, declare himself trustee, but he must do something equivalent to it, and use expressions which have that meaning. To create a trust, the acts or words relied upon must be unequivocal, implying that the person holds the property as trustee for another. There must be an executed gift of the equitable title without any reference to its taking effect at some future time.

"While courts of equity will enforce a perfect and completed trust, although purely voluntary, it is certainly true that equity will lend no

assistance toward perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. In order for such a trust to be valid and enforceable, it must always appear from the written or oral declaration, from the nature of the transaction, the relation of the parties, and the purposes of the gift, that the fiduciary relation is completely established. Nor will the court enforce as a trust a transaction which was intended as a gift, but is imperfect for that purpose, 'for then every imperfect instrument would be made effectual by being converted into a perfect trust.'"

Finally, the court said, with respect to the creation of an executed voluntary trust by Mrs. Reed: "We do not think that any acts or language of hers can admit of such interpretation. She never made a declaration of trust, formal or otherwise. She never notified the persons named as joint tenants of the transaction at the savings bank; and, while this may not be necessary, if the creation of the trust is clearly established, it is a circumstance of greater or less weight, according to the facts of each case, upon the question of intention. It seems to us that she purposely retained possession of the pass-books, and withheld all knowledge of the transaction from the persons named in the entries upon the books, in order that she might retain the control of the deposits for her own purposes, if necessary. We cannot see that she ever, by act or word, constituted herself a trustee of these sums of money for others." The court then stated that in the principal case the words, "in trust for," were held sufficient to create a *prima facie* trust, and that the declaration, acts, and conduct of the donor were consistent with the presumption arising from the entry.

GILROY, PETITIONER.

[28 MAINE, 199.]

NATURALIZATION—STATE COURTS.—There is no provision of the federal constitution which requires the courts or judges of a state to perform any duties respecting the admission of aliens to citizenship. They may, if they choose, exercise the power conferred upon them by Congress, unless prohibited by state legislation, but this is a naked power, and imposes no duty respecting the naturalization of aliens.

NATURALIZATION.—A state statute prohibiting all courts of the state, except certain designated courts of record, from entertaining any jurisdiction over the naturalization of aliens is not in conflict with any provision of the federal constitution.

Application to be admitted to citizenship. The case was heard on exceptions.

D. J. McGillicuddy and F. A. Morey, for the petitioner.

200 **WISWELL, J.** An alien applied to the Lewiston municipal court, at its July term, 1894, to be admitted to become a citizen of the United States. The judge of the court declined to entertain the application, and dismissed it on the ground that, by virtue of chapter 310 of the laws of 1893, that court no longer

²⁰¹ had any jurisdiction of naturalization cases. The applicant excepted to this ruling.

By the constitution of the United States, article 1, section 8, it is provided that Congress shall have power "to establish a uniform rule of naturalization." Congress has enacted that an alien making application for citizenship shall make a declaration on oath, "before a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common-law jurisdiction and a seal and clerk." And that he may be admitted to become a citizen by "some one of the courts above specified": U. S. Rev. Stats., sec. 2165.

Assuming that the Lewiston municipal court is a court of record having common-law jurisdiction and a seal and a clerk, within the meaning of the statute referred to, the question is presented whether the act of the legislature, approved March 29, 1893, is in violation of, or contrary to, any provision of the federal constitution. That act provides that the supreme judicial and superior courts shall respectively have jurisdiction of applications for naturalization, but that no other court established by the state shall entertain any primary or final declaration or application made by, or in behalf of, an alien to become a citizen of the United States, or entertain jurisdiction of the naturalization of aliens: Laws 1893, c. 310.

There is no provision of the federal constitution which requires the courts or judges of a state to perform any duties respecting the admission of aliens to citizenship. It is well established that such courts and magistrates may, if they choose, exercise the power conferred upon them by Congress, unless prohibited by state legislation: *Prigg v. Pennsylvania*, 16 Pet. 622. But this is a naked power, and imposes no legal obligations on the courts to assume and exercise them, and such exercise is not within their official duty, or their oath to support the constitution of the United States: *Stephens, Petitioner*, 4 Gray, 559.

The Massachusetts legislature, in 1855, enacted a statute prohibiting any court of the state from receiving or entertaining any primary or final declaration or application of an alien to ²⁰² become a citizen of the United States, or to entertain jurisdiction for the naturalization of aliens. It was held in the case of *Stephens, Petitioner*, 4 Gray, 559, that this statute was not contrary to the constitution of the United States.

The ruling of the judge of the municipal court was correct.

Exceptions overruled.

NATURALIZATION — POWER OF STATE AND ITS COURTS. No state can confer rights of citizenship upon an alien, who has not complied with the laws of Congress, so as to make him a citizen of the United States, and entitled to the rights and privileges guaranteed to citizens by the federal constitution: *In re Wehlitz*, 16 Wis. 443; 84 Am. Dec. 700. The power to pass uniform naturalization laws is delegated to Congress, and is exclusive in its character: *In re Wehlitz*, 16 Wis. 443; 84 Am. Dec. 700. Any court of record having common-law jurisdiction is competent to the performance of everything required to be done in the process of naturalization, as prescribed by the act of Congress: *Morgan v. Dudley*, 18 B. Mon. 693; 68 Am. Dec. 735; *People v. McGowan*, 77 Ill. 644; 20 Am. Rep. 254; *In re Conner*, 39 Cal. 98; 2 Am. Rep. 427. But a court not of record has no such jurisdiction: *State v. Whittemore*, 50 N. H. 245; 9 Am. Rep. 196.

TRACY v. ROBERTS. ROBERTS v. TRACY.

[88 MAINE, 310.]

JURISDICTION. — COURTS OF PROBATE ARE CREATED by statute and possess special and limited jurisdiction only. The record of their proceedings must show their jurisdiction. Nothing is to be presumed in favor of the right to divest an heir of his title.

GUARDIAN AND WARD—PETITION TO SELL—JURISDICTION.—A petition to the probate court, by a guardian, for leave to sell the real estate of his ward is the foundation upon which to base the jurisdiction of the court, and must allege sufficient facts to give the court power to authorize the sale.

GUARDIAN AND WARD—INVALID SALE OF REAL ESTATE.—Under a statute requiring a petition, license, oath, bond, and notice of sale, a guardian's sale of his ward's real estate is void where there was no petition or license covering the premises conveyed, where no oath was taken, and where there was not given any bond or notice of such sale: and the five years' limitation within which an action may be brought by the ward, or those claiming under him, to avoid such sale does not apply to such a case, for the court had no jurisdiction over the subject matter. That limitation applies to a defective sale under a license from a court having jurisdiction, but does not apply where there was no petition or license.

GUARDIAN AND WARD—INVALID SALE OF REAL ESTATE—RATIFICATION.—If a sale of a ward's real estate, by his guardian, under license, is invalid for want of a compliance with some requirement of law by the guardian, it is competent for the ward, when he becomes of age, to affirm the sale, or he may avoid it within a reasonable time. If he affirms it, he becomes bound by it; and his receiving and retaining the proceeds amounts to such affirmation.

ESTOPPEL, EQUITABLE—VOID SALE OF WARD'S REAL ESTATE.—The doctrine of equitable estoppel is legally available in an action at law as well as in equity. Hence, if a guardian has made a void sale of his ward's real estate, but in good faith, there being no fraud or mistake, and the ward has received the benefit of the proceeds of such sale, and has, by his conduct, ratified and affirmed it after he became of age, with full knowledge of the facts, the doctrine of equitable estoppel applies, and neither the ward, nor those claiming under him, can afterward recover the land itself.

L. B. Deasy and J. T. Higgins, for Tracy.

George P. Dutton, for Roberts.

³¹¹ FOSTER, J. Two cases are reported to this court: 1. A writ of entry for a parcel of land lying in Mount Desert; 2. A bill in equity brought by the defendants in the first suit against the plaintiff therein, praying for an injunction restraining him from prosecuting his suit at law, and for a decree requiring him to release to the complainants his pretended title. The cases are submitted on the same statement of facts and are to be decided together.

In 1870, William Roberts was the owner of the premises in dispute. He died intestate, leaving a widow, and Franklin B. Roberts and Horace D. Roberts, his children and sole heirs. The premises in dispute were assigned to his widow for her dower. She died February 23, 1876.

September 25, 1875, Franklin B. Roberts died intestate, leaving three children as his sole heirs, Abbott L., Josephine M., and Ralph V. Roberts.

April 17, 1876, Abbott L. Roberts, being of full age, conveyed his interest, being one-third of an undivided half, in the ³¹² demanded premises, to his uncle, Horace D. Roberts, by sufficient deed, duly recorded. Thus Horace D. Roberts was an owner of an undivided half of the demanded premises by inheritance from his father, William Roberts, and one-sixth by purchase from Abbott L. Roberts, heir of Franklin B. Roberts.

December 1, 1875, Deborah M. Roberts, widow of the said Franklin B. Roberts, was, upon her own petition, duly appointed guardian of Josephine M. and Ralph V., children of herself and the said Franklin B. Roberts, and duly filed her guardian's bond and inventory.

The said Franklin B. Roberts left other real estate at his decease, than that in controversy; and at the April term, 1876, of probate court, the said Deborah M. Roberts filed a petition to sell certain real estate of her said wards. Her license bond was duly filed and approved, wherein she recited that she was duly licensed to sell and convey "all of the real estate belonging to said Franklin B. Roberts, the same described in the petition of said Deborah M. for license to sell entered at the last April term of said court, A. D. 1876."

On the third Wednesday of June, 1876, license issued to the said Deborah M. Roberts to sell the land "described in her petition for license." But neither does said petition, nor said license, embrace the demanded premises, nor does it appear that she ever took the oath required by law under said license, although the license was returned into court and recorded. June 27, 1876, the said Deborah M. Roberts, in her capacity as guardian of

Josephine M. and Ralph V. Roberts, by a guardian's deed in due form reciting the aforesaid petition and license, conveyed to the said Horace D. Roberts the undivided interests of the said Josephine and Ralph V. Roberts in the demanded premises, which deed was duly recorded August 20, 1876.

If we correctly understand the facts, it appears that on that same day other real estate which was embraced in the petition and license, and to which the bond related, was sold by the said Deborah M. Roberts to other parties, as stated in the case of *Kingsley v. Jordan*, 85 Me. 137, 138.

²¹³ Horace D. Roberts died December 7, 1876, intestate, and the defendants are his heirs at law. Ralph V. Roberts died June 16, 1886, intestate, without issue, being nearly sixteen years of age, leaving as heirs his brother and sister, Abbott L. Roberts and Josephine M. Roberts. Josephine M. Roberts became of age in 1878.

September 18, 1888, Deborah M. Roberts, then having become the wife of William W. Sumner, and Josephine M., who had married Otis M. Ober, and Abbott L. Roberts, by their deed of quitclaim without covenants, conveyed to the demandant, Tracy, their interest in the demanded premises, for the consideration hereafter stated.

It is admitted that the said Deborah M. Roberts was duly appointed guardian as aforesaid; that a license to her as said guardian had duly issued to her on the third Wednesday of June, 1876, to sell some real estate, but that neither the petition nor license in any way covered the demanded premises, nor that she ever took the oath required by law under that license. It is also admitted that the said guardian in her said deed claims authority by virtue of the petition and license aforesaid; that she made the conveyance in good faith, and for the benefit of the estate of said wards; that her said wards received the benefits of the proceeds of said sale; that the plaintiff, when he took the deed from Deborah M. Sumner, Abbott L. Roberts, and Josephine M. Ober, took it with full knowledge of said guardian's deed, and that the consideration thereof was an agreement on the part of the plaintiff to prosecute this claim against the defendants to final judgment for one-half the land, and, if not successful, to receive nothing for his services and expenses.

The tenants' ancestor, Horace D. Roberts, went into the occupation of the premises on the purchase from Abbott L. Roberts and from the guardian in 1876, and he, during his life, and the tenants after his death were not disturbed by any claim till the commencement of this action.

It will be seen from this statement that if the sale by the guardian is sustained, then the plaintiff has no title, and this action cannot be maintained. For it is admitted in argument,³¹⁴ and the evidence discloses the fact, that he has no title to two-thirds of the demanded premises—the one-half inherited by Horace D. Roberts, father of the tenants, from his father, William Roberts, and the one-sixth conveyed to him by Abbott L. Roberts. The controversy, therefore, is concerning the remaining third—that which upon the death of their father, Franklin B. Roberts, came by inheritance to Josephine M. and Ralph V. Roberts. Can the plaintiff recover that third, or any portion thereof?

Was the guardian's conveyance of this third to the tenants' ancestor, Horace D. Roberts, such as can be legally sustained?

The plaintiff raises several formidable objections to the legality of that conveyance. The irregularities apparent throughout the proceedings are numerous and extraordinary. There was neither petition nor license that in any way covered the demanded premises; nor was there oath, or bond, or notice of sale, as required by statute.

The case at bar is essentially different from that of *Kingsley v. Jordan*, 85 Me. 137, where the only objection to the validity of the guardian's sale was, that it did not appear that the guardian took the oath required by law before making the sale. The petition, license, and bond in that case embraced the premises then in controversy, and there was but one omission of the statute requisite to constitute a valid sale. The material facts in that case are so different from those in the present case, that the decision there can afford no criterion by which the rights of these parties are to be determined.

1. The defendants set up, in answer to these objections to the validity of the guardian's conveyance, the limitation provided by the Revised Statutes, chapter 71, section 30, viz: "No action shall be brought to recover an estate sold under this chapter with a view to avoid the sale by the ward or persons claiming under him, unless it is done within five years after the sale, or the termination of the guardianship, except that persons out of the state, or under legal disability at said times, are limited to five years after their return to the state, or the removal of the disability."

³¹⁵ The statute, in the section following that already cited, provides that in an action brought to contest the validity of any such sale by the ward or person claiming under him, no such

sale shall be avoided on account of any irregularity in the proceedings if it appears: 1. That the license was granted by a court of competent jurisdiction, and the deed was duly executed and recorded; 2. That the person licensed took the oath, and gave the bond and notice of the time and place of sale required by law; 3. That the premises were sold in such manner, and within such time, as the license authorized, and are held by one who purchased them in good faith. The implication being that an omission of these requisites would render such sale void.

The limitation of five years within which an action is to be brought applies to defective sales under licenses from a court of competent jurisdiction, and not to sales where no petition or license ever existed: *Chadbourn v. Rackliff*, 30 Me. 354, 360; *Poor v. Larrabee*, 58 Me. 543, 558; *Rev. Stats. 1821, c. 52, sec. 12*. The petition to the probate court is the foundation upon which to base the jurisdiction of the court, and must allege sufficient facts to give the court jurisdiction and power to authorize the sale: *Overseers v. Gullifer*, 49 Me. 360; 77 Am. Dec. 265; *Danby v. Dawes*, 81 Me. 30; *Gross v. Howard*, 52 Me. 192.

Courts of probate are created by statute, and possess special and limited jurisdiction only. The record of their proceedings must show their jurisdiction. Nothing is to be presumed in favor of the right to divest an heir of his title. The authority to do so is derived wholly from the statute, and its provisions must be strictly complied with.

This doctrine was affirmed in the case of *Williams v. Morton*, 38 Me. 47, 61 Am. Dec. 229, where a conveyance of real estate of his wards by their guardian, even under license of the probate court, without complying with the requirement of the statute as to giving a bond, was held to be void and to vest no title in the grantee; and the court further held that the money paid for such a deed might be recovered back in an action upon its covenants, or for money had and received: See, also, *Moody v. Moody*, 11 Me. 247, 253; *Knox v. Jenks*, 7 Mass. 488; *Williams v. Reed*, 5 Pick. 480.

In the case last cited, the court say: "There being no bond and no oath, the sale is void, or at least voidable, so that the parties to it are at liberty to vacate it, and consider it annulled."

A fortiori, where there is neither petition nor license, as well as no bond or notice of sale, and no oath, all of which are required by statute, the court had no jurisdiction over the subject matter.

The limitation of five years within which an action is to be brought by the Revised Statutes, chapter 71, section 30, cannot be applied in this case.

The sale was void as not being in compliance with the statute.

2. But there are other grounds upon which the tenants rely to defeat the plaintiff's recovery, and these are ratification and equitable estoppel.

In *Kingsley v. Jordan*, 85 Me. 137, this court said: "When a sale by guardian under license is invalid for a want of compliance with some requirement of law by the guardian, it is competent for the ward when he becomes of age to ratify and affirm the sale, or he may avoid it within a reasonable time. If he affirms it, he becomes bound by it": *Williamson v. Woodman*, 73 Me. 163.

It is admitted that the sale by the guardian was made in good faith, for the benefit of the estate of the wards, and that they received the benefit of the proceeds of the sale. Ralph V. died a minor, intestate, without issue. He was not quite sixteen years of age. His heirs took his share of the estate, and stood as he would stand if of age: *Kingsley v. Jordan*, 85 Me. 137. Nearly three years elapsed between his death and the commencement of this action. All these facts were known to the heirs. Josephine M. had become of age eleven years prior to the commencement of this action, and had made no claim prior to that time. For more than thirteen years, the land in controversy had been in the possession, occupation, and improvement of these defendants. To set aside the sale and reclaim the land they must pay back the consideration received and ³¹⁷ retained, and this they have not attempted to do. The guardian is estopped by the covenants in her deed from now alleging the illegality of her conveyance to Horace D. Roberts: *Williamson v. Woodman*, 73 Me. 163; *Brazee v. Schofield*, 124 U. S. 495, 504.

Moreover, the doctrine of equitable estoppel applies in this case, and is legally available in an action at law as in equity: *Kirk v. Hamilton*, 102 U. S. 68, 77; *Dickerson v. Colgrove*, 100 U. S. 578. As the plaintiff stands in no better light than those from whom he claims to have received his title (*Pratt v. Pierce*, 36 Me. 448, 454; 58 Am. Dec. 758; *Hovey v. Hobson*, 51 Me. 62, 67), his rights cannot be regarded as superior to theirs had they been the ones to attempt a recovery in this action.

In *Penn v. Heisey*, 19 Ill. 295, 68 Am. Dec. 597, the court holds that there is no distinction in the application of this principle between void and voidable sales, and that a party is estopped from setting up title to land when he has received and enjoyed

the benefits of its sale, and it is in the possession of an innocent purchaser. "Such estoppels," say the court, "are and should be favored in law, honor, and conscience, for the truest and best of reasons, that a man, having received a benefit in one character, the value of the thing or of the property, shall not afterward receive the thing or property itself in the same or another character. This principle, so equitable and legal, runs throughout all the transactions and contracts of civilized life."

There are numerous cases illustrative of this principle to be found in the decisions. Thus, one who accepts a part of the purchase money arising out of a sheriff's sale is estopped from denying the validity of the sale: *Stroble v. Smith*, 8 Watts, 280.

If a legatee, the executrix, proves the will and accepts a bequest under it, she will thereby be equitably estopped from asserting a claim in hostility to other provisions of the will: *Benedict v. Montgomery*, 7 Watts & S. 238. And again, this principle is firmly enunciated in *Deford v. Mercer*, 24 Iowa, 118, 92 Am. Dec. 460, where the heirs were held to be estopped from questioning the validity of a guardian's sale of ³¹⁸ their interest in certain real estate, on the ground of defective proceedings, where, after becoming of age, with knowledge of all the facts, and in the absence of fraud and mistake of fact, they received and retained the purchase money arising from such sale; and the court there held that the principle applied to sales that were void. *Dillon, C. J.*, in the course of the opinion, says: "That they are not entitled to, and cannot have, both the money and the land, is a proposition which seems too plain to require either an extended argument or authority to show. We have so held in a former case arising upon the same sale: *Pursley v. Hayes*, 17 Iowa, 310. If the brief opinion filed in that case is closely examined, it will be seen that the propositions on which it rests are guardedly stated. That opinion is certainly correct. There is nothing in the circumstances of the present case which requires us to decide more than that where a party, with full knowledge of all the facts, there being no fraud or mistake, and nothing to repel the presumption that he knew his legal rights, but much to show that he did fully know them, voluntarily accepts and retains the purchase money arising from the sale of his land, he cannot afterward claim the land itself. He is equitably estopped to deny the validity of the sale": *Horn v. Cole*, 51 N. H. 287, 289; 12 Am. Rep. 111; 2 *Pomeroy's Equity Jurisprudence*, sec. 802.

No further citation of authorities is necessary to establish the fact that such an estoppel as that which is invoked in this case

is not to be deemed odious, but, on the contrary, conducive to honesty and fair dealing. It prevents a party from making use of a title which, in equity and good conscience, ought, upon every principle of right and justice, to inure to the use of another. If such a case was ever presented, we think this is one.

The result is, that in no view of the case has the demandant any title and he cannot recover.

Judgment for the tenants.

In the other case, there being no necessity for the intervention of equity jurisdiction, the entry will be, bill dismissed without costs.

COURTS OF PROBATE—JURISDICTION—PRESUMPTION.—In some of the states courts of probate have special and limited jurisdiction, and the record of their proceedings must affirmatively show their jurisdiction: *Overseers of Poor v. Gullifer*, 49 Me. 360; 77 Am. Dec. 265; *Clarke v. Perry*, 5 Cal. 58; 63 Am. Dec. 82; note to *Waters v. Stickney*, 90 Am. Dec. 136; *People's Sav. Bank v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 894. They can exercise only such powers as are directly conferred upon them by statute: *Smith v. Howard*, 86 Me. 203; 41 Am. St. Rep. 537. No presumption is indulged in favor of their proceedings, and such a court cannot order a sale of an intestate's lands until everything necessary to give it jurisdiction of the person and of the subject matter appears upon its records: *Root v. McFerrin*, 37 Miss. 17; 75 Am. Dec. 49, and note.

GUARDIAN AND WARD—SALE OF WARD'S PROPERTY—JURISDICTION.—In proceedings affecting the sale of infant's real estate, the jurisdiction of the subject matter is acquired by filing the petition, and jurisdiction of the persons, by publication of the notice: *Gibson v. Roll*, 27 Ill. 88; 81 Am. Dec. 219. On the application of a guardian for license to sell his ward's realty, notice of the presentation of the petition is the first step in the proceeding, and if it misdescribes the land sought to be sold, it is no notice; the court obtains no jurisdiction to grant a license to sell, and the sale is therefore void: *Frazier v. Steenrod*, 7 Iowa, 339; 71 Am. Dec. 447. His deed of the ward's realty, under license, but without the statutory bond, is not valid as a release under the Maine statute: *Williams v. Morton*, 38 Me. 47; 61 Am. Dec. 229. It must appear, either from the record or by evidence, that the guardian took the oath required by the statute before fixing on the time and place of sale: *Cooper v. Sunderland*, 3 Iowa, 114; 66 Am. Dec. 52. The deed of a guardian conveys no title, unless he makes a report of his proceedings, and a confirmatory order is entered by the court authorizing the sale: *Penn v. Heisey*, 19 Ill. 295; 68 Am. Dec. 597.

GUARDIAN AND WARD—EQUITABLE ESTOPPEL—RATIFICATION.—An equitable estoppel is a defense available at law as well as in equity: *Dickerson v. Board of Commrs.*, 6 Ind. 128; 63 Am. Dec. 373. Equitable estoppels to prevent fraud apply to infants as well as adults: *Penn v. Heisey*, 19 Ill. 295; 68 Am. Dec. 597. Heirs who, with knowledge, accept the proceeds of an unauthorized sale of their lands, made by their guardian, are estopped from disputing the validity of the sale. They cannot retain the purchase money and also recover the land: *Wilmore v. Stetler*, 137 Ind. 127; 45 Am. St. Rep. 169, and note showing the effect of accepting the consideration after attaining majority: *Penn v. Heisey*, 19 Ill. 295; 68 Am. Dec. 597, and note. And this principle applies even where the sale is void: *Deford v. Mercer*, 24 Iowa, 118; 92 Am. Dec. 460. But, if a guardian

sells land of his ward without authority of law, the ward may elect, when he attains majority, to accept the price or reclaim the land, no matter who has become purchaser: *Smith v. Dibrell*, 31 Tex. 239; 98 Am. Dec. 526; note to *Mason v. Caldwell*, 48 Am. Dec. 835.

WHITE v. CUSHING.

[38 MAINE, 339.]

NEGOTIABLE INSTRUMENTS—NON-NEGOTIABLE ORDER

An order upon a savings bank for a certain sum of money, made chargeable to the drawer's account, but with the printed words, "the bank-book of the depositor must accompany this order," upon the face of the order, below the signature of the drawer, is not a negotiable instrument, and cannot be recovered upon, as such, by an indorsee thereof, as these words make it subject to a contingency which necessarily embarrasses its circulation for commercial purposes, and imposes a restraint upon its negotiability. Such words, being upon the face of the order, in the position stated, at the time of its inception, became a substantive part of it, and qualified its terms as if they had been inserted in the body of the instrument.

Assumpsit upon an order, the terms of which appear in the opinion. The words, "The bank-book of the depositor must accompany this order," were printed in small capitals on the lower margin of the order, under the signature of J. N. Cushing. There was evidence tending to show that White bought the order of Lawler, on or before November 21, 1893. The defendant asked the court to rule that the order was not negotiable, and that White could not maintain an action thereon, but it was ruled, as a matter of law, that the order was negotiable, and that the action could be maintained in the name of White by a simple indorsement by Lawler. To this ruling, the defendant excepted.

T. W. Vose, for the plaintiff.

J. B. Peaks, for the defendant.

343 FOSTER, J. The plaintiff sues as indorsee of an order signed by the defendant of the following tenor:

"\$120.

Dover, Oct. 27th, 1893.

Piscataquis Savings Bank.

"Pay James Lawler, or order, one hundred and twenty dollars, and charge to my account on book No. —

"Witness —

J. N. CUSHING.

"The bank-book of the depositor must accompany this order."

The order was indorsed in blank on the back by James Lawler and Samuel Lewis, and the plaintiff claimed to recover against the defendant as upon a negotiable instrument. The real ques-

tion presented is, whether the instrument declared on is negotiable, so that an action may be maintained upon it in the name of the indorsee.

To constitute a negotiable draft or order, it must be a written order from one party to another for the payment of a certain sum of money, and that absolutely, and without any contingency that would embarrass its circulation, to a third party or his order or bearer.

It has often been held that a bill or note is not negotiable if made payable out of a particular fund. But there is a distinction between such instruments made payable out of a particular fund, and those that are simply chargeable to a particular account. In the latter case, the payment is not made to depend upon the adequacy of that fund, the only purpose being to inform the drawee as to his means of reimbursement, and the negotiability of the instrument is not affected by it.

The objection that is raised to the negotiability of this instrument is, not that it is made payable out of a particular fund, but that it is subject to such a contingency as necessarily embarrasses its circulation and imposes a restraint upon its negotiability, by means of these words contained upon the face of the order: "The bank-book of the depositor must accompany this order." Although these words are upon the face of the order below the signature of the drawer, they were there at the time of its inception, became a substantive part of it, and qualified its terms as if they had been inserted in the body of the instrument: *Littlefield v. Coombs*, 71 Me. 110; *Cushing v. Field*, 70 Me. 50, 54; 35 Am. Rep. 293; *Johnson v. Heagan*, 23 Me. 329; *Barnard v. Cushing*, 4 Met. 230; 38 Am. Dec. 362; *Heywood v. Perrin*, 10 Pick. 228; 20 Am. Dec. 518; *Benedict v. Cowden*, 49 N. Y. 396; 10 Am. Rep. 382; *Costelo v. Crowell*, 127 Mass. 293; 34 Am. Rep. 367, and cases there cited.

Was the order negotiable? The answer to that depends upon the effect of the words, "The bank-book of the depositor must accompany this order." If not negotiable, the plaintiff as indorsee cannot maintain an action upon it: *Noyes v. Gilman*, 65 Me. 589. If their effect is such as constitutes a contingency in relation to the payment of the order, dependent upon the production of the drawer's bank-book by the holder or indorsee of the order, then they must be regarded as such an embarrassment to the negotiation of the order, and such a restriction upon its circulation for commercial purposes, as to render it non-negotiable.

Without these words the order is payable absolutely, and there

is no apparent uncertainty affecting its negotiability. With them, the order is payable only upon contingency, or condition, and that is upon the production of the drawer's bank-book. This is rendered imperative from the language employed, and the bank upon which the order is drawn would have the right to insist upon such production of the book, in compliance with the terms of the order; and the case shows that it has refused payment upon presentation of the order for the reason that it was not accompanied by the bank-book. It cannot, therefore, be regarded as payable absolutely and without any contingency that would embarrass its circulation. The drawer has it in his power to defeat its payment by withholding the bank-book. Certainly the bank-book of the depositor is within his own control, rather than that of the indorsee of this order.

It was the necessity of certainty and precision in mercantile affairs, and the inconveniences which would result if commercial paper was encumbered with conditions and contingencies, that led to the establishment of an inflexible rule, that to be negotiable they must be payable absolutely and without any conditions or contingencies ³⁴⁴ to embarrass their circulation: *American Ex. Bank v. Blanchard*, 7 Allen, 333. In that case, the words, "subject to the policy," being included in a promissory note, were held to render the promise conditional and not absolute, and so the note was held not to be negotiable: *Noyes v. Gilman*, 65 Me. 589, 591; *Hubbard v. Mosely*, 11 Gray, 170; 71 Am. Dec. 698.

A case in every essential like the one we are considering was before the supreme court of Pennsylvania in 1891. A fac simile of the order is given in the opinion. No two cases could be nearer alike. There, as here, the order was drawn on a savings bank. The suit was by the indorsee against the drawer as in this case. There, as here, the order contained a statement upon its face, but below the signature of the drawer, that the "Deposit-book must be at bank before money can be paid." In discussing the question of its negotiability, cases are cited from the courts of Maine, Vermont, Massachusetts, and New York, as well as from Pennsylvania. In the course of the opinion, the court say: "It sufficiently appears from the memoranda on its face that it was drawn on a specially deposited fund held by the bank subject to certain rules and regulations, in force between it and the depositor, requiring certain things to be done before payment could be required, viz: previous notice of depositor's intention to draw upon the fund, return of the notice ticket with the order to pay, and presentation of the deposit-book at the bank, so that the payment might be entered therein. . . . It is, in sub-

stance, merely an order on the dollar savings bank to pay J. W. Quinn, or order, nine hundred dollars in nine weeks from date, or February 1, 1868, provided he or his transferee present to the bank, with the order, the notice ticket, and also produce, at and before the time of payment, the drawer's deposit-book. As already remarked, these are undoubtedly prerequisites which restrain or qualify the generality of the order to pay as contained in the body of the instrument. They are also prerequisites with which it may be difficult, if not sometimes impossible, for the payee, transferee, or holder of such an order to comply": *Iron City Nat. Bank v. McCord*, 139 Pa. St. 52; 23 Am. St. Rep. 166.

³⁴⁵ The order in question was drawn upon a savings bank, and it is common knowledge that all such banks in this state have a by-law which all depositors are required to subscribe to, that "no money shall be paid to any person without the production of the original book that such payment may be entered therein."

This court, in the case of *Sullivan v. Lewiston Inst. for Savings*, 56 Me. 507, 96 Am. Dec. 500, has considered the purpose and necessity of these salutary regulations. We should be slow to countenance any departure from this rule needed for the protection of depositors in our savings banks, now numbering more than one hundred and sixty thousand, and whose deposits aggregate nearly sixty million dollars.

Inasmuch as this order is not negotiable, and no suit can be maintained upon it by the plaintiff as indorsee, it becomes unnecessary to consider the other exceptions.

Exceptions sustained.

NEGOTIABLE INSTRUMENTS — CONDITIONS DESTROYING NEGOTIABILITY — ORDER ON BANK — PASS-BOOK. — Anything written or printed on a negotiable instrument prior to issuance by the maker, relating to the subject matter thereof, and tending to restrain or qualify it, is regarded as part of the contract; and if, by such language, payment is not necessarily to be made at all events, and for the full sum, at a time certain, subject to no contingency, its negotiability is destroyed. Thus, an order drawn by a depositor on a bank to pay to the payee named therein, or order, a certain sum nine weeks from date, and providing on its face that he or his transferee must present to the bank, with the order, a notice ticket, and also produce at or before the time of payment the drawers' deposit-book, is non-negotiable, and shows on its face that it is not a regular commercial check, and is not intended to operate as such, but was drawn on a specially deposited fund, held subject to certain rules and regulations requiring certain things to be done before payment could be required: *Iron City Nat. Bank v. McCord*, 139 Pa. St. 52; 23 Am. St. Rep. 166. A savings bank pass-book is not a negotiable instrument, nor does it become such when accompanied by a written order signed by the person to whom it was issued, directing the bank to pay the amount credited to him therein to another person: *McCaskill v. Connecticut Sav. Bank*, 60 Conn. 300; 25 Am. St. Rep. 323.

STATE v. BUCKNAM. STATE v. TIBBETTS. STATE v.
BAILEY. STATE v. WORCESTER.

[38 MAINE, 285.]

GAME LAWS—CONSTRUCTION OF.—Under a statute providing that no person shall take, kill, destroy, or have in possession, between the first days of October and January, more than three deer, under a stated penalty, and that one having such possession shall be deemed to have killed or destroyed the deer in violation of law, it is no crime merely to have in one's possession, on December 12th, the carcasses of eighty-nine deer. The context of the statute must be considered in determining its whole scope and meaning. Its object is to prevent the decimation of game by limiting the time when it may be taken or killed, and not to interfere with foreign game, dead or alive, brought within the state, at any time, or with game lawfully taken or killed within the state. But one penalty for killing, having in possession, and transporting could have been intended; and that applies to the illegal capture of the game. The other provisions were intended to aid in the enforcement of that one, by making the possession evidence of illegal capture, and compel the person charged to explain his possession of what would directly point to an illegal taking of the game. Game illegally taken or killed subjects the possessor of it to the penalty for its illegal taking, just as if he had illegally taken it himself.

Prosecution for violation of game law. The complaints simply charged the defendants, they not being marketmen or provision dealers, with having, in open time, parts of the carcasses of a certain number of dead deer exceeding three. Nothing was said as to how the defendants came into possession of the deer, whether they were lawfully or unlawfully killed, with what intent the defendants had them, or what they purposed to do with them. The naked charge was that of possession, at a season when it was lawful, within certain limits, to kill deer. Each defendant, upon arraignment, pleaded not guilty, waived an examination, and was fined in accordance with the statute. From each sentence an appeal was taken.

F. J. Campbell, county attorney, and T. W. Vose, for the state.

Jasper Hutchings, for the defendants.

381 HASKELL, J. The complaints charge the defendants with having in their possession, at one time during the open season when deer may be lawfully killed, eighty-nine carcasses of deer, they not being marketmen or provision dealers within the terms of the statute. The only question presented is, whether the statute (Rev. Stats., c. 30, sec. 12), as amended by the act of 1891, chapter 95, section 4, makes such possession an offense. It reads as follows:

"No person shall take, kill, destroy, or have in possession, between the first days of October and January, more than one

moose, two caribou, and three deer, under a penalty of one hundred dollars for every moose, and forty dollars for every caribou or deer, or parts thereof, so taken, killed, destroyed, or in possession in excess of said number. Whoever has in possession ³²² except alive, more than the aforesaid number of moose, caribou, or deer, or parts thereof, shall be deemed to have killed or destroyed them in violation of law. But nothing in this section shall prevent any marketman or provision dealer, having an established place of business in this state, from purchasing and having in possession at his said place of business, not exceeding one moose, two caribou, and three deer lawfully caught, killed, or destroyed, or any part thereof, at one time, and selling the same at retail in open season to his local customers."

The object of the statute is to prevent the decimation of game, by limiting the time when it may be taken or killed to the months of October, November, and December, in each year. During these months, under certain restrictions unimportant here, deer, moose, and caribou may be lawfully taken or killed, and the various provisions of the statute aim to compass this result. They do not intend to interfere with foreign game, dead or alive, brought within the state, at any time, or with game lawfully taken or killed here. While the enactment, by its letter, makes the possession of more than one moose, two caribou, and three deer at any time an offense, the context of it must not be overlooked in determining the scope and meaning of the whole statute. But one penalty for killing, having in possession and transporting could have been intended; and that applies to the illegal capture of the game. The other provisions were intended to aid in the enforcement of that one, by making the possession evidence of illegal capture, and compel the person charged to explain his possession of what would directly point to an illegal taking of the game. In other words, compel him to have or handle game illegally taken or killed, by any person, at his peril. Game illegally taken or killed subjects the possessor of it to the penalty for its illegal taking, just as if he had illegally taken it himself. This interpretation best comports with the true intent and purpose of the statute, and works out a reasonable and just application of its provisions, at the same time obviating various difficulties in the way of a different construction of it.

³²³ Nor is this view without authority. In *Allen v. Young*, 76 Me. 80, it was held that, although this very statute prohibited the transportation of the hide or carcass of deer, moose, or cari-

bou, during close time, yet, such transportation was not illegal if the game had been lawfully killed. The court say: "The question is whether, if deer are killed during the time when it is lawful to do so, it is a crime to carry or transport the hides or carcasses from place to place in this state during the time when it is unlawful to kill them.

"We think it is not. True, the transportation at such a time seems to be within the letter of the law; but we think such could not have been the intention of the legislature. We can see no possible motive for making such transportation a crime. We can readily see that it would be in furtherance of the purposes of the act to make such transportation prima facie evidence of guilt, and thus throw the burden of proof upon the party to show his innocence, as is done in section 5 with respect to possession; but we fail to see any motive for making the mere transportation of the hide or carcass of a deer from one place to another a crime when the deer has been lawfully killed and is lawfully in the possession of the one who transports it. Certainly, one may reasonably doubt whether such could have been the intention of the legislature; and the act being a penal one, a reasonable doubt is sufficient to make it the duty of the court to adopt the more lenient interpretation, and construe the term 'such animal' as meaning an animal unlawfully killed, as was done in construing a similar statute in *Commonwealth v. Hall*, 128 Mass. 410; 35 Am. Rep. 387." See, also, *Bennett v. American Exp. Co.*, 83 Me. 236; 23 Am. St. Rep. 774.

In *Michigan*, *People v. O'Neil*, 71 Mich. 325, the defendant was convicted, in the lower court, for having in possession, for the purpose of selling, a large number of quail, in violation of a statute that prohibits selling, exposing for sale, or having in possession for the purpose of selling, such birds after eight days from the time when the killing of such birds was prohibited; and, on certiorari to the supreme court, the conviction was reversed by construing the statute to apply to birds only, killed ³⁰⁴ in violation of law. The court says: "So construed, the statute is reasonably adapted to carry out its objects, and is free from all constitutional difficulty." The court then quotes at length from *Allen v. Young*, 76 Me. 80, with approval. Campbell, J., in a concurring note says: "I do not think it would be competent for the legislature to punish the possession of game which was lawfully captured or killed. Having become private property, it cannot be destroyed or confiscated, unless it becomes unfit for use, any more than other property can be destroyed. I do not think the cases to the contrary are reasonable or sound."

In *Pennsylvania, Commonwealth v. Wilkinson*, 139 Pa. St. 298, the defendant was convicted of having in his possession, during close time, twenty quail that were not killed in the state, but had been lawfully killed in Missouri and brought into the state. The indictment was under a statute that prohibited the killing, exposing for sale, or having in possession, after the same had been killed, quail, during a specified close time of each year. The court reversed the conviction, upon the ground that the act applied only to quail killed in the state out of season. The court says: "A careful reading of the language of the act shows that it applies only to game killed in this state out of season. . . . The meaning of the act, as we view it, is that no quail shall be killed in this state between the dates specified, and no person shall have in his possession, or offer for sale, any quail so killed in this state."

In *State v. McGuire*, 24 Or. 366, the defendants were prosecuted for having in possession, and offering for sale, certain salmon during close time, under a statute that prohibited the same. The defense was, that the salmon had been taken in open time and kept in cold storage for sale in close time, when they would bring an enhanced price. This defense was excluded in the trial courts and convictions ordered. On appeal, the decision below was reversed, upon the ground that the act applied only to salmon illegally taken. *Allen v. Young*, 76 Me. 80, was cited with approval by the court, and the opinion is an elaborate one.

There are cases contra: *Phelps v. Racey*, 60 N. Y. 10; 19 Am. Rep. 140; ³⁹⁵ *Magner v. People*, 97 Ill. 333. We are aware of our own decision, *Allen v. Leighton*, 87 Me. 206, but do not regard that as an authority upon the question here considered. This question was not considered in that case.

Complaints quashed.

GAME LAWS—CONSTRUCTION OF STATUTES.—Under a statute providing that any person having in his or her possession, between certain dates, certain specified game killed, shall be liable to a penalty, it has been held that the time when, or the place where, the game was killed, or when brought within the state, or where from, is not material, and that the court has no power to make it so. Other cases hold that the question of criminality depends upon the question as to whether the game was illegally taken or killed: See monographic note to *Ex parte Maier*, 42 Am. St. Rep. 138-144, on game laws. That such a statute is constitutional, see *Roth v. State*, 51 Ohio St. 209; 46 Am. St. Rep. 566.

FLANDERS v. COBB.

[88 MAINE, 498.]

PLEADING.—AN AMENDMENT CHANGING THE FORM OR NATURE of an action is not allowable. Hence, an amendment of a declaration, against the objection of defendant, changing the nature of the action from assumpsit to an action on the case for deceit, is unauthorized.

FRAUD—FALSE AND FRAUDULENT MISREPRESENTATIONS.—In a case where the plaintiff and defendant traded horses, and the defendant turned out a negotiable promissory note signed by a third party, as "boot" between the horses, and the note was indorsed by the defendant in blank, but was not paid when it became due, or the defendant seasonably notified so as to hold him as an indorser, the plaintiff cannot recover against the defendant in an action of deceit for false representations made by the defendant in reference to the financial responsibility of the maker of the note, where the evidence fails to show that the plaintiff was, in some way, deceived by the alleged misrepresentations.

E. N. Merrill and G. W. Gower, for the plaintiff.

S. S. Brown, for the defendant.

⁴⁹² **FOSTER, J.** The plaintiff and defendant traded horses. The defendant was to pay seventy-five dollars to the plaintiff as the difference between horses, and, in lieu of the money, turned out a negotiable promissory note of eighty dollars, which he held against one Joseph Frost. The note was not then due, and the defendant indorsed it in blank. The note was not paid at ⁴⁹³ maturity, nor was the defendant seasonably notified, so as to hold him as an indorser.

The plaintiff claims that, while the trade was going on, the defendant represented that the maker of the note was a man of means and financially responsible, and that these statements were false and fraudulent, and made with intention of deceiving him, and that he relied upon them, and was thereby deceived and injured.

On the other hand, the defendant asserts that he made no misrepresentations; that what he said was but the honest expression of an opinion; that the plaintiff neglected seasonably to notify him so as to hold him as an indorser of the note, and that, in consequence of that neglect, this suit was brought, in which he seeks to collect his debt.

The action was originally framed in assumpsit, the declaration containing three counts. At the second term, the presiding justice allowed an amendment of the writ by striking out the three counts in assumpsit and substituting therefor a count in case for deceit. To the allowance of this amendment the defendant's counsel seasonably objected, on the ground that it changed the

form as well as introduced a new cause of action. The case is before us upon exceptions as well as report.

1. The first question, and one of vital importance, is, whether this amendment was allowable. We think it was not.

Our attention has been called to no case under our system of practice that goes to the extent of authorizing the court to allow an amendment which changes the nature of the action from assumpsit to tort. The case of *Rand v. Webber*, 64 Me. 191, was never intended to authorize amendments to the extent of allowing the form or nature of the action to be changed. Upon examination of the facts in that case, it will be found that the amendment there was but the correction of an error in the writ, the correction of an amendment (improperly made) to the original declaration, so as to restore the declaration as originally framed, and prevent a change in the nature of the action from what seemed to be its form as originally drawn, and to escape ⁴⁹⁴ the statute of limitations that might be pleaded to another suit. The original count was more in the nature of deceit than assumpsit, and the last amendment was but a restoration to its former self—the spirit taking on form “in the furtherance of justice.” “As the special count stood,” say the court, “it could easily be amended so as to have been an action of deceit.” In *Dodge v. Haskell*, 69 Me. 429, 434, this court, in referring to *Rand v. Webber*, 64 Me. 191, remarked that it “has been erroneously supposed to allow an amendment to the extent of allowing the nature of the action to be changed. That case merely allowed a correction of the writ, already improvidently and improperly amended, that such a result might be avoided.”

In the present case, the change is absolute from assumpsit to an action on the case for deceit. It is not a restoration of form as originally drawn. The cause of action, as originally stated, was clearly and distinctly set forth in appropriate counts based upon an alleged promise. There was no defect to be amended, or correction of the cause of action as originally stated, as in *Rand v. Webber*, 64 Me. 191. The amendment was not the correction of a defect in pleading, but the addition of a cause of action not set forth in the original declaration, as well as a change of the nature of the cause of action. This was clearly wrong. While the greatest liberality is allowed in the matter of amendments, the authorities are abundant and uniform, that no new cause of action can be introduced by way of amendment against the objection of the defendant.

In *Houghton v. Stowell*, 28 Me. 215, it was held that a

change in the form of action from debt to case was unauthorized, and that the court had no authority to allow it.

A fortiori, in the present case, would it be unauthorized to allow an amendment which changes the nature of the action from assumpsit to an action on the case for deceit. The plea of the defendant in the former case is "never promised," while in the latter it is "not guilty." At common law, the court had no power to allow an amendment which introduced a new cause of action: Common Law Pleading, sec. 142. Nor has this been extended by statute in this state: *Farmer v. Portland*, 63 Me. 46; ⁴⁹⁵ *Cooper v. Waldron*, 50 Me. 80. Neither can counts which are in form *ex contractu* be joined with those in form *ex delicto*: *Corbett v. Packinton*, 6 Barn. & C. 268; 1 Chitty on Pleading, 201*. Unless this rule is observed, confusion would arise in the forms of pleas and judgments which the different forms of actions require.

The remedies and forms of action which have been afforded to parties, and which have been sanctioned by long usage and approved by the highest authorities, should be adhered to, and it is not the province of the court, upon reasons of supposed convenience or occasional hardship, to dispense with them, and to substitute one for another, varying the right of one or both of the parties.

2. But notwithstanding the result to which the court may have arrived upon the amendment to the writ, the plaintiff claims to recover upon the alleged false and fraudulent misrepresentations made by the defendant in reference to the financial responsibility of the maker of the note at the time the trade was concluded.

We have examined the report of the evidence, and feel satisfied that, instead of relying upon the statements of the defendant and being deceived thereby, the plaintiff relied upon the defendant as an indorser to pay the note when it became due; and, had he pursued the course prescribed by law in regard to negotiable paper, this suit would never have been instituted. Having failed to comply with the law in not giving notice of the dishonor of the note, and thus lost his claim upon the defendant as an indorser, this suit is brought upon the alleged misrepresentations of the defendant.

The evidence, however, in our opinion, does not sustain the plaintiff in this position. He testifies, in substance, that the defendant said he could not trade because the plaintiff asked so much "for boot," and wanted to know if plaintiff would take

a note, and he replied that he could get along if the defendant had a good one. Defendant said he had one against Joseph Frost. Plaintiff told him he didn't know anything about him, and asked defendant if he would not give him his. The defendant replied ⁴⁰⁰ that he would rather let the note go. The plaintiff asked what Frost's business was, and to this defendant replied that he owned a stage line and a farm, and was perfectly good. To this the plaintiff replied, that if he was perfectly good, and he could have his pay without running around—no trouble—he would take the note if the defendant would put his name on it. In the house, while looking for a pen, plaintiff says that the defendant said: "It won't make any difference with the note, it won't do any good if I put my name on it." "I says, I guess we will have your name on it, and he put his name on it."

The defendant's testimony is substantially this: "He asked me about Mr. Frost, and I told him as far as I knew, . . . that I took the note supposing the note was good, and that Frost said, when I took the note, that he was driving the stage line, and expecting to get the money to pay for the horse that I let him (Frost) have out of driving the stage, . . . and wanted me to wait a year for the pay for the horse, or I could have half of it in June, and then the balance of it for the year." He says further, in answer to plaintiff's inquiry, "Mr. Flanders, I don't know anything in particular about this man, but I suppose it is good." He also testifies that the plaintiff said: "I don't know this man very well, but, if you indorse the note, I will take it," and thereupon he indorsed the note, delivered it to the plaintiff, and the trade was concluded.

From the terms of the stipulation in the report, the entry should be exceptions sustained; judgment for defendant.

FRAUD—FALSE AND FRAUDULENT MISREPRESENTATIONS. Fraud will not be presumed, but must be proved: *Tuteur v. Chase*, 66 Miss. 476; 14 Am. St. Rep. 577, and note; and, like any other fact, by a preponderance of evidence merely: *Note to Brown v. Mitchell*, 11 Am. St. Rep. 759. In order to recover in an action for false representations, the representations must have been made as to a material fact, and with knowledge of their falsity. They must also have been made with intent to deceive, and must have been relied upon. If one honestly believes a representation to be true, at the time he makes it, he cannot be held liable in this form of action: See monographic note to *Cottrill v. Krum*, 18 Am. St. Rep. 555-563, on action to recover for false representations. False representations as to the character and pecuniary standing of a third person, made with knowledge of their falsity, and with intent to deceive, to one who, relying upon them, is injured thereby, will sustain an action, but there must be evidence that the plaintiff was deceived thereby: *Note to Cottrill v. Krum*, 18 Am. St. Rep. 558, 561.

What Amendments to Pleadings Are not Admissible because They Change the Cause of Action.*

General Rule.—In nearly all of the states, the general rule is, that no amendment can be allowed, either at or before trial, which introduces into the case a new, substantive cause of action, different from that declared upon, and different from that which the party intended to declare upon when he brought his action. If this were allowed, a single suit, it is said, might become "a business for life." The statement, by way of amendment, of an entirely new cause of action is not allowable, either at common law, in equity, or under the codes: *Heman v. Glann*, 129 Mo. 325; *Chamberlain v. Mensing*, 51 Fed. Rep. 511; *First Nat. Bank v. Myers*, 44 Neb. 306; *Snyder v. Harper*, 24 W. Va. 206; *Stevens v. Brooks*, 23 Wis. 196; *Diets v. City Nat. Bank*, 42 Neb. 584; *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894; *First Nat. Bank v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649; *Pridgin v. Strickland*, 8 Tex. 427; 58 Am. Dec. 124; *Newall v. Hussey*, 18 Me. 249; 38 Am. Dec. 717; *Emerson v. Wilson*, 11 Vt. 357; 34 Am. Dec. 695; *Stevenson v. Mudgett*, 10 N. H. 338; 34 Am. Dec. 155, and monographic note thereto, on how far amendments varying or altering a cause of action are allowed; *Lloyd v. Brewster*, 4 Paige, 537; 27 Am. Dec. 88; *Carpenter v. Gookin*, 2 Vt. 495; 21 Am. Dec. 566; *Ball v. Claffin*, 5 Pick. 303; 16 Am. Dec. 407; *Shock v. McChesney*, 4 Yeates, 507; 2 Am. Dec. 416; *Sturges v. Botts*, 24 Mo. App. 282; *State v. Turner*, 96 N. O. 416; *Barnes v. Prewitt*, 28 Mo. App. 163; *Steffy v. Carpenter*, 37 Pa. St. 41; *Sumner v. Brown*, 34 Vt. 194; *Fort v. Litmer*, 31 Ohio St. 215; *Joy v. Walker*, 28 Vt. 442; *Sackett v. Thompson*, 2 Johns. 206; *Trumbo v. Finley*, 18 S. O. 305; *Brewer v. Jacobs*, 22 Fed. Rep. 217; *Taylor v. Keeler*, 51 Conn. 397; *Norris v. Pollard*, 75 Ga. 368; *Pfeiffer v. Hunt*, 75 Ga. 513; *Milliken v. Whitehouse*, 49 Me. 527; *Cooper v. Waldron*, 50 Me. 80; *Snead v. McCoull*, 12 How. 407; *Walden v. Bodley*, 14 Pet. 156; *Johnson v. Martin*, 54 Ala. 271; *Nelson v. Webb*, 54 Ala. 436; *Mobile Sav. Bank*, 94 Ala. 125, 129; *Givens v. Wheeler*, 5 Col. 598; 6 Col. 149; *Slater v. Nason*, 15 Pick. 345; *Oglesby v. Attrill*, 14 Fed. Rep. 214; *Bangor etc. R. R. Co. v. Smith*, 49 Me. 9; 17 Am. Dec. 246; *Gulick v. Loder*, 15 N. J. L. 416; *Allen v. Brooks*, 88 Wis. 265, 271; *Brown v. Mitchell*, 102 N. O. 347; 11 Am. St. Rep. 748; *Silver v. Jordan*, 139 Mass. 280; *People v. Judges*, 1 Doug. (Mich.) 434; *Newlin v. Palmer*, 11 Serg. & R. 98; *Trego v. Lewis*, 58 Pa. St. 463. And it makes no difference that the new cause of action is introduced by the addition merely of a new count: *Carpenter v. Gookin*, 2 Vt. 495; 21 Am. Dec. 566. A complaint cannot be amended by adding the common counts, when it appears affirmatively that they present a new and separate cause of action from that stated in the original complaint: *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894. So, in a writ of entry, where the demandant claimed only part of a messuage, he cannot, by adding a new count in the way of amendment, claim the whole of the same messuage: *Slater v. Nason*, 15 Pick. 345. Neither a legal nor an equitable amendment setting out a new cause of action and requiring new parties can be made to an action at law: *White v. Moss*, 67 Ga. 89.

* REFERENCE TO MONOGRAPHIC NOTES.

Amendments varying or altering cause of action, how far allowed: 24 Am. Dec. 158-162.

The court has no power, except by consent, to allow amendments, either in respect to parties or the cause of action, which will introduce, substantially, a new action, as this is not the allowance of an amendment, but the substitution of a new action for the one pending: *State v. Turner*, 96 N. C. 416. Thus, if an action is brought in the name of Printup, Brother & Pollard, for the use of William J. Pollard, based upon four promissory notes, two of which are payable to the order of Printup, Brother & Pollard, and the others to William J. Pollard, and it does not appear that the first two notes have ever been indorsed by the firm to Pollard, or that the last two have ever been assigned by Pollard to the firm, the declaration is demurrable because of a misjoinder of causes of action, and the want of proper parties as to two of the notes sued on; and it cannot be amended at the trial by striking therefrom the words, "Printup, Brother & Pollard, for the use," and adding to the copy notes appended thereto, payable to the order of the firm, their blank indorsement of the same, as such an amendment would make new parties and a new cause of action: *Norris v. Pollard*, 75 Ga. 358.

An amendment introducing a new cause of action cannot be allowed against a defaulted defendant without notice: *Ball v. Danforth*, 63 N. H. 420; and the plaintiff will not be allowed, by an amendment, to introduce a cause of action which had no existence when the summons was issued: *State v. Turner*, 96 N. C. 416. After a case has been remanded for a new trial, the plaintiff will not be allowed to amend his declaration by adding thereto several new counts claiming certain damages not set up in his original declaration. He ought not to be allowed to try the case over again: *Taylor v. Keeler*, 51 Conn. 397. An essential change in the character and objects of the cause should not be allowed after a case has been argued and is under advisement: *Snead v. McCoull*, 12 How. 407. There are cases in chancery as to which amendments are permitted at any stage or progress of the cause; as where an essential party has been omitted; but amendments changing the character of the bill or answer, so as to make, substantially, a new case, should rarely, if ever, be admitted, after the cause has been set for hearing, much less, after it has been heard: *Walden v. Bodley*, 14 Pet. 156. Amendments of pleadings will not be allowed during the trial of a case, when they will delay the trial, and change the issues: *Sevin v. Caillouet*, 30 La. Ann. 528; nor will an amendment to a petition be allowed after it has been dismissed as showing no cause of action: *Hart v. Bowie*, 34 La. Ann. 323. No amendment of pleadings is allowed where the proof establishes a case different from the one alleged in the complaint: *Carpenter v. Huffstetter*, 87 N. C. 273; *Allen v. Brooks*, 88 Wis. 265, 271.

If an application to amend a libel, in admiralty, proposes to introduce a new cause of action, it is usual to allow the amendment, if the new cause of action corresponds in character, and is kindred in nature to that presented in the original libel; but, if the amendment introduces a new, substantive cause of action and a new charge against the defendant, it is not allowed. Thus, if a libel of information is filed under a section of a statute imposing a punishment for disposing of property subject to internal revenue tax, in fraud of the revenue laws, and the government applies for leave to amend by adding a count founded on another section of the statute, which imposes a punishment on a manufacturer, etc., who neglects to make returns of his manufactures to the proper revenue officer, the proposed amendment is substantially a

new charge, and should be denied: *United States v. 123 Casks of Distilled Spirits*, 1 Abb. C. C. 573. If a libel is dismissed on exception, but leave is given to amend, and a new libel is filed setting out a valid cause of action, but adding a second cause of action, substantially like the one dismissed, the libel will be dismissed, as such pleading is irregular and improper, and not within the spirit of the order giving leave to amend: *Steamship Circassian*, 2 Ben. 171.

The true criterion for determining whether an amendment to a complaint is allowable is to inquire whether the proposed amendment is another cause of controversy, or is upon the same contract or injury: *Maxwell v. Harrison*, 8 Ga. 61; 52 Am. Dec. 385. A fair test to determine whether a proposed amendment of a complaint sets up a new cause of action is to ask whether a recovery on the original complaint would be a bar to a recovery under the amended complaint: *Davis v. New York etc. B. R. Co.*, 110 N. Y. 646. It is also held that two of the tests by which to determine whether a second petition is an amendment, or the substitution of a new cause of action are: 1. That the same evidence will support both petitions; 2. That the same measure of damages will apply to both. If both of these fail, the new pleading is not an amendment. Thus, if the first petition is in trover for certain goods, and the second charges that the defendant maliciously sued out a writ of attachment, and caused the goods to be seized and sold at a sacrifice, the second petition states a new and distinct cause of action, and is not an amendment: *Scovill v. Glasner*, 79 Mo. 449. So, in a suit by the claimant of personal property, against the obligors in a bond, given by the plaintiff in an execution to indemnify the sheriff from any liability incurred by him in the sale of the property under the execution, where the original petition seeks to recover damages for a breach of the conditions of the bond, the claimant will not be allowed to file an amended petition, even before an answer is filed, which seeks to recover from the sheriff damages for the wrongful sale of the property, and from the obligors in the bond damages caused by their instigation and procurement of the sale. As stated in the former petition, the cause of action is *ex contractu*; but it is *ex delicto* as stated in the amended petition. To recover upon the former petition, it would be necessary to prove the bond; but this would not be essential to a recovery upon the latter petition. As the amended petition states an essentially different cause of action from that stated in the original petition, and requires different proof, it will not be allowed: *Lumpkin v. Collier*, 69 Mo. 170.

In determining whether an amended pleading states a new cause of action, the court is not, as in case of a motion to dismiss the suit itself, confined to the record, but may, and should, if necessary, receive extrinsic evidence to determine whether the cause of action is the same: *Geroux v. Graves*, 62 Vt. 280; *Lycoming Fire Ins. Co. v. Billings*, 61 Vt. 310; though what was intended to be embraced in the original cause of action must be gathered from the face of the original statement thereof: *Sturges v. Botts*, 24 Mo. App. 232; *Gregory v. Wabash etc. Ry. Co.*, 20 Mo. App. 448.

Statutes concerning amendments to pleadings are not considered applicable to causes of action radically different in substance, and in the character of proof necessary to maintain them. They apply when something is omitted from the original complaint, or where it is necessary to add some averment within the manifest intentment of the

pleader in framing the original complaint; yet leaving the cause of action in each case substantially the same: *Sturges v. Botts*, 24 Mo. App. 282. In speaking of the rule that an amendment is not admissible which is inconsistent with the nature of the declaration, or which changes the cause of action, Parker, C. J., said, in *Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155: "The difficulty which sometimes exists in the application of the rule arises from the fact that almost all amendments change, to some extent, the cause of action as originally stated. An amendment which changes the alleged date of a contract, or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, changes, in one sense, the cause of the action; but it is not in this sense that the rule is to be understood. Amendments of that character, so long as the identity of the matter upon which the action is founded is preserved, are admissible; the alteration being made, not to enable the plaintiff to recover for another matter than that for which he originally brought his action, but to cure an imperfect or erroneous statement of the subject matter, upon which the action was in fact founded. So long as the form of action is not changed, and the court can see that the identity of the cause of action is preserved, the particular allegations of the declaration may be changed, and others superadded, in order to cure imperfections and mistakes in the manner of stating the plaintiff's case." No item or cause of action not included in the original complaint, or intended to be included therein, should be added by way of amendment: *Gregory v. Wabash etc. Ry. Co.*, 20 Mo. App. 448.

Exceptions to General Rule New York Practice.—It is held in New York, and in some cases from other states, that the only limit to the power of amending the pleadings in an action on trial is, that it shall not bring in a new cause of action: *Reeder v. Sayre*, 70 N. Y. 180; 26 Am. Rep. 567; *Harris v. Tumbbridge*, 83 N. Y. 92; 38 Am. Rep. 398; *Price v. Brown*, 93 N. Y. 388, 393; *Brown v. Mitchell*, 102 N. C. 347; 11 Am. St. Rep. 748. The issues to be tried in an action, it is said, are not matters of form, but are of the substance of the litigation. The provision, therefore, of the mechanics' lien law for the city of New York, making matters of form amendable at all times, does not require the court to amend, as a matter of course, the pleadings upon the trial of an action to foreclose a lien under said act, but is within its discretion, and the court does not abuse such discretion by refusing an amendment which introduces an entirely new cause of action or defense: *McGraw v. Godfrey*, 58 N. Y. 610. Before trial, however, a more liberal rule respecting amendments of pleadings prevails in New York than in other states, so much so as to make the later New York decisions a conspicuous example of liberality in such matters. But this arises from the construction placed upon the code of that state in *Brown v. Leigh*, 49 N. Y. 78. There the construction adopted in the former cases prohibiting the setting up of a new cause of action or defense, was considered too strict, and subversive of the true meaning of the code sections: Monographic note to *Stevenson v. Mudgett*, 34 Am. Dec. 161; and it was held that a plaintiff is authorized, within the time specified by the code, to amend his complaint by setting forth a new cause of action, and that this right is not restricted to setting forth a cause of action of the same class as that contained in the original complaint;

but that, while he cannot add a cause of action belonging to a different class, retaining those set up in the original complaint, he may abandon the latter, and include, in the amended complaint, one or more causes of action of a different class, it being requisite only that the causes of action in the amended complaint should all belong to the same class, and be warranted by the summons. In conformity with this principle, it has been held, under the provision of the Code of Civil Procedure of New York authorizing amendments of pleadings by the court, that it has power to direct the amendment of a complaint, although it changes the cause of action and substitutes another belonging to a different class, if the result sought to be reached is the same. Thus, in an action brought by a creditor of a decedent to reach certain real estate of which he died seised, situate in another state, where the original complaint was based upon the theory that defendants, who were devisees, had fraudulently conspired to defeat the claims of creditors by means of a sale and conveyance of the real estate, and the parties entered into a stipulation allowing the plaintiff's attorney to serve an amended or supplemental complaint, such "as the court had power to grant," and an amended complaint was served setting out a cause of action against the defendants, as devisees, to recover the proceeds of the real estate, based upon the provisions of the code making devisees liable for the debts of their testator, and providing for the bringing of actions to enforce the liability, the amended complaint was held to be authorized by the stipulation: *Deyo v. Morss*, 144 N. Y. 216. Under the New York practice, it is the duty of the trial court, in the absence of objections to the sufficiency of the complaint, to give the plaintiff the benefit of any cause of action established by the evidence, and a refusal by it to direct the jury to find in accordance with the case made by such evidence is error: *Knapp v. Simon*, 96 N. Y. 234; but there can be no recovery upon an entirely different cause of action against an objection: *Freeman v. Grant*, 132 N. Y. 22; *Walter v. Bennett*, 16 N. Y. 250; *Romeyn v. Sickles*, 108 N. Y. 650; *O'Neill v. New York etc. R. R. Co.*, 60 N. Y. 138; *Southwick v. First Nat. Bank*, 84 N. Y. 420; *Decker v. Saltsman*, 1 Hun, 421. But, even in that state, a pleading cannot be lawfully amended, in a material respect, except at a time which will give the party against whom the amendment is allowed a right and opportunity to meet by proof the new allegations made against him: *Romeyn v. Sickles*, 108 N. Y. 650. In New York, an action has been changed from contract to tort, and if, when the action was brought, the claim was not barred by the statute of limitations, the fact that the statute had run against the claim at the time the motion was made for leave to amend, is no reason why the motion should not be allowed: *Eighmie v. Taylor*, 89 Hun, 366. It has been held, too, that after the satisfaction of a judgment, in that state, in favor of the plaintiff, it is within the discretion of the court to vacate it, and to amend the complaint by adding new causes of action, although, by so doing, the statute of limitations is avoided: *Hatch v. Central Nat. Bank*, 78 N. Y. 487.

A court will sometimes allow an amendment setting up a new cause of action, subject to certain restrictions, provided it does not prejudice the other party, such as the payment of costs up to the time of making such amendment, and that the amendment shall not relate back to the time of the commencement of the suit: *Williams v. Randon*, 10 Tex. 74; *McLane v. Paschal*, 62 Tex. 102, 105; and it is held in *Omaha etc.*

R. R. Co. v. Moschel, 38 Neb. 231, that it is not necessarily a fatal objection to a proposed amendment that it is, in fact, an additional cause of action or defense, as the other party may not be prejudiced by it.

Illustrations of General Rule—Account.—The declaration in an action of account cannot be amended so as to introduce a new and distinct claim after the report of the auditors comes in, unless the report is first set aside, and, if then amended, the plaintiff may plead *de novo*: **Joy v. Walker**, 28 Vt. 442. A complaint stating a cause of action for labor and services performed, and not paid for, cannot be amended on the trial, so as to set up a cause for a stated account, as this would “substantially change the cause of action”: **Foste v. Standard Ins. Co.**, 26 Or. 449. A declaration on an account cannot be amended by filing a count upon a note taken for the debt, as it is a new cause of action: **Newall v. Hussey**, 18 Me. 249; 36 Am. Dec. 717. So, an amendment to a declaration in *assumpsit* on account, which seeks to recover on items of an earlier date than the time specified in the writ, states a new cause of action, and is inadmissible against the objection of the defendant: **Parkman v. Nutting**, 59 Me. 398. And it is error to permit the plaintiff to amend his cause of action on appeal by filing an account showing a balance of two hundred and fifty dollars, where the transcript shows that the cause was tried on an account showing a balance of one hundred and eighty-seven dollars and fifty cents, and that a judgment was rendered for the plaintiff, from which the defendant appealed: **Wehringer v. Ahlemeyer**, 23 Mo. App. 277. See subdivisions, *Assumpsit*, and *Bill of Particulars*, *infra*.

Administrator's Bond—Assessments.—An amendment to an original petition, in the nature of an action at law on an administrator's bond asking for a setting aside of the administrator's final settlement, is a substitution of one cause of action for another, and, therefore, inadmissible: **Phillips v. Broughton**, 30 Mo. App. 148. So, a complaint alleging an excessive assessment cannot be amended by alleging a disproportionate assessment, as the two causes of action are essentially different: **White v. Portland**, 63 Conn. 18, 23, 24.

Animals.—One who sues the defendant for knowingly keeping a vicious animal and allowing it to escape must recover, if at all, upon that ground, and not upon a new and distinct cause of action. Hence, an amendment to the declaration, which does not allege that the defendant knew the animal was vicious, or even that it was vicious, but does allege that the defendant kept it so negligently that it escaped and injured the plaintiff, introduces a distinct cause of action, and is improperly allowed: **Cox v. Murphy**, 82 Ga. 623.

Assumpsit, Generally.—Amendments have been refused which sought to change the cause of action from *assumpsit*, on the judgment of another state, to debt; or from *assumpsit* to account rendered: **Note to Stevenson v. Mudgett**, 34 Am. Dec. 159. A declaration containing only the common indebitatus counts, counting upon a sale to the defendant, is not amendable by adding counts upon a contract of guaranty. They are not for the same cause of action: **Brodek v. Hirschfeld**, 57 Vt. 12. After the plaintiff has counted for work and labor done, he cannot add a count, setting up a claim for not being employed by the defendant agreeably to a special contract: **Diehl v. McGlue**, 2 Rawle, 337. So, an amendment to a declaration in *assumpsit* on an account, adding a count on a parol submission and award “of divers controversies” between the

parties, introduces a new cause of action, and should not be allowed: *Holmes v. Robinson Mfg. Co.*, 60 Me. 201. And where the plaintiff has a remedy by an action of covenant upon a sealed contract, he cannot waive this remedy and bring assumpsit to recover for services in sawing lumber, drawing slabs, and for damages sustained by him by reason of the defendant's failure to furnish slabs pursuant to his agreement under seal. An amendment that changes the form of action from assumpsit to covenant is not allowable: *McKay v. Darling*, 65 Vt. 639. A count upon a note for specific articles cannot be introduced, by way of amendment, to a declaration for money had and received, and for the hire of the goods: *French v. Gerrish*, 22 N. H. 97. A declaration having the usual money counts, and counts for goods sold and delivered, and for work and labor and materials found, cannot be amended by introducing a special count upon a lease, for unliquidated damages, for breach of an agreement by the tenant to carry on the farm in a husbandlike manner, to repair the fences or buildings, to harvest all the crops in good order, etc: *Burt v. Kinne*, 47 N. H. 361.

In an action to recover a distributive share of an intestate's estate from the defendants, who, in the writ, are styled his administrators, and where the defendants, a man and his wife, are jointly charged upon an assumption made by them to the plaintiffs in consideration of money had and received by them for the use of the plaintiffs, and there is nothing to indicate that the wife has any separate estate, or that she made the contract upon her private and separate account, there is no cause of action against the wife, and the declaration, as to this count, cannot be amended: *Grasser v. Eckart*, 1 Binn. 575. But, upon an original declaration in indebitatus assumpsit for goods sold and delivered, the addition of two new counts, charging the defendant with merchandise and promissory notes received by him as factor, and not accounting therefor, are not fatal to a recovery, where no evidence is offered in support of the two last counts, as there is but one contract, one cause of action, one single subject matter of the suit: *Ball v. Claflin*, 5 Pick. 303; 16 Am. Dec. 407. In an early Missouri case, the court allowed an action of assumpsit to be changed into an action of trover, but this appears to be an extreme case and not in conformity with the prevailing law on the subject: *Lee v. Lee*, 21 Mo. 531; 64 Am. Dec. 247. See subdivision, Account, *supra*.

Bill of Particulars.—If, in an action against a manufacturing company, upon account, in the short statutory form, the attached copy of the account is as follows: "To amount due as manager of its office in Macon, for the months of January, February, and March, 1891, \$3,000.00," the cause of action is either for the whole, or for the balance, of an amount due to the plaintiff as manager; and, after it appears in evidence, by the testimony of the plaintiff himself, that the contract with him as manager has been fully complied with, the bill of particulars cannot be amended by substituting for it another bill of particulars predicated upon a subsequent contract employing him, not as manager, but as the instructor of, and assistant to, his successor in the position of manager. Though the two contracts are identical in terms as to the rate of compensation, they are, in fact, separate and distinct undertakings, and the breach of one is a different cause of action from a breach of the other: *Singer Mfg. Co. v. Armstrong*, 91 Ga. 745.

Breach of Warranty.—A complaint for a breach of covenant of war-

ranty cannot, by amendment, be changed into another and entirely different cause of action in the nature of a fraud and deceit: *Givens v. Wheeler*, 6 Col. 149. Hence, an amendment to a cross-complaint, proposed at the trial, changing a suit on warranty to a suit to reform a deed for mistake in description, is properly refused, where no reason is shown why it was not proposed before trial, and no reasonable diligence or excuse for the delay is shown: *Kelly v. Kershaw*, 5 Utah, 295. But, under the easier practice of New York, a cause of action on contract may be abandoned, and one for fraud be substituted in place thereof. Thus, in an action to recover damages for a breach of a verbal warranty or guaranty made by defendant's intestate upon a sale to plaintiff of two oil wells and fixtures, the plaintiff was allowed to amend, even after the case had been remanded for a new trial, by alleging that at the time of making the statements and representations set forth in the complaint, the intestate knew that each and every one of them was false and untrue, and that each and every one of them was made by him with intent to induce the plaintiff to purchase the said property, and with intent to defraud the plaintiff thereby: *Eighmie v. Taylor*, 39 Hun, 386.

Contracts.—An action, in form *ex contractu*, cannot be changed by amendment to an action *ex delicto*: *Note to Stevenson v. Mudgett*, 34 Am. Dec. 159; *Givens v. Wheeler*, 5 Col. 598; 6 Col. 149; *Thomas v. Hawkins*, 13 Ind. App. 318; *Hollehan v. Roughan*, 62 Wis. 64; *Lumpkin v. Collier*, 69 Mo. 170. The reason of this rule is obvious. The character of the proceeding is changed by the amended complaint, and the defendant finds himself in court to answer a charge concerning which he has never been summoned. Such a practice is too "loose and dangerous to be tolerated"; and, if a new summons does not issue, great injustice and oppression may be occasioned: *Givens v. Wheeler*, 6 Col. 149. Therefore, if the plaintiff has declared on contract respecting personal property, he must take his remedy in form *ex contractu*, or not take it at all. He cannot, by amendment, change the action to one for a wrongful conversion, although each action relates to, or grows out of, the same subject matter: *Walter v. Bennett*, 16 N. Y. 250, 254; *Gilmore v. Barnett*, 20 Hun, 514; especially when the defendant is absent at the time of the change: *Gilmore v. Barnett*, 20 Hun, 514. So, if the plaintiff purposely commences an action upon contract for the purpose of obtaining an order of publication and warrant of attachment, and, after having obtained it, he asks leave to amend the summons and complaint, so as to found the action upon tort, his application should be denied: *Lane v. Beam*, 1 Abb. Pr. 65. If it appears, in an action to recover money paid for chattels sold under a fraudulent warranty, that the plaintiff paid no money, but gave his note for the purchase price, and the trial court, pending a motion for nonsuit, permits the complaint to be amended so as to allege the giving of the note, instead of the payment of the money, and the demand and refusal to return the same, it is reversible error, as the amendment entirely changes the action from one on contract, and in assumpsit for money had and received, to one of tort or of trover, which is not allowable. The rescission of the contract of purchase on the ground of fraud is the foundation of the action: *Hollehan v. Roughan*, 62 Wis. 64. So, a cause of action for the breach of a subsisting contract cannot be converted, by amendment, into an action of equitable cognizance, to reform a written agreement: *Bush v. Tilly*, 49 Barb. 599. If suit is brought upon a contract for the entire

loading of a vessel, alleged to have been made with the plaintiffs by a certain person acting for and in behalf of the defendants, the plaintiffs should not be allowed to amend by alleging that the defendants are liable upon another and distinct contract for a partial loading of the vessel, made for the defendants by another person authorized to contract for and to bind them, as such amendment sets up a new and distinct cause of action: *Milburn v. Davis*, 92 Ga. 362.

Costs.—An amendment, in an action at law to recover the defendant's alleged share of the costs and expenses of a foreclosure suit, should be denied, where it would change the action into one to redeem from a foreclosure sale and compel the defendant to surrender possession of the land: *Stevens v. Brooks*, 23 Wis. 196.

Damages.—In an action for damages, an amendment introducing a new cause of action is not allowable. Thus, in an action brought under one statute to recover compensation for the destruction of a building by the municipal officers of a city to prevent the spreading of a fire, it is not permissible to allow an amendment setting forth a cause of action, under another statute, for the destruction of the building mentioned in the original declaration, by a riotous mob: *Farmer v. Portland*, 63 Me. 46. So, in an action to recover damages for the obstruction of a private way, which the plaintiff claims to be entitled to over the land of the defendant, where the plaintiff alleges a right of way from a public road bounding his plantation across defendant's land to a boat landing, and that the right of way is for the use of plaintiff's plantation and those connected with it, this is an allegation of a right of way in gross; and an amendment to the complaint inserting an allegation that the right of way begins on the plaintiff's land, would substitute a claim of a right of way appurtenant for that of a right of way in gross, and so substantially change the claim. Such an amendment, therefore, cannot be allowed: *Whaley v. Stevens*, 21 S. C. 221. In an action to recover damages or the wrongful erection and maintenance of a mill-dam, and also for an injunction against the further maintenance of such dam, the plaintiff should be allowed, at the trial, to amend his complaint, so as to make it conform to the provisions of the mill-dam law, and to proceed for the recovery of compensation under that law: *Newton v. Allis*, 12 Wis. 374. A suit was brought to recover damages for an injury to a stock of merchandise, alleged to have been caused by the falling of the wall of a building which the defendant had leased to the plaintiff, upon the theory that the landlord was under obligation to repair the wall. The plaintiff got judgment, but it was reversed. After two years the plaintiff amended by alleging that after the defendant had notice that the wall had become unsafe he "undertook to repair the same as aforesaid, and so negligently repaired the same that the said wall fell," etc. It was held that this amendment set up a new cause of action, and that it was barred by the statute of limitations of two years: *Lynch v. Ortleib*, 87 Tex. 590. It cannot be declared error for a trial judge to refuse to permit an amendment to a complaint, whereby a statutory cause of action for injury done by fire communicated from a railroad right of way would be changed into an action at common law for negligent burning: *Mayo v. Spartauburgetc. R. R. Co.*, 43 S. C. 225; or for him, in an action claiming damages to plaintiff's mill by the setting back of water by the defendant, this being the sole damage averred, to refuse, after the case has been reversed and remanded, to allow the plaintiff to amend

by claiming damages for the flowing of the land: *Taylor v. Keeler*, 51 Conn. 397.

The statutory penalty for failure to transmit telegraph messages promptly is a separate and distinct cause of action from the damages recoverable under the general law for like default. While the statute allows both causes to be joined in the same action, there is no authority, where one is omitted, for introducing it, by way of amendment to the declaration, pending the action. No amendment adding a new and distinct cause of action is allowable, unless expressly provided for by law: *Baldwin v. Western Union Tel. Co.*, 93 Ga. 692; 44 Am. St. Rep. 194. If a complaint is good at common law, and is sufficient, it cannot be changed, on appeal, by amendment, to the statutory action for double damages: *Gregory v. Wabash etc. Ry. Co.*, 20 Mo. App. 448. An action under the statute for treble damages for cutting down timber on plaintiff's land cannot be changed by amendment into an action of trover for the timber: *Missouri etc. Co. v. Zeitinger*, 45 Mo. App. 114. The declaration, under a provision of the statute, for triple damages, by reason of killing cattle in an inclosure not protected by a lawful fence, cannot properly be amended by adding a count praying exemplary damages independently of that provision: *Tumlin v. Parrott*, 82 Ga. 732. See subdivision, *Personal Injuries*, *infra*.

Debt.—In an action of debt, on a foreign judgment, with a single count, the writ cannot be amended by inserting a count on the original cause of indebtedness on which the judgment is founded: *Latine v. Clements*, 3 Ga. 426. In an action of debt on a judgment of the court of common pleas, for a certain county, rendered at the March term, the plaintiff cannot amend so as to declare on a judgment of such a court, for another county, rendered at the April term, as the causes of action are essentially different: *Pillsbury v. Springfield*, 16 N. H. 565.

Ejectment.—A plaintiff in ejectment will not be allowed to amend so as to change his action into one to compel the defendant to purchase land at a price to be fixed by the court, or to remove its road from the land: *Gaslight Co. v. Rome etc. R. R. Co.*, 51 Hun, 119; or to amend, upon the trial, and proceed as though the action were brought to restrain an unlawful interference with his rights as owner of an adjacent lot: *Vrooman v. Jackson*, 6 Hun, 326. A declaration in ejectment, setting out demises severally from two persons, cannot be amended by ingrafting upon one of these demises an equitable claim for money in favor of a third person against the defendants. Such new matter is not germane to the original cause of action, either as to parties or the subject matter: *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301. See subdivision, *Real Actions*, *infra*.

Equity.—An amendment to a bill in equity can only be granted when the bill is defective in parties, or in the prayer for relief, or in the omission or mistake of a fact or circumstance connected with the substance, but not forming the substance itself, nor repugnant thereto: *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 46; *Carey v. Smith*, 11 Ga. 539. A party, under the privilege of amending, cannot introduce matter which will constitute a new bill: *Carey v. Smith*, 11 Ga. 539; *National Bank v. Smith*, 17 R. I. 244; *Park v. Lide*, 90 Ala. 246. Amendments to a bill in equity which abandon the case originally made by the bill, and substitute a new one, cannot be allowed, particularly if not proposed until after the case originally made has been heard: *National*

Bank v. Smith, 17 R. I. 244; but an amendment of a bill, proper in itself, may be allowed even after the cause has been reversed on appeal and remanded, if it does not make out a new case, or work a departure, or contain alternative averments which would make the bill demurrable: *Park v. Lide*, 90 Ala. 246.

An action at law cannot, by amendment, be changed into an equitable action: *Carmichael v. Argard*, 52 Wis. 607; and it is error to allow an amendment of the complaint changing the action from one at law to one in equity, against the defendant's objection: *Kavanagh v. O'Neill*, 63 Wis. 101; *Lullman v. Barrett*, 18 Ill. App. 573. Contra, *Robinson v. Willoughby*, 67 N. C. 84. Thus, a complaint setting up a purely legal cause of action, as one in ejectment, cannot be amended, either as of course or by leave, so as to set up a cause of action in equity, as one to remove a cloud upon title: *Carmichael v. Argard*, 52 Wis. 607. An action in equity based on allegations of fraud, deceit, deceitful influence, collusion, conspiracy, and misleading, and praying for an accounting and payment to plaintiff of whatever may be found due, cannot, after its trial, as an equity action, be changed into an action at law: *Halsey v. Tradesmen's Nat. Bank*, 24 Jones & S. 7. A referee has no power to amend a complaint on trial so as to change the cause of action from one for equitable relief to one at law, as in ejectment: *Bockes v. Lansing*, 74 N. Y. 437; but where the plaintiff has failed to establish an equitable cause, it has been held proper to allow him to obtain a legal remedy, in such equitable action, by appropriate amendments: *Beck v. Allison*, 66 N. Y. 366; 15 Am. Rep. 430; and one equitable action has been converted, by amendment, into another. Thus, an action to establish a trust, and to compel a reconveyance, has been transformed, by amendment, into an action to quiet title: *Newell v. Newell*, 14 Kan. 202.

Escape—False Imprisonment.—The court will not allow a complaint in an action for escape and for a false return to be amended so as to subject the sheriff, under the statute, to liability as bail. His preparation to meet an action of escape is necessarily different from what it would have been to defend the action as amended. The amendment changes the form and character of the action, and cannot be allowed: *Daguerre v. Orser*, 3 Abb. Pr. 86. If the plaintiff, in an action for false imprisonment, has rested his case, but failed to sustain the action, he will not be allowed to amend his complaint by adding a count for malicious prosecution. "To allow a plaintiff, after he has failed in his action, to resort to another, by suffering him to amend his complaint on the spot, would in practice be followed by the grossest abuses": *Waldheim v. Sichel*, 1 Hilt. 46.

Form of Action.—In the absence of some enabling statute, an amendment of a declaration, which changes the form of action, is not allowable: *Little v. Morgan*, 31 N. H. 499; *McKay v. Darling*, 65 Vt. 639; *Dewey v. Nicholas*, 44 Vt. 24; *Stevenson v. Mudgett*, 10 N. H. 338; 34 Am. Dec. 155; *Brown v. Leavitt*, 52 N. H. 619; *Meredith Mechanic Assn. v. American Twist Drill Co.*, 66 N. H. 539. But it is no objection to an amendment that it changes the form of action where such an amendment is authorized by statute: *North v. Nichols*, 39 Conn. 355; *Duff v. Snider*, 54 Miss. 245; *Knapp v. Kingsbury*, 51 Ala. 563. But the distinction between the form of action and the form of declaring in the same form of action must be observed: *Ball v. Clafin*, 5 Pick. 303; 16 Am. Dec. 407; *Excelsior Electric Co. v. Sweet*, 57 N. J. L. 224.

Fraud.—In *Allen v. Woodruff*, 63 Conn. 389, the defendant, in an action before a justice of the peace for fraud in contracting an alleged debt, was transiently in Connecticut, though he was a citizen of another state. By authority of the statute, in such cases, his body was attached on the writ, and he gave special bail. After judgment for the plaintiff, the defendant appealed to the court of common pleas, where, without discharging the attachment or releasing the bail, the plaintiff filed a second count in contract for the original debt, without charging fraud. The amendment, changing the cause of action, was allowed by the court, and the case went to trial, and a verdict was rendered for the plaintiff on the new count only. The action of the court in allowing the filing of the new count was held to be error, as it virtually enabled the plaintiff to hold his attachment of the defendant's body and the special bail, upon a judgment rendered solely upon the contract. A petition in the nature of a creditor's bill attacking the validity of a certain mortgage, on the ground that it was without consideration and made to defraud creditors, cannot be amended, after judgment, by presenting an issue as to the date of the delivery of the conveyance in question, where no such issue was raised by the original petition, as this would permit a substantially different cause of action to be stated by amendment after judgment, which is not allowable: *First Nat. Bank v. Myers*, 44 Neb. 306, 309. After one fails in establishing his case, whether at law or in equity, he ought not to be allowed to amend by charging fraud. "There is no judge," says Jessel, M. R., in *Hendriks v. Montagu*, 17 Ch. Div. 638, "more liberal, if I may use the expression, in allowing amendments, in order to try the real case, than I am, at any stage of the case; but I make one exception, that is, as to charges of fraud. I do not, as a rule, allow amendments to make a charge of fraud at a time when the case is launched independently of fraud. I generally stop there." An amendment changing a cause of action from trover and conversion to an action of fraud and deceit should not be allowed: *Parker v. Rodas*, 79 Mo. 88.

Guaranty.—In an action upon a guaranty of the performance of a contract, the refusal to allow an amendment of the complaint, which sets up a modification of the contract originally declared upon, and which substitutes an entirely new cause of action in the place of the one upon which suit is brought, is within the discretion of the trial court, and will not be reviewed: *Watts v. Weston*, 62 Fed. Rep. 136.

Insurance.—A declaration counting upon a written contract of insurance, and claiming damages for the breach of that contract in the failure or refusal of the defendant to pay the amount of the insurance upon a loss by fire, cannot be amended so as to claim damages for the refusal of the defendant to deliver a policy of insurance in conformity to a verbal agreement, by which the plaintiff was deprived of the insurance upon his goods for which he contracted. These are two independent and distinct causes of action: *Connecticut Fire Ins. Co. v. Kinne*, 77 Mich. 231; 18 Am. St. Rep. 398. So, a declaration upon a policy of insurance, renewed, or considered as renewed, by parol, cannot be properly amended so as to recover against the insurance company for failing and refusing to renew the policy. Such amendment introduces a new cause of action: *Roberts v. Germania Fire Ins. Co.*, 71 Ga. 478. And a complaint upon a written policy of insurance against fire cannot be amended at the trial so as to drop the contract sued upon and substitute

an independent parol contract of insurance, made subsequent to the issue of the policy. Such a radical amendment, even if warranted by the proofs, could not be made at the trial: *Hill v. London Assur. Corp.*, 26 Abb. N. C. 203.

Libel.—In an action for libel founded on statements made in proceedings upon a petition to the governor for the removal of a sheriff from office, the complaint cannot be amended at the trial by inserting an averment of express malice and want of probable cause in making such statements. Such an amendment would not help the case as an action for libel, and should not be permitted for the purpose of changing it into an action for malicious prosecution: *Larkin v. Noonan*, 19 Wis. 93.

Neglect of Duty—Negligence.—In an action against an officer for not retaining property attached, to be sold to satisfy the execution, an amendment introducing a count for not returning the execution embraces a new cause of action, and is not authorized by law: *Annis v. Gilmore*, 47 Me. 152. In an action against a sheriff for making a false return upon a writ, as by returning bail to the action, when no bail was taken, the plaintiff cannot be authorized to amend his writ by inserting a count for not delivering up the bail bond mentioned in the officer's return, as the proposed count would be founded on a new cause of action: *Eaton v. Ogier*, 2 Me. 46. If the declaration contains but one count, wherein the plaintiff seeks to recover against the defendant, as sheriff, solely upon the ground of his responsibility for the acts of another person as his deputy, it cannot be amended by adding another count, with a view of sustaining the action by reason of other and distinct acts of the sheriff himself, although both counts are intended to recover damages arising from the loss of the same rights: *Lambard v. Fowler*, 25 Me. 308.

If the plaintiff, in an action for negligence, fails in his proof, he cannot amend his complaint by adding a contract proved, but which does not touch the allegation of negligence, and which would not have aided him in establishing the defendant's negligence: *Button v. Schuyler's Steam Towboat Line*, 40 Hun, 422. In an action to recover damages for the alleged negligence of the defendant in causing the death of the plaintiff's intestate, the plaintiff cannot, against the objection of the defendant, amend his complaint by charging a willful and malicious injury, as this is a cause of action essentially different from the one set out in the complaint, and one of which the defendant had no notice and no opportunity to answer or defend: *Pitkin v. New York etc. R. R. Co.*, 64 Conn. 482. See subdivision, Personal Injuries, *infra*.

Negotiable Instruments.—A new and distinct cause of action cannot be introduced, by way of amendment, in a suit on a promissory note: *Pfeiffer v. Hunt*, 75 Ga. 513; *Norris v. Pollard*, 75 Ga. 358. If the declaration contains two counts charging the defendant as indorser of two promissory notes for four thousand three hundred and twenty-two dollars, and also a count for five thousand dollars lent, the plaintiff cannot amend by introducing five other notes, amounting in all to about ten thousand dollars, entirely different as to dates, sums, and, as regards two of them, even different as to the name of the maker, and also by adding a count for money had and received. Such an amendment would entirely change the plaintiff's ground, and would introduce new matter, altogether distinct from the transaction originally set forth: *Farmers' etc. Bank v. Israel*, 6 Serg. & R. 293. If the plaintiff has

given notice that the bill or note sued on is the only cause of action, he cannot add to his complaint a special count against one of the indorsers: *Frost v. Flint*, 3 How. Pr. 14. Compare *Chrysler v. James*, 1 Hill, 214; *Comstock v. Merritt*, 1 Hill, 369. In a suit upon a promissory note, the declaration cannot be amended by alleging that the plaintiff holds an absolute deed to certain land as security for the note, and that the defendant holds the plaintiff's bond to reconvey the land on payment of the debt, and by adding a prayer to enforce the debt against the land. The amendment seeks to bring in a contract not identical with that contained in the note sued upon, but altogether distinct from it, and is not authorized: *Broach v. Kelly*, 66 Ga. 148. So, if suit is brought by the drawee against the drawer of an instrument in the shape of a draft for advances on his crop of a specified year, payable to his own order, and with a crop lien incorporated therein, it not being indorsed, an amendment cannot be made, or sustained by parol proof, to the effect that the instrument was intended to be a promissory note due to the drawee, not for advances, but for a previous indebtedness; as such amendment makes the case of a suit as upon a promissory note, with an allegation that it was intended as such, that it was given for an indebtedness already due and owing, and not for advances to be made upon the crop to be raised in the year specified, nor for the purchase of supplies to make the crop of that year. The whole character of the contract as set forth in the original draft is changed, and a new and distinct consideration alleged: *Fokes v. De Vaughn*, 66 Ga. 735. And a complaint upon a promissory note, in the form prescribed by statute, cannot be amended by adding a count setting up that the plaintiff holds title to certain property as security for the payment of the debt sued, and praying that the property be sold, the note sued on paid out of the proceeds, and that the surplus be turned over to the defendant; as the cause of action thus set up is new, and a new judgment prayed for: *Long v. Bullard*, 59 Ga. 355.

Parties.—One rule concerning amendments is, that they will not be allowed where they make an entire change of parties: *Johnson v. Martin*, 54 Ala. 271; *Nelson v. Webb*, 54 Ala. 436; *State v. Turner*, 96 N. C. 416. A complaint may be amended by substituting parties different from those in whose names the suit was originally brought, if such amendment does not substantially change the claim or defense: *Hubler v. Pullen*, 9 Ind. 273; 68 Am. Dec. 620; *Bank of Havana v. Magee*, 20 N. Y. 355, 361. But an amendment which essentially changes the parties to an action is unauthorized and will not be allowed, if such change has the effect of introducing a new cause of action not contained in the original declaration: *Emerson v. Wilson*, 11 Vt. 357; 84 Am. Dec. 695; *Norris v. Pollard*, 75 Ga. 358. Thus, where the plaintiffs of record have no interest in the subject of the litigation, an amendment bringing in other parties unconnected with them is unauthorized, especially where it changes the character of the suit from one brought to prevent a private injury to individuals, to an action at the suit of the state, to enjoin against the commission of a public wrong: *Davis v. Mayor*, 14 N. Y. 506; 67 Am. Dec. 186. Neither can one defendant be substituted for another, where such substitution affects the cause of action. Thus, a plaintiff brought an action for damages for personal injuries, alleged to have been caused by the negligence of the servants of the defendant while operating his railroad. There was an answer by attorney, who

gave leave to amend the complaint. The original complaint was against the defendant in his individual capacity, but the amended complaint attempted to change the action into one against the defendant as receiver of a railroad company, operating the road as such receiver. A motion was made to strike out the amendment on the ground that it was not permissible, and because the amended complaint constituted a new and different cause of action from that set up in the original complaint. The court granted the motion, and this order was affirmed on appeal, where the court said: "The amendment was not merely a change of the grounds or cause of action against the same defendant, but really amounted to the substitution of one defendant for another. The defendant's liability arises only by reason of the doctrine of respondeat superior. In his individual capacity he was not the master of the servants whose negligence caused the injury. He was such master only in his capacity of receiver. He is not personally liable for the negligence of such servants employed by him in operating a railroad under the orders of the court: *High on Receivers*, secs. 255, 295. It cannot be presumed that the attorney of the defendant, sued in his individual capacity, has authority to stipulate for the substitution of said defendant in his capacity as receiver, and appear for him in such new capacity. The burden was on the plaintiff to show that such attorney had such authority, and plaintiff failed to show it. If, for a considerable length of time after such substitution, the action had proceeded without objection against the defendant in his capacity as receiver, it might be evidence of the attorney's authority to consent to such substitution, or of ratification of his act in so consenting. But the action did not so proceed for a considerable length of time. The act of the attorney was promptly repudiated": *Erskine v. McIlrath*, 60 Minn. 485. If a plaintiff shows, in his complaint, that he has no cause of action, the court cannot amend it by making others parties who have: *State v. Rottaken*, 34 Ark. 144.

Partnership.—If suit is brought for the loss, by fire, of certain cotton shipped by the plaintiff, against the Central Line Steamers, a corporation alleged to be engaged as common carriers in running a line of boats, and composed of an individual and a railroad company, in whose charter no power to form such a partnership appears, the action is demurrable, and there is nothing in it to amend by. Hence, an amendment by which it is sought to sue the natural person and the company as individual tortfeasors united in a common venture as carriers is properly refused: *Ledsinger v. Central Line Steamers*, 75 Ga. 567.

Personal Injuries.—If an original action for personal injuries is founded on the allegation that the plaintiff was injured and sustained damage by reason of having fallen into a hole or ditch which the defendant had unlawfully or wrongfully dug, an amendment seeking to recover damages of defendant because it removed a certain crossing over a ditch or hole, by reason whereof plaintiff fell into the ditch and was injured, is not authorized, because it introduces a new and distinct cause of action from that set out in the original declaration: *Skidaway Shell Road Co. v. O'Brien*, 73 Ga. 655. If the death of one person is caused by the negligence of another, and there is an interval of suffering between the time of the injury and the time of the death, the representatives of the decedent cannot recover both for the suffering and for the death, but must elect. Hence, if the administrator files his petition seeking

to recover for the death, he cannot file an amended petition to recover for the suffering: *Hackett v. Louisville etc. R. R. Co.*, 95 Ky. 236. One cannot sue on one cause of action and recover on another. He cannot sue for an injury and recover on a contract, express or implied, or vice versa: *Sumner v. Rodgers*, 90 Mo. 324. An amendment, during the consideration of an action for personal injuries, setting up a distinct ground of negligence as a basis of recovery, is too late, as well as otherwise objectionable: *Clyde v. Richmond etc. R. R. Co.*, 59 Fed. Rep. 394. In an action in one state against a railroad company for injuries received in another state from defective materials furnished to its servant, an amendment declaring on a statute of the state where the injuries were received, giving a right of recovery on other grounds, adds a new cause of action, and is not allowable: *Bolton v. Georgia Pac. Ry. Co.*, 83 Ga. 659. See subdivisions, Damages, and Negligence, *supra*.

Real Actions.—An amendment will not be allowed, in a real action, so as to embrace more or different land from that described in the complaint, as it sets forth a new cause of action: *Note to Stevenson v. Mudgett*, 34 Am. Dec. 159; *Robbins v. Harris*, 96 N. C. 557. Plaintiff will not be allowed to amend his declaration so as to enable him, instead of recovering the land sued for, to have judgment for the amount paid out by him as purchaser at a foreclosure sale thereof, and for the sale of the land to repay such amount. The proposed amendment is entirely too remote from the original cause of action, and the parties thereto, to be germane to the controversy set out in the declaration: *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301. If the plaintiff goes into court to enforce a mortgage lien, but does not set up a judgment lien, which he might do, and the judgment lien, pending the proceedings, becomes dormant, he cannot, by an amended petition, revive and enforce the lifeless lien in his favor, and thus give himself precedence over all other lienholders before the court in the case: *Fort v. Litmer*, 81 Ohio St. 215. If the owner of one of two adjacent houses, separated by a party wall, places upon the top thereof a cornice which projects over the lot of the adjoining owner, an action of ejectment cannot be maintained against him by such owner, on account of some unlawful interference with his rights; and, if the court, from the allegations contained in the complaint, decides the action to be one of ejectment, the plaintiff cannot be allowed to amend his complaint upon the trial, and proceed as though the action were brought to restrain an unlawful interference with his rights as owner of the adjacent lot: *Vrooman v. Jackson*, 6 Hun. 326. A declaration against a chartered railroad company for the value of land permanently appropriated by it under its charter cannot be amended by adding a count for the value of soil taken from the land and appropriated to the use of the company, as the two causes of action are different. The first treats the land as realty and as sold to the company; the second treats the soil taken as personalty and as sold to the company. Where such an amendment has been allowed, the judgment will be reversed: *Chattanooga etc. R. R. Co. v. East Rome Town Co.*, 89 Ga. 732. In an action by the heirs of a mortgagor for the recovery of the mortgaged land, the court errs in withdrawing the case from the jury, and directing the complaint to be amended so as to make the case an action to redeem the mortgaged premises. The claim of the plaintiffs is changed by such an amendment, and a new and different cause and kind of action is substituted: *Skinner v. Hodge*, 24 S. C. 165. If a petition which asserts

title in the plaintiff, and which seeks a recovery in his right, is amended so as to assert title in an estate of which the plaintiff is administrator, the amendment asserts a different right, a new cause of action, and operates as an abandonment of the cause of action set up in the original petition: *Morales v. Fink*, 66 Tex. 189. A complaint for land cannot be amended by alleging that the land belonged to an estate of which the plaintiff was a distributee; that the administrator sold it in 1864, and had bought it in for himself; that the present holder claims under the administrator, and knew of this sale; and that the administrator obtained a final receipt from the plaintiff by fraudulent statements; and praying to have the sale set aside and the deeds under it canceled: *White v. Moss*, 67 Ga. 89.

Replevin.—The action to recover personal property takes the place of, and is a substitute for, both the former actions of replevin and detinue: *Willis v. De Witt*, 3 S. Dak. 281. An action of replevin for a deed cannot be changed, by amendment, into an action for specific performance: *Buffalo etc. Ferry Co. v. Allen*, 12 N. Y. Civ. Proc. 64. And, if an action of replevin to recover three thousand eight hundred and sixteen steamship tickets for passages from Europe to America is not maintainable for a detention of tickets not returned, and the right of plaintiff to damages being dependent upon his right to a return of the property, or some part thereof, it is not error to refuse to allow him, at the opening of the trial before a referee, to amend his complaint so as to embrace a claim for five hundred dollars damages, where the original complaint did not allege or demand damages for the detention. Any amendment of the complaint necessary to recover money, other than as damages founded upon a recovery of the property, would constitute a new cause of action, and one which the referee could not grant: *National Steamship Co. v. Sheahan*, 122 N. Y. 461. But in *Goddard v. Cassell*, 84 Hun, 43, the court refused to interfere with the discretion of the trial court in permitting a complaint alleging a cause of action for the recovery of the possession of personal property to be so amended as to allege a cause of action for the conversion thereof.

Scire Facias, to revive and continue a lien of a judgment, is not an original action, and cannot be amended to one of debt or assumpsit, in a proceeding to recover a judgment extinguished by a discharge in bankruptcy, as this would change not only the form, but the cause of the action: *Murphy v. Crawford*, 114 Pa. St. 496.

Services.—A complaint stating a cause of action for labor and services performed and not paid for cannot be amended on the trial so as to set up a cause for a stated account, as this would "substantially change the cause of action": *Foste v. Standard Ins. Co.*, 28 Or. 449.

Slander.—A plaintiff will not be allowed to change his action for slander into one for malicious prosecution, as no amendment will be allowed which gives to the plaintiff a new, substantive cause of action, and which may take from the defendant the right of pleading the statute of limitations: *Shock v. McChesney*, 4 Yeates, 507; 2 Am. Dec. 415.

Specific Performance.—Matter inconsistent with, or repugnant to, the substantive allegations of an original bill to enforce the specific performance of a land contract cannot be introduced by amendment: *Ogden v. Moore*, 95 Mich. 290.

Statute of Limitations.—An amendment of a declaration will not be allowed if a new cause of action is thereby introduced, especially where

the new cause of action is so old as to have been barred by the statute of limitations. In other words, an amendment which substitutes a new and different cause of action, and debars the defendant of the privilege of pleading the statute of limitations, will not be allowed: *First Nat. Bank v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649; *Tyrrill v. Lamb*, 96 Pa. St. 464; *Trego v. Lewis*, 58 Pa. St. 463; *Wright v. Hart*, 44 Pa. St. 454; *Wood v. Anderson*, 25 Pa. St. 407; *Shock v. McChesney*, 4 Yeates, 507; 2 Am. Dec. 415; *Van de Haar v. Van Domseleer*, 56 Iowa, 671; *Quimby v. Claffin*, 27 Hun, 611; *Trousdale v. Thomas*, 3 Lea, 715; *Stevens v. Brooks*, 23 Wis. 196; *Cogdell v. Exum*, 69 N. C. 464; 12 Am. Rep. 657. Thus, in an action by the payee of a nonaccepted bank check against a bank, it is error to allow an amendment of record substituting the drawer as the legal plaintiff for the use of the payee, particularly when the drawer's rights of action against the bank to recover damages for the dishonor of his check, or to recover the balance of his deposit, are barred by the statute of limitations: *First Nat. Bank v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649. So, where the action is in detinue, but the declaration in trover, it is not reversible error for the trial court to refuse the plaintiff's application to amend his declaration by a count on the facts of the case for neglect, if the defendant objects that the new cause of action is barred by the statute of limitations: *Trousdale v. Thomas*, 3 Lea, 715. According to *Eighmie v. Taylor*, 39 Hun, 366, it is no objection to the allowance of such an amendment that the statute of limitations had run against the plaintiff's claim at the time the motion for an amendment was made, if it was not barred at the time the action was commenced; but this is not good law. In *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, an action was brought in the state of Missouri by an employé of a railroad company against the company to recover damages for an injury which had happened to the plaintiff in the state of Kansas while on duty there. The action was based upon the general law of master and servant prevailing in Missouri, and it was held that an amended petition which changed the nature of the claim and based it upon a statute of Kansas, giving the employé, in such a case, a right of action against the company in derogation of the common law, was a departure in pleading, and set up a new cause of action; and that the statute of limitations, as applied to such new cause of action, treats the action as commenced when the amendment was incorporated into the pleadings, and not as begun when the action was commenced. This result is not affected by the fact that the amended petition was filed by consent, as that confers only the right to file the amendment, and does not waive defenses to it when filed.

Statutory Actions.—A petition, in an action against a railroad company, by a materialman, to enforce a statutory lien upon the railroad for the price of material sold, not to the company, but to a contractor, cannot be amended so as to charge the company, as a debtor to the plaintiff, for the value of the material, as goods sold and delivered, or as goods of the plaintiff used and appropriated by the company in constructing its railroad. Such an amendment would introduce a wholly new and distinct cause of action: *Montague v. Chattanooga etc. R. R. Co.*, 94 Ga. 668.

Stockholders.—In a suit against a stockholder of a corporation, the common counts cannot be added to the complaint, by amendment, when it affirmatively appears that they are intended to present a new

and independent cause of action, different from that stated in the original complaint: *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894. Thus, a declaration against a stockholder for the debt of a corporation, containing only the allegations to bring the case within the provisions of one law, cannot legally be amended, against the defendant's objections, so as to bring the case within another law: *Milliken v. Whitehouse*, 49 Me. 527.

Tort.—An action in form *ex delicto* cannot be amended so as to state an action *ex contractu*: Note to *Stevenson v. Mudgett*, 34 Am. Dec. 160; *Hackett v. Bank of California*, 57 Cal. 335; *Baldwin v. Rood*, 15 N. Y. Civ. Proc. 56; *Board of Supervisors v. Decker*, 34 Wis. 378. Thus, a declaration sounding in tort, against a railroad company for a violation of its duty as a common carrier, cannot be amended by converting it in whole, or in part, into an action upon a contract to carry: *Cox v. Richmond etc. R. R. Co.*, 87 Ga. 747. So, if in an action for a tort in wrongfully taking and converting the plaintiff's property, there is an entire failure of proof that the taking was wrongful or tortious, or that there was any fraudulent intent, the plaintiff should be nonsuited. He cannot, at the close of the case, waive the tort, and recover as upon a contract. An amendment changing the form and nature of the action from tort to *assumpsit* cannot be asked for after the whole case is finished: *Ransom v. Wetmore*, 39 Barb. 104. The plaintiff can waive a tort and sue in contract only where the wrongdoer has sold or otherwise disposed of the property: *Cushman v. Jewell*, 7 Hun, 525. See subdivisions, *Trover and Conversion*, *infra*.

Trespass.—If the plaintiff, in an action on the case, fails to establish his right as set forth in his writ, he will not be allowed to amend by making a different description of his cause of action, so that he may recover nominal damages: *Bangor etc. R. R. Co. v. Smith*, 49 Me. 9; 77 Am. Dec. 246. If he declares in trespass, upon a statute, to recover penalties for cutting trees upon his land, he cannot change the cause of action by an amendment, inserting a general count for breaking the close and cutting the trees: *Melvin v. Smith*, 12 N. H. 462. In trespass *quare clausum fregit*, an amendment enlarging the plaintiff's close, as described in the declaration, cannot be allowed: *Robinson v. Miller*, 37 Me. 312. In such an action, for taking away the annual profits of the land, the court will not permit the declaration to be amended by adding a count for a usurpation of the fee: *Bartlett v. Perkins*, 13 Me. 87. So, an amendment changing a declaration from *quare clausum* to case is not allowable: *Lawry v. Lawry*, 88 Me. 482. Nor will an amendment be permitted adding a count in trespass *de bonis asportatis*: *Duncan v. Sylvester*, 13 Me. 417; 29 Am. Dec. 512. If defendants, in an action *quare clausum*, have occupied the land in such a manner as to give them title under the statute of limitations, plaintiffs cannot, after the statutory period of limitations has run, amend their declaration so as to recover for trespass on land not described in the original declaration. In such a case, the amendment introduces a new cause of action, and the statute of limitations fairly applies: *Wolf v. Wolf*, 158 Pa. St. 621. If the declaration in trespass *vi et armis* against a constable for an excessive distress avers that the plaintiff held the premises as the tenant of a person named, that a certain amount was due, and that the distress made was excessive, the court should not allow the plaintiff to amend so as to change the averments which admitted the tenancy, as this would be a substantial

change of the cause of action: *Boyce v. May*, 93 Pa. St. 454. As no amendment should be allowed against the protest of the defendant, which introduces into the case a new substantive cause of action different from that declared upon, and different from that which the party intended to declare upon when he brought his action, though the amendment be such as would in another count have been properly inserted in the original declaration, and the new cause of action is such, as could, if the plaintiff had so chosen, been united in the same suit with the original cause of action actually sued upon, a count for trespass *de bonis asportatis* for carrying away the plaintiff's goods, and converting and disposing of them to the defendant's use, cannot, against the defendant's protest, be added to a declaration for trespass *vi et armis* for an assault and battery of the plaintiff's person: *Snyder v. Harper*, 24 W. Va. 206. An amended petition which states a cause of action for treble damages for trespass under the statute states a different cause of action, within the purview of the statute of limitations, from that stated in the petition for single damages for the same trespass: *Holliday v. Jackson*, 21 Mo. App. 660, 664. If the cause of action originally set out is for the mismanagement of the defendants in conducting a lawfully established bank, an amendment to the declaration, which sets up that the alleged bank was never legally chartered, but was a pretended institution, and that the defendants, acting as directors, had circulated large amounts of their promissory notes to be used as money, etc., cannot be allowed, as it would introduce a new and distinct cause of action: *Gardner v. Post*, 43 Pa. St. 19.

Trover and Conversion.—An amendment seeking to change the cause of action from trover to assumpsit is not allowable: Note to *Stevenson v. Mudgett*, 34 Am. Dec. 159; nor can an action of trover be changed, by amendment, into an action for malicious attachment: *Scovill v. Glasner*, 79 Mo. 449. An original declaration in trover for certain goods cannot be amended by introducing a new count charging that the defendant attached the same goods on a writ in favor of the plaintiff, and by his negligence lost them: *Goddard v. Perkins*, 9 N. H. 488. In trover for a bond, the plaintiff cannot amend by substituting a different cause of action, namely, one for the conversion of certain instruments of writing not under seal: *Tryon v. Miller*, 1 Whart. 11. A cause of action for the wrongful conversion of money cannot, by amendment, be turned into a cause of action on contract for money had and received: *Board of Supervisors v. Decker*, 34 Wis. 378. So, a declaration charging the conversion of a horse, called the Smith horse, cannot be amended so as to recover for the conversion of a horse known as the Connor horse, they being different horses, and the plaintiff intending to describe the Smith horse and not the Connor horse, when the writ was made: *Nickerson v. Bradbury*, 88 Me. 593. And if a common-law action is brought against a defendant corporation for the conversion of a promissory note, and the plaintiff, failing to secure service, makes certain stockholders parties, and files an amended complaint, stating a cause of action under a statute and seeking to make them liable under it, there is a change of the cause of action, and the amended petition should be stricken out on motion: *Sears v. Missouri Mortgage Loan Co.*, 56 Mo. App. 122. If a complaint for unlawful conversion of personal property contains an allegation waiving the tort, it is not proper to allow an amendment, on the trial,

striking out the waiver of the tort: *Oushman v. Jewell*, 7 Hun, 525. An amendment changing a cause of action from trover and conversion to an action of fraud and deceit should not be allowed: *Parker v. Rodas*, 79 Mo. 88. The great liberality of the law in allowing amendments to perfect a pleading in respect to the cause of action originally set out does not allow amendments on the trial changing the cause of action from one thing to another: *Sweet v. Mitchell*, 15 Wis. 641.

Trusts.—If an original petition declares on a trust agreement, containing conditions which must have been complied with before an action could be sustained thereon, an amended petition stating an ordinary cause of action for money loaned unconditionally and then due, is a change of the cause of action, and not permissible: *Heman v. Glann*, 129 Mo. 325.

Wills.—A suit by an executor for the construction of a will cannot be changed, by amendment, into a suit by himself as trustee under a deed from the devisee, asking for the removal of a supposed cloud upon the title of that portion of the real estate; although the same person had been executor and was afterward trustee, the law regards the executor and trustee as distinct persons: *Miles v. Strong*, 60 Conn. 393.

REMEDIES.—A pleading cannot be amended lawfully, in a material respect, except at a time which will give the party against whom the amendment is allowed a right and opportunity to meet by proof the new allegations made. He is entitled to notice of the amendment, and has a right to defend against it, and the court must see that his rights are protected: *Romeyn v. Sickles*, 108 N. Y. 650; *Leavenworth etc. R. R. Co. v. Van Riper*, 19 Kan. 317; *Bennett v. Collins*, 52 Conn. 1; *Joy v. Walker*, 28 Vt. 442; *Furlow v. Miller*, 30 Tex. 28; *Cleveland v. Cohrs*, 13 S. C. 397. Thus, where the plaintiff, by amendment, sets up a new cause of action, the defendant cannot be restricted in his pleas, but may set up any legal defense as a matter of right: *Gill v. Young*, 88 N. C. 58; and if the defendant moves to be allowed to file a new answer and have the case tried again upon the facts, it is error to deny his motion: *Bennett v. Collins*, 52 Conn. 1. It is error, also, for the court to allow a pleading to be amended in a material respect, and then to render judgment thereon in the absence of the adverse party, and without any notice to him: *Leavenworth etc. R. R. Co. v. Van Riper*, 19 Kan. 317. If the action as originally brought is founded upon an alleged written promise by the defendant to pay to the plaintiff a debt due him from a third person, and the plaintiff is permitted, at the trial, to amend his complaint by adding a verbal promise by the defendant to pay the debt, the defendant is entitled to amend his answer by pleading the statute of limitations to the entire cause of action, and his application to do so is not addressed to the discretion of the court: *Morton v. Bartning*, 68 Cal. 306. But the answering of an amended complaint is a waiver of objection that it alleges a new cause of action which arose after the institution of the suit: *Witkowski v. Hern*, 82 Cal. 604.

It is often said that the allowing or disallowing of an amendment changing the cause of action, is a matter for the discretion of the court below, and that its ruling cannot be reviewed on appeal: *Taylor v. Keler*, 51 Conn. 397; *Church v. Phillips*, 157 Mass. 566; *Newall v. Hussey*, 18 Me. 249; 36 Am. Dec. 717; *Watts v. Weston*, 62 Fed. Rep. 136; *Davis v. New York etc. R. R. Co.*, 110 N. Y. 646; *Henry v. Cannon*, 86 N. C. 24; *Trumbo v. Finley*, 18 S. C. 305. This is undoubtedly good

practice where the order is one of refusal, or where it is apparent that the amendment does not set up a new cause of action; but where the amendment does set up a new cause of action, and that is the thing of which the defendant complains, he undoubtedly has a right to except to it as having been improperly allowed, and to have his exception considered on appeal: *Newall v. Hussey*, 18 Me. 249; 36 Am. Dec. 717; *Annis v. Gilmore*, 47 Me. 152. The defendant cannot answer that an amendment changing the cause of action has been allowed. He should object to the filing of the amendment, and, if it is still allowed, he should except and move to strike it from the files: *Wheeler v. West*, 78 Cal. 95; *Oglesby v. Attrill*, 14 Fed. Rep. 214; *Sears v. Missouri Mortgage Loan Co.*, 56 Mo. App. 122. But there is no error in dismissing such a case on demurrer: *Roberts v. Germania Fire Ins. Co.*, 71 Ga. 478. A demurrer may also be properly sustained where the new cause of action is barred by the statute of limitations: *Van de Haar v. Van Domeeler*, 56 Iowa, 671, 675. In hearing a motion to dismiss a count on the ground that it states a new cause of action, the court should receive extrinsic evidence to determine whether it does so: *Geroux v. Graves*, 62 Vt. 280. If the claim of the plaintiff is changed, by amendment, into a new and different cause and kind of action, the order allowing such amendment being erroneous, all subsequent proceedings, orders, and decrees under the amended complaint must fall with the erroneous order: *Skinner v. Hodge*, 24 S. C. 165. A plaintiff must recover on the cause of action stated in his complaint. A judgment upon an amended complaint stating a new cause of action cannot be upheld, where an opportune objection was made: *Barnes v. Prewitt*, 28 Mo. App. 163; and if the amendment was allowed at a time when the defendant's rights were prejudiced thereby, a new trial will be granted: *Brewer v. Jacobs*, 22 Fed. Rep. 217.

LINSKOTT v. ORIENT INSURANCE COMPANY.

[88 MAINE, 497.]

FRAUD—FALSE AND FRAUDULENT STATEMENTS.—A false statement intentionally and knowingly, or fraudulently, made, constitutes fraud; and the statement of a fact as true, which a party does not know to be true, and which he has no reasonable ground for believing to be true, is fraudulent.

INSURANCE—FRAUD—FALSE SWEARING.—In an action upon a policy of insurance containing a clause that it shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning the insurance, or in case of any fraud or false swearing touching any matter relating to the insurance or the subject thereof, where the fraud relied on by the defense is "false swearing," the expression "fraud and false swearing," taken in connection with this issue, has the same significance as "fraud or false swearing." "False swearing" is fraud, and consists in knowingly and intentionally stating upon oath what is not true.

INSURANCE—AVOIDANCE OF POLICY BY FALSE STATEMENTS.—If a policy of insurance contains a provision that it shall be void in case the insured makes any misrepresentation as to a material matter, and the insured, knowingly and purposely, makes a false statement on oath concerning the subject matter, it vitiates the policy and

bars his right of recovery, whether his purpose was to deceive the company or not.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—In deciding motions for new trials on account of newly discovered evidence, courts have found it necessary to apply somewhat stringent rules to prevent the endless mischief which a different course would produce. Hence, a new trial will not be granted on the ground of newly discovered evidence, unless the legitimate effect of such evidence would require a different verdict, and it is made to appear that injustice is likely to be done by refusing it.

William H. Fogler, for the plaintiff.

C. E. and A. S. Littlefield, for the defendant.

497 FOSTER, J. The plaintiff was insured in the defendant company to the amount of five hundred dollars upon his stock of goods contained in a frame store. This store, with all its contents, was wholly destroyed by fire. The policy of insurance contained the following clause: "This entire policy shall be ⁴⁹⁸ void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing touching any matter relating to this insurance or the subject thereof, whether before or after the loss."

The defendant claimed that the plaintiff had been guilty of false swearing, within the meaning of this provision in the contract, both in connection with his proofs of loss and in his testimony as a witness on the stand, and was not, therefore, entitled to recover.

The verdict was for the plaintiff for five hundred and twenty dollars, and the case comes before this court on exceptions, and motion for a new trial.

Exceptions. Among other things, the court instructed the jury, upon the question of fraud and false swearing, as follows: "And if a man attempt to defraud the company by reason of false swearing, then, by our statute, he has forfeited his whole claim. . . . If he is blameless in these particulars, but although inaccurate, although he has made misstatements that are not chargeable to his dishonesty, not chargeable to his falsehood, not chargeable to his desire and determination to cheat and defraud, and deceive, but are mere mistakes of either judgment or memory, then, gentlemen, you will deal with the witness accordingly. Punish no man for mistake, but visit condemnation upon men who are false and fraudulent, and upon such only. . . . The whole matter is for you, and it is for you to say whether this man has met with a loss by misfortune, and has

not attempted, by false swearing, to defraud the insurance company. If a preponderance of the evidence in the case satisfies you that, having met with a loss by fire that occurred by misfortune, without fraud on his part, why, . . . then, gentlemen, he is entitled to recover in this case. . . . And if you find his claim honest, untainted by fraud and false swearing, it is your duty to remunerate him."

These disconnected portions of the charge of the presiding justice form the basis of the defendant's bill of exceptions; and the gravamen of the defendant's complaint is, that "fraud and false swearing" are terms that the court used conjunctively and not disjunctively; that the court should have discriminated between fraud and false swearing by employing the disjunctive "or" instead of the conjunctive "and," and the language of the charge should have been, that the duty of the jury was to remunerate the plaintiff if they found his claim honest, untainted by fraud or false swearing, instead of "untainted by fraud and false swearing."

But this is a discrimination altogether too subtle and refined in its application to the case under consideration. The fraud relied on by the defense, so far as it relates to these exceptions, is false swearing, and false swearing is fraud. False swearing consists in knowingly and intentionally stating upon oath what is not true. A false statement intentionally and knowingly, or fraudulently, made certainly constitutes fraud; and the statement of a fact as true which a party does not know to be true, and which he has no reasonable ground for believing to be true, is fraudulent: *Leach v. Republic Fire Ins. Co.*, 58 N. H. 245; *Harding v. Randall*, 15 Me. 332; *Hammatt v. Emerson*, 27 Me. 308; 46 Am. Dec. 598. It was immaterial, therefore, whether the language employed was "fraud and false swearing," or "fraud or false swearing." The significance of these expressions is the same, when taken in connection with the issue before the jury, and the subject matter to which they related.

There is no contention but that the court gave the jury instructions that, if the plaintiff had knowingly made a false statement upon oath in reference to some material matter, it would avoid the policy. But it is insisted that these portions of the charge excepted to really modify that proposition by requiring the jury to find, as a requisite to fraud and false swearing, that the statement or testimony must not only be false, but made with an intent to defraud the company.

We do not so understand the instructions. The court defined the difference between a misstatement honestly made, a mistake

either of judgment or memory, and statements that were knowingly and intentionally false. Upon examination of the charge in connection with the fragmentary portions about which complaint ⁵⁰⁰ is made, we think it was in accordance with the law as laid down in *Dolloff v. Phoenix Ins. Co.*, 82 Me. 266, 17 Am. St. Rep. 482, and *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, which hold that where a clause like the one mentioned is contained in the policy, and the insured knowingly and purposely makes a false statement on oath, concerning the subject matter, it vitiates the policy and bars his right of recovery, whether his purpose was to deceive the company or not, for it is "so nominated in the bond."

The exceptions, therefore, must be overruled.

Motion. We have examined the evidence with care, and that which is set forth in support of the motion as newly discovered. It is unnecessary, and would be unprofitable, to epitomize the testimony in an opinion. From an examination of that upon which the verdict was based, we by no means can say that the verdict was clearly wrong, or that the jury must have been influenced by any improper bias or prejudice in arriving at their conclusion. In reference to the newly discovered evidence, we are not so strongly impressed as to feel warranted in granting a new trial. It has long been the settled doctrine of this court that a new trial will not be granted on the ground of newly discovered evidence, unless it seems to the court probable that it might alter the verdict: *Snowman v. Wardwell*, 32 Me. 275; *Handly v. Call*, 30 Me. 9; *Todd v. Chipman*, 62 Me. 189. The court very pertinently remarked in *State v. Carr*, 21 N. H. 166, 53 Am. Dec. 179, that "in deciding motions for new trials on account of newly discovered evidence, courts have found it necessary to apply somewhat stringent rules, to prevent the endless mischief which a different course would produce." And this court, in the recent case of *State v. Stain*, 82 Me. 472, 490, had occasion to consider the question and state the doctrine somewhat fully, applicable to cases of this nature, and the decisions are there referred to, which hold that the rule is applicable alike in civil and criminal cases. "Notwithstanding the discretion of the court in such cases," remark the court, "is very broad, and will be exercised by the court in granting a new trial whenever a proper case is presented, yet there are well-settled rules by which the court in this as well as all other cases should be governed. In ⁵⁰¹ order to warrant a new trial upon the ground of newly discovered evidence, it should be made to appear that injustice is

likely to be done by refusing it, and therefore it becomes necessary for the court to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former trial, and even the credibility of the witnesses." Tested by these rules, the case before us is one where the verdict should not be disturbed. Much of the alleged newly discovered evidence is negative in its character—that which the witnesses did not see or notice. With all of this applied to the evidence in the former trial, its bearing would not, in our opinion, be of sufficient weight to change the result.

In considering the motion, we are not to inquire whether, taking the newly discovered evidence in connection with that given on the former trial, a jury might be induced to give a different verdict, but whether the legitimate effect of such evidence would require a different verdict: *Commonwealth v. Flanagan*, 7 Watts & S. 423; *State v. Stain*, 82 Me. 472, 491.

Exceptions and motion overruled.

FRAUD—FALSE AND FRAUDULENT STATEMENTS.—If a party states as of his own knowledge material facts susceptible of knowledge, which are false, he is guilty of fraud; and one who makes a representation without knowing whether it is true or false is, in morals and in law, as blameable as if he made it knowing it to be false: See monographic note to *Cottrill v. Krum*, 18 Am. St. Rep. 560.

INSURANCE—FRAUD—FALSE SWEARING—AVOIDANCE OF POLICY.—A policy of insurance is avoided by fraud and false swearing: *Jones v. Mechanics' Fire Ins. Co.*, 36 N.J. L. 29; 13 Am. Rep. 405; but not by a mere mistake, though the policy itself declares that fraud, false swearing, misstatement, or concealment of a material fact by the assured shall render it void: *National Bank v. Union Ins. Co.*, 88 Cal. 497; 22 Am. St. Rep. 324; *Jones v. Mechanics' Fire Ins. Co.*, 36 N.J. L. 29; 13 Am. Rep. 405. But a material misrepresentation by the insured as to the property insured renders the policy void: Note to *Keeler v. Niagara Fire Ins. Co.*, 84 Am. Dec. 719. A misrepresentation renders the policy void on the ground of fraud: Note to *Continental Life Ins. Co. v. Rogers*, 59 Am. Rep. 817; and if it is conditioned to be void "in case of any misrepresentation whatever," any misrepresentation, whether material or not, will avoid it: *Graham v. Fireman's Ins. Co.*, 87 N.Y. 69; 41 Am. Rep. 349. Fraud in any part of a formal statement of losses taints the whole, especially where the policy contains a stipulation that "any fraud, or attempted fraud, or false swearing on the part of the assured shall cause the forfeiture of all claims under this policy": *Doloff v. Phoenix Ins. Co.*, 82 Me. 266; 17 Am. St. Rep. 482. This case shows that false swearing alone, without its operating as a fraud upon the company, forfeits the policy.

NEW TRIAL.—A motion for a new trial, on the ground of newly discovered evidence, will not be granted, though the evidence might have justified a different result, if the court is satisfied that substantial justice has been done between the parties: *Smith v. Shultz*, 1 Scam. 490; 52 Am. Dec. 83. A new trial will not be granted on the ground of newly discovered evidence, unless it appears that such evidence, if received at the former trial, ought to or might have changed the result: *Fleet v. Hollenkemp*, 13 B. Mon. 219; 56 Am. Dec. 563. It will not be granted when such evidence will not change the result: *McClusky v. Gerhauser*, 2 Nev. 47; 90 Am. Dec. 512.

LARRABEE v. HASCALL.

[88 MAINE, 511.]

GIFT CAUSA MORTIS—PASS-BOOK AND ORDER ON BANK.—The delivery of a savings bank pass-book, with an order upon the bank to pay a specific part of the deposit represented by the pass-book to the payee of the order; though accompanied by a declaration of trust, is a valid gift causa mortis, when made during the donor's last sickness.

GIFT CAUSA MORTIS—DELIVERY.—Actual delivery of property as a gift, so far as the nature of it will admit of delivery, together with a delivery of the evidence and means of reducing the gift to possession, is sufficient, so far as the element of delivery is concerned, to pass the title as a gift causa mortis.

GIFT CAUSA MORTIS—TERMS AND QUALIFICATIONS.—The fact that the donee of a gift takes it upon the terms and qualifications annexed to it as prescribed by the donor will not defeat it, or affect its validity as a gift causa mortis.

GIFT CAUSA MORTIS—REQUISITES—IN EXTREMIS.—It is essential to the validity of a gift causa mortis that it be made under apprehension of death from some present disease, or other impending peril, though it is not necessary that the donor should die of the disease from which he apprehended death. Neither is it necessary that the gift should be made in extremis, when there is no time or opportunity to make a will; and there is no limit of time within which the donor must die to make such a gift valid. The only rule is, that he must not recover from that illness.

GIFT CAUSA MORTIS—PASS-BOOK AND ORDER ON BANK FOR PART OF DEPOSIT.—If one, during his last sickness, six weeks before his death, delivers to his nurse and attendant a savings bank pass-book, with an order upon the bank to pay a specific part of the deposit represented by the pass-book to the payee of the order, saying: "Take this, Jim; when I am gone, draw the money, put a monument over my brother Stillman's grave, pay my funeral expenses, and the rest is yours"; and the payee, two days after the donor's death, draws the amount of the order, and surrenders the book, representing the remainder of the deposit, to the administrator, the order, accompanied by a delivery of the bank-book, constitutes an equitable assignment and valid transfer of the amount represented by the order, though it is not for the full amount, and the donee, having executed the trust, is not liable to the administrator for the money drawn on the order.

Action by Albert W. Larrabee, as administrator of John P. Larrabee, deceased, to recover a certain sum of money from the defendant.

A. R. Savage and H. W. Oakes, for the plaintiff.

W. H. Newell and W. B. Skelton, for the defendant.

515 FOSTER, J. The plaintiff, as administrator of John P. Larrabee, deceased, brings this suit to recover of the defendant the sum of two hundred dollars, which he claims to belong to the estate of the deceased, drawn by the defendant from the Auburn Savings Bank, two days after the decease of the intestate, upon the following order:

"West Durham, April 25, 1892.

"To the Treasurer of the Auburn Savings Bank:

"Pay to James A. Hascall two hundred dollars, and charge the same to Deposit Book No. 11875.

"JOHN P. LARRABEE.

"Witness, Charles H. Hascall."

The case shows that deceased was seventy-two years old, lived alone, and had been sick for about six months prior to his decease, and from this sickness he died. It appears that the defendant nursed and cared for him for about three months ⁵¹⁶ prior to his death, which occurred June 11, 1892. When the order was drawn, and at the time of his death, the deceased had a deposit in the Auburn Savings Bank for four hundred and eighty-six dollars and twenty-six cents. At the time the order was drawn and signed, the deceased delivered it, together with the savings bank book, to the defendant, saying to him: "Take this, Jim; when I am gone, draw the money, put a monument over my brother Stillman's grave, pay my funeral expenses, and the rest is yours."

The defendant took the order and book, and retained them in his possession till after the decease of said Larrabee. Two days after his decease, the defendant presented the order and book to the bank, and drew the two hundred dollars, and afterward surrendered the bank-book, with the remainder of the deposit therein, to the administrator, who demanded that he should pay over the two hundred dollars to him.

Subsequently, the defendant paid out from the sum, thus drawn upon the order, all but twelve dollars for the funeral expenses of the deceased and for the monument of his brother Stillman, in accordance with the request of said deceased at the time the order and bank-book were delivered to him.

We do not think, from the facts as they appear, that the plaintiff is entitled to recover.

Had the order been for the full amount represented by the savings bank book, there could be no question but that such an order, accompanied by the bank-book, would constitute a valid transfer of the funds, without further notice, or even an acceptance of the order by the bank: *Kingman v. Perkins*, 105 Mass. 111; *Kimball v. Leland*, 110 Mass. 325; *Foss v. Lowell* etc. Sav. Bank, 111 Mass. 285.

In *Kimball v. Leland*, 110 Mass. 325, a depositor delivered an order for the payment of the deposit, and also the bank-book, to a person for the purpose of transferring the money repre-

sented by the order and book. The order and bank-book were not presented to the bank till after the death of the donor, and it was held that such order and delivery of the bank-book constituted a complete transfer as against the next of kin of the donor, notwithstanding the money was not drawn during the life of the ⁵¹⁷ donor. Nor is there any doubt that an order for a specific fund, which is identified by the order itself, would constitute a valid assignment of that fund, as was held in *Kingman v. Perkins*, 105 Mass. 111; *Holbrook v. Payne*, 151 Mass. 383, 384; 21 Am. St. Rep. 456. And so would an order for a part only of an entire debt, or demand, constitute an equitable assignment to a party so as to be good as between him and the debtor upon trustee process in cases where just and equitable results may be accomplished thereby: *Exchange Bank v. McLoon*, 73 Me. 498; 40 Am. Rep. 388; *Roberts v. Noyes*, 76 Me. 590, 593; *Horne v. Stevens*, 79 Me. 262; *Dana v. Third Nat. Bank*, 13 Allen, 445, 447; 90 Am. Dec. 216; *James v. Newton*, 142 Mass. 366, 374; 56 Am. Rep. 692.

In the case at bar, the order, it is true, was not for the full amount of the deposit represented by the bank-book, but, notwithstanding that fact, the intention of the deceased is clearly manifest, and that was to transfer a specific and definite sum. With the delivery of that order and the bank-book to the defendant, we are unable to perceive any valid reason why the deceased did not thereby transfer his title to that specific sum as effectually as though it had been for the entire amount of the deposit: *Brill v. Tuttle*, 81 N. Y. 454; 37 Am. Rep. 515. Such was undoubtedly his intention, manifested by the language of the order itself and the attendant circumstances. It was certainly an equitable assignment, and it is held, both in England and this country, that any delivery of property which transfers to the donee either the legal or equitable title is sufficient to effectuate a gift: *Ridden v. Thrall*, 125 N. Y. 572, 577; 21 Am. St. Rep. 758, and cases there cited; *Basket v. Hassell*, 107 U. S. 602, 610. In *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515, the New York decisions are reviewed, and it is there held that if the language is ambiguous, and the order not negotiable, "the attendant circumstances may be shown to determine the intention and understanding of the parties." There is a distinction to be noticed between those instruments which are in form negotiable, and on their face show that they were drawn upon a particular fund, and those that are not negotiable: *Holbrook v. Payne*, 151 Mass. 383, 384; 21 Am. St. Rep. 456; *Whitney v. Eliot Nat. Bank*, 137 Mass. 351, 355; 50 Am. Rep. 316.

518 In this case, the order was not negotiable. It was signed by the deceased, and the same, together with the bank-book, was delivered to the defendant in the presence of the person who witnessed it. At the same time, there was a declaration of trust, that the defendant was to take the same, and when the deceased was gone, to draw the money, put a monument over his brother's grave, pay his funeral expenses, and the rest to keep for himself. This was a gift coupled with a trust which the defendant has executed.

This delivery of the evidence and means of reducing the gift to possession, was sufficient, so far as the element of delivery was concerned, to pass the title as a gift *causa mortis*. There was actual delivery so far as the nature of the property would admit of: *Hatch v. Atkinson*, 56 Me. 324; 96 Am. Dec. 464; *Hill v. Stevenson*, 63 Me. 364; 18 Am. Rep. 231; *Curtis v. Portland Sav. Bank*, 77 Me. 151, 153; 52 Am. Rep. 750; *Barker v. Frye*, 75 Me. 29, 33; *Drew v. Hagerty*, 81 Me. 231; 10 Am. St. Rep. 255; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425; 37 Am. Rep. 371.

In *Borneman v. Sidlinger*, 15 Me. 429, 33 Am. Dec. 626, it was held that a negotiable promissory note, payable to order, may be the proper subject of a gift *causa mortis* without indorsement; that the equitable interest passes to the donee, and that if there is a mortgage given as collateral security, it would be held in trust for his benefit, and may be enforced in the name of the representative of the donor, as the note may be, also, if necessary. The same doctrine is established in several Massachusetts cases, among which are *Bates v. Kempton*, 7 Gray, 382, and *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 433; 37 Am. Rep. 371.

So delivery of a bank-book, without an assignment even, passes an equitable title to the fund which it represents: *Grover v. Grover*, 24 Pick. 261; 35 Am. Dec. 319; *Parish v. Stone*, 14 Pick. 198; 25 Am. Dec. 378; *Basket v. Hassell*, 107 U. S. 602, 611.

Applying to this case the strictest rules laid down in the decided cases as necessary to constitute a valid gift *causa mortis*, and it will stand the test. This delivery, accompanied by the declaration of trust, was the unmistakable manifestation of the intention of the donor of making a final disposition of the two hundred dollars represented by the order and bank-book, 519 and was a valid gift *causa mortis*. The defendant held the same in trust upon the terms expressly prescribed by the donor at the time the gift was perfected by delivery to him: Clough

v. Clough, 117 Mass. 83; Sheedy v. Roach, 124 Mass. 472; 26 Am. Rep. 680.

Nor does the fact that the defendant, as donee, took the gift upon the terms and qualifications annexed to it, as prescribed by the donor, defeat it, or affect its validity as a gift *causa mortis*: Dresser v. Dresser, 46 Me. 48; Borneman v. Sidlinger, 15 Me. 429; 33 Am. Dec. 626; Borneman v. Sidlinger, 21 Me. 185; Curtis v. Portland Sav. Bank, 77 Me. 151, 153; 52 Am. Rep. 750; Clough v. Clough, 117 Mass. 83; Hills v. Hills, 8 Mees. & W. 401.

In the case of Curtis v. Portland Sav. Bank, 77 Me. 151, 52 Am. Rep. 750, there was a delivery of the bank-book, and accompanying the gift was this language by the donor: "Now keep this, and if anything happens to me, bury me decently, and put a headstone over me, and anything that is left is yours." The court there held that the gift was valid as *causa mortis*, and that it was coupled with the trust that the donee should provide for the funeral expenses of the donor, and see that a headstone was furnished in accordance with the declaration of trust.

A gift of this nature cannot avail against creditors, and the donee would take it subject to the right of the administrator to reclaim it if necessary for the payment of debts of the deceased: Mitchell v. Pease, 7 Cush. 350. But there being no creditors whose rights could be affected by it, the transaction was one where the administrator stands in no better position than would the deceased himself, and is equally effectual whether with or without consideration.

It is true that the donor did not die for a month and a half after the gift was made, yet at the time it was made he was suffering from the sickness from which he died. He was under the apprehension of death, and was then so sick that he required a nurse, and this sickness continued to increase until it terminated in death.

In Ridden v. Thrall, 125 N. Y. 572, 21 Am. St. Rep. 758, in an action to determine the title to certain funds deposited in various savings banks, where the donor had delivered a box containing his bank-books ⁵²⁰ to the donee, the court, in discussing the elements necessary to constitute a gift *causa mortis*, held that, to sustain such gift, it must be made under apprehension of death from some present disease, or other impending peril, though it was not necessary to the validity of the gift that the donor should die of the disease from which he apprehended death; and that the gift would become void by recovery from the disease, or escape

from the peril; but that it was not necessary that the gift should be made in extremis and when there is no time or opportunity to make a will, and that it would be sufficient to render the gift effectual if, before his recovery from the disease from which he apprehended death, he should die from some other disease existing at the same time. "In many of the reported cases," say the court, "the gift was made weeks, and even months, before the death of the donor, when there was abundant time and opportunity for him to have made a will": 2 Kent's Commentaries, 444; Story's Equity Jurisprudence, secs. 606, 607; 3 Pomeroy's Equity Jurisprudence, sec. 1146; Grymes v. Hone, 49 N. Y. 17, 21; 10 Am. Rep. 313. In the case last cited, the court say: "True, the donor died five months thereafter; but we are referred to no case or principle that limits the time within which the donor must die to make such a gift valid. The only rule is, that he must not recover from that illness": See, also, Williams v. Guile, 117 N. Y. 343.

In the case before us, the gift was made during the last sickness of the donor; it was evidenced by every element necessary to constitute a valid gift; it was coupled with a trust reposed in, and conferred upon, the defendant to perform certain duties, the terms of which were to be performed after the decease of the donor. That trust appears to have been fully and faithfully executed. The title to the property, therefore, so far as the deceased, his administrator and the bank were concerned, was, by the order in writing and the delivery of the same together with the savings bank book, vested in the defendant.

Judgment for defendant.

GIFTS CAUSA MORTIS—PASS-BOOK OF BANKS.—A *donatio causa mortis* must be completely executed, so far as delivery is concerned, in the lifetime of the donor, precisely as required in the case of gifts *inter vivos*. To constitute a valid gift there must be a delivery of the property with intent on the donor's part to divest himself of title and possession. Any delivery is sufficient which is as complete as the nature of the thing given and the circumstances of the parties permit, and which enables the donee to obtain control of the object which it is intended to transfer: *Orook v. First Nat. Bank*, 83 Wis. 31; 35 Am. St. Rep. 17; *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531; *Drew v. Hagerty*, 81 Me. 231; 10 Am. St. Rep. 255; *Love v. Francis*, 63 Mich. 181; 6 Am. St. Rep. 290. To make valid a gift *causa mortis*, either the thing given, or the means of reducing it to possession, should be delivered to the donee: *Note to Thomas v. Lewis*, 37 Am. St. Rep. 848. A gift *causa mortis* of money deposited in a savings bank may be consummated by a delivery to the donee of the bank-book representing the deposit: *Jones v. Weakley*, 99 Ala. 441; 42 Am. St. Rep. 84, 877; *Drew v. Hagerty*, 81 Me. 231; 10 Am. St. Rep. 255; *Brunn v. Schuett*, 48 Am. Rep. 510, and note. *Contra*, notes to *Bradley v. Hunt*, 23 Am. Dec. 603. The gift of a savings bank book *causa mortis* carries the deposit without any assignment: *Pierce v. Boston Five Cents Savings Bank*, 129

Mass. 425; 37 Am. Rep. 371; Tillinghast v. Wheaton, 8 R. I. 536; 94 Am. Dec. 126; if such is the intention of the donor: Jones v. Weakley, 99 Ala. 441; 42 Am. St. Rep. 84. The delivery of a savings bank pass-book, with an assignment of the deposit, is a valid gift causa mortis: Sheedy v. Roach, 124 Mass. 472; 26 Am. Rep. 680. There is a distinction, however, between cases where the delivery is that of a savings bank book and that of an ordinary bank of deposit. In the latter case the delivery of the pass-book showing the amount of a deposit is not sufficient to perfect a gift causa mortis of the money on deposit: Jones v. Weakley, 99 Ala. 441; 42 Am. St. Rep. 84; Thomas v. Lewis, 89 Va. 1; 37 Am. St. Rep. 848. A gift of savings bank books, causa mortis, is good, especially where it appears certain from the whole evidence that the donor intended to bestow his estate on the donee, and died in the belief that he had done so: Goulding v. Horbury, 85 Me. 227; 35 Am. St. Rep. 357. A gift causa mortis must be in apprehension of some present disease or some other impending peril, and becomes void upon recovery from the disease or escape from the peril. If the donor does not recover, the gift is good, though death results from a cause not apprehended by him. Such a gift need not be made in extremis when there is no time or opportunity to make a will: Ridden v. Thrall, 125 N. Y. 572; 21 Am. St. Rep. 758.

BEARCE v. BASS.

[88 MAINE, 521.]

LIBEL.—MATTERS OF PUBLIC INTEREST AND CONCERN are legitimate subjects of newspaper criticism. Every one has a right to comment on such matters, so long as he does so fairly and with an honest purpose. Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously. They are not libelous without the averment and proof of special damage, unless they go further and attack some individual connected with such matters.

LIBEL.—CRITICISM OF PUBLIC WORK—DEFAMATION OF PERSON.—So long as comment and criticism upon a public work are confined to it, and are fair and reasonable, there is no libel, because there is no defamation of the individual who performed the work, and it cannot be made libelous by any attack upon the private or business reputation of some other person, however much malice may exist; but when it becomes an attack upon the private or business character of the one who performed the work, the element of malice comes in and stamps the language as libelous.

LIBEL.—MATTERS OF PUBLIC INTEREST—PRIVILEGED COMMUNICATION.—In regard to matters of public interest, all that is necessary to render the words spoken or published privileged is, that they should be communicated in good faith, without malice, to those who have an interest in the subject matter to which they refer, and in an honest belief that the communication is true, such belief being founded on reasonable and probable grounds.

LIBEL.—PRIVILEGED COMMUNICATION—BURDEN OF PROOF.—If the matter complained of as libelous is privileged, the burden of proving malice lies on the plaintiff, and the defendant cannot be called on to prove that he was not actuated by malice until some evidence of malice, more than a mere scintilla, has been adduced by the plaintiff.

LIBEL.—INNUENDO.—The office of an innuendo is to explain what has already been expressed; but not to enlarge or change the sense of the previous words.

LIBEL—LEGITIMATE MATTER FOR PUBLIC DISCUSSION. The character of the construction of a public building, such as a city hall, is a matter of public importance and interest to the inhabitants and taxpayers, and is, therefore, a legitimate matter for public discussion by newspapers, as well as all others interested in the construction of such an important public work.

LIBEL—CONSTRUCTION OF CITY HALL—PRIVILEGED COMMUNICATION.—The plaintiffs had contracted to build the Bangor city hall, a public building designed to be used and occupied by the government of the city for public purposes, estimated to cost one hundred thousand dollars, but ultimately costing considerably more than that amount. During the construction of the building, and while an election for mayor was pending, the defendants published what was claimed to be a libelous article in their paper. That portion of it claimed to be libelous was as follows: "The mason work is of the poorest quality, and it should not be accepted by the city. Too much sand has been used in the mortar, and to such an extent that it does not prevent the alkali, which is the life of the mortar, from running out, as can be seen by the white appearance of the building. Very many of the bricks are loose, the mortar being too lifeless to hold them together and the contractors should be obliged to take down and replace the imperfect sections of the walls. The doings of the old Tweed ring, in New York, were no worse than much that has been done in connection with our city building." This language was held to be a privileged communication, and not libelous, as it was but a fair and reasonable criticism upon the work which entered into the construction of the building, and did not attack the character of the plaintiffs, either as individuals or in their business as contractors.

A. R. Savage and H. W. Oakes, for the plaintiffs.

F. H. Appleton, H. R. Chaplin, and Seth M. Carter, for the defendants.

538 **FOSTER, J.** This is an action of libel brought by the plaintiffs for the recovery of damages for defamation of themselves in their business, as contractors, against the defendants as proprietors of the Bangor Daily Commercial, by means of an article published in that paper, on March 28, 1894.

A verdict of fifteen hundred and eight dollars and three cents was found for the plaintiffs, and the case comes before this court upon motion and exceptions by the defendants.

The publication of the alleged libel was during the progress of a municipal campaign in Bangor, in which the election of F. O. Beal for mayor was then pending. The plaintiffs had contracted to build the Bangor city hall, a public building designed to be used and occupied by the government of the city for public purposes, estimated to cost one hundred thousand dollars, but ultimately costing considerably more than that amount. The mason work had been suspended during the cold weather, and at the time of the publication of the alleged libel, the building, although in the process of construction, was in an incomplete and unfinished condition. The character of the construction of such a building was a matter of public importance,

and of interest to the inhabitants and taxpayers of Bangor, and was, therefore, a matter of legitimate public discussion by the defendants, as well as all others who had, in common with the rest of the community, a public and a private pecuniary interest in this important public work.

⁵³⁹ While the construction of this building was in progress, and while an election for mayor was pending, who was to be ex officio chairman of the building committee, an article was published by the defendants in their paper, and that portion of which claimed to be libelous is as follows:

"The mason work is of the poorest quality, and it should not be accepted by the city. Too much sand has been used in the mortar, and to such an extent that it does not prevent the alkali, which is the life of the mortar, from running out, as can be seen by the white appearance of the building. Very many of the bricks are loose, the mortar being too lifeless to hold them together, and the contractors should be obliged to take down and replace the imperfect sections of the walls.

"The doings of the old Tweed ring in New York were no worse than much that has been done in connection with our city building."

The defendants contend that these words are not actionable, and constitute no libel upon the plaintiffs in the way of their trade, business, or occupation as contractors as alleged; and, moreover, that the last allegation does not refer to them; and that the article, as a whole, is only fair and reasonable comment and criticism upon a public work made to the public by interested citizens and taxpayers.

Two things are necessary for the maintenance of this defense: 1. That the comment or criticism upon the plaintiffs' work should be fair and reasonable; 2. That it should be without malice toward them individually or in their business as contractors.

The question is, therefore, whether the language used imports any personal reflection or attack upon the character of these plaintiffs, either as individuals or in their business as contractors, or whether it is merely a disparagement of the work done by them.

Everyone has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously. Thus ⁵⁴⁰ it has been held that books, prints, pictures, and statuary publicly exhibited, and the architecture of public buildings, are all the legitimate subjects of newspaper criticism, and such criticism,

fairly and honestly made, is not libelous, however strong the terms of censure may be, without the averment and proof of special damage, unless it goes farther and attacks the individual: *Dooling v. Budget Pub. Co.*, 144 Mass. 258; 59 Am. Rep. 83; *Gott v. Pulsifer*, 123 Mass. 235; 23 Am. Rep. 322; *Tobias v. Harland*, 4 Wend. 537; *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; *Merivale v. Carson*, 20 Q. B. Div. 275.

In *Crane v. Waters*, 10 Fed. Rep. 619, it was held that the safety of a bridge on the line of a railroad was matter in which the public were concerned; and that a newspaper might discuss the construction of the bridge, even though the effect of such discussion and criticism was, to some extent, a reflection upon the character of the builder.

So, too, upon the same principle, it has been held to be within the proper limits of criticism to publish of a newspaper that it is the most vulgar, ignorant, and scurrilous journal ever published in Great Britain; for this affected the character of the newspaper only, and not, except remotely, the character or reputation of the person publishing it: *Heriot v. Stuart*, 1 Esp. 437.

The cases are numerous where this principle has been applied, and the doctrine upon which they are founded is one of universal application, that the public convenience is to be preferred to private interests, and that every man has a right to discuss freely, so long as he does it honestly and without malice, any subject in which the public are generally interested, and to state his own views for the consideration of all or any of those who have a common interest in the subject: *Henwood v. Harrison*, L. R. 7 Com. P. 606, 621, 622.

Applying this rule to the case at bar, we think the language complained of is but a fair and reasonable criticism upon the work which entered into the construction of this public building. The mason work is criticised as being of the poorest quality, and ought not to be accepted by the city. The mortar ⁵⁴¹ is criticised as containing too much sand. Criticism is also made that very many of the bricks are loose, the mortar being too lifeless to hold them together, and that the imperfect sections of the wall should be taken down by the contractors. No attack is made upon the character of these plaintiffs, either as individuals or in their business as contractors. The criticism is not of them, but of the work done by them.

But the plaintiffs contend that these assertions charge the plaintiffs with not doing the work according to contract, and that, therefore, the words become defamatory of the plaintiffs in their

business. If this be true, then it must follow, as a legal conclusion, that no criticism, however fair and reasonable, could ever be made upon the work which entered into the construction of any public building, built under contract. To say that an individual, or the public press, should be dumb upon a matter which is of public interest, on the ground that any criticism would impute a breach of contract, and consequently affect the business of the contractors, would amount to an abrogation of that rule of law to which we have referred; and deprive the public of the right of criticism altogether, and that too, in reference to matters in which individuals, citizens, and taxpayers have a common interest.

Certainly, such comment or criticism would seem to be fair and reasonable when temperately written and applied to a state of facts such as this case develops—for a full report of the evidence in relation to the construction of the building is before us—and where the language of the criticism does not go beyond the work and attack the person.

It is sometimes said that fair and honest criticism in matters of public concern is privileged. But this is not true in a strict legal sense. The distinction between fair and reasonable comment and criticism, and privileged communications, is this: That in the latter case, the words may be defamatory, but the defamation is excused or justified by reason of the occasion; while in the former case, the words are not defamatory of the plaintiff, and hence not libelous—the stricture or criticism is not upon the person himself, but upon his work. So long, ⁵⁴² therefore, as the criticism is confined to his work, and does not attack the moral character or professional integrity of the individual, and is fair and reasonable, there is no libel, because there is no defamation of the man himself. But, when the comment or criticism of the man's work becomes an attack on his private or business character, then the element of malice comes in and stamps the language as libelous: *Fraser v. Berkeley*, 7 Car. & P. 621.

In this case, it is conceded that the defendants bore no malice whatever toward these plaintiffs, the evidence being that they were not acquainted with each other and never had either social or business relations. If, therefore, the defendants' criticism of the plaintiffs' work was fair and reasonable, and had no reference to their private or business character, and there was no proof of actual malice on the part of the defendants toward the plaintiffs, then, however much malice may have existed between the defendants and Mr. Beal, cannot make the defendants' criticism

libelous. If the criticism of the defendants was fair and reasonable, and in reference to a matter of public concern, and the plaintiffs are not attacked either in their private or business reputation, then it constitutes no libel, because not defamatory; and it cannot be made libelous by any attack upon the private or business reputation of some person other than the plaintiffs, no matter to what extent such malice may exist: *Odgers on Libel*, 39, 268; *Newell on Libel*, 324.

Moreover, we are of opinion that the alleged libel was a privileged communication. The principle applicable to cases in which the claim of privilege is set up is well settled. The difficulty more frequently lies in its application.

In general, an action lies for the publication of statements which are false and injurious to the character of another, for the reputation and character of individuals should not be wantonly and unnecessarily assailed. And the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs where his interest is ⁵⁴³ concerned. In regard to matters of public interest, all that is necessary to render the words spoken or published privileged is, that they should be communicated in good faith, without malice, to those who have an interest in the subject matter to which they refer, and in an honest belief that the communication is true, such belief being founded on reasonable and probable grounds. In such cases, the occasion rebuts the inference of malice, which the law would otherwise draw from unauthorized communications, and affords a qualified defense depending upon the absence of actual malice. If fairly warranted by any such occasion or exigency as we have named, and honestly made, upon reasonable and probable grounds, such communications are protected for the common protection and welfare of society.

Upon a careful consideration of the circumstances attending the publication of the article in question, as disclosed from the evidence offered at the trial, we feel warranted in the conclusion that the occasion was one that rendered the publication justifiable and privileged. The defendants were citizens, taxpayers, and publishers of a newspaper in Bangor. The city building was then in process of construction. It had not been accepted by the city. There was indubitable evidence that the mason work was of poor quality and not in conformity to the contract; that the mortar used in the construction of certain parts of the building and the foundation walls was poor and lifeless, and in

many instances the bricks were loose, on account of the inferior quality of the mortar.

The building was of a public nature, in which not only the defendants but every citizen of Bangor was interested. It was a legitimate subject of criticism by those interested in its construction.

The people have a right to know how their municipal affairs are being conducted; how the money which they have contributed by way of taxes is being expended; and they have a right to know how the duties of those whom they have intrusted with the expenditure of such money are being performed, and it is one of the privileges of newspapers to give the people this information; and, if the information so given is true, or if the publishers act in good faith, without malice, believing it to be true, and have reasonable and probable cause for so believing, the law protects them: *Gott v. Pulsifer*, 122 Mass. 235; 23 Am. Rep. 322.

When the matter complained of is privileged, the burden of proving malice lies on the plaintiff, and the defendant cannot be called on to prove that he was not actuated by malice until some evidence of malice more than a mere scintilla has been adduced by the plaintiff.

In this case, we are unable to discover any evidence of malice between the defendants and the plaintiffs. There is nothing upon which a verdict could legally be sustained, and, if there is evidence of any malice, it relates to other parties than these plaintiffs.

In relation to that portion of the alleged libel wherein the "Tweed ring" is referred to, all that need be said is, that it is not susceptible of the meaning ascribed to it by the plaintiffs' innuendo.

By no fair construction of the article can these words be held to apply to the plaintiffs or either of them. The whole trend of the article is in another direction. The plaintiffs are not spoken of; their names are not given, nor is there any reference to their occupation, directly or indirectly.

The rule is too well settled to need citation of authority, that an innuendo "is only explanatory of some matter already expressed; it serves to point out when there is precedent matter, but never for a new charge; it may apply to what is already expressed, but cannot add to, or enlarge, or change the sense of the previous words": 1 Chitty on Pleading, 407; 1 Wm. Saund. 243 a, note 4; *Emery v. Prescott*, 54 Me. 389.

It is the province of the court to determine, in the first instance, whether the language published is reasonably susceptible of the meaning ascribed to it by the plaintiffs' innuendo. If it is not susceptible of such meaning, and the language is not upon its face defamatory of the plaintiffs, then they have no ground of action in reference to that particular charge.

The construction to be put upon this particular part of the alleged libelous publication must be that which is consistent ⁵⁴⁵ with the whole article, that which follows, as well as that which precedes. When viewed in this light, it will be found that it will not reasonably bear the meaning attributed to it by the innuendo. The plaintiffs' whole scheme of defamation, upon this point, depends upon the alleged charge of conspiracy between the agents or servants of the city of Bangor and themselves, in pursuance of which they were to corruptly divide with them the proceeds arising from their contract to build the city hall. This is the interpretation they placed upon the language by their innuendo, and by it they are bound: *Williams v. Stott*, 1 *Crompt. & M.* 675. But there is no suggestion of the charge of conspiracy to be found anywhere in the published article, either to divide the proceeds of the contract or anything else; nor does it attribute the ill-treatment of the local contractors to these plaintiffs, either directly or indirectly. On the contrary, it excludes the plaintiffs from such an imputation by charging the whole matter upon the mayor, who was then a candidate for re-election.

The interpretation which the plaintiffs have seen fit to ascribe to it is contrary to the whole spirit of the publication, and perverts the idea which its language plainly conveys. It contains no insinuation of fraud, or criminal intent, or moral turpitude on the part of the plaintiffs. It does arraign the mayor, charging him with bossism, with a contemptuous indifference to public opinion and the rights of the public, with an arrogant assumption of power and control over the disposition of submitted bids, and censures his methods, calling him king boss, and charging him as responsible for the alleged unfair treatment of the local contractors. It compares these acts of his with the doings of the Tweed ring.

It is the opinion of the court that the motion for a new trial should be sustained and a new trial granted.

Motion sustained.

LIBEL — PRIVILEGED COMMUNICATIONS. — MATTERS OF PUBLIC INTEREST are lawful subjects of public comment, but an action for a false and malicious statement concerning the plaintiff's

property is not an action for a libel upon the plaintiff himself. The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon any matter of public interest, and such publication is a privileged communication for which no action can be maintained without proof of actual malice: See monographic note to *McAlister v. Detroit Free Press Co.*, 15 Am. St. Rep. 358, 360. A communication made in good faith, in reference to a matter in which the person communicating has an interest, or in which the public is interested, is privileged, if made to another for the purpose of protecting that interest; or if it is made in the discharge of a duty, and looking to the prevention of wrong toward another or the public, it is privileged if made in good faith; and, in such case, even if the statement made is untrue, malice is not implied, but must be proved: *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 588; 15 Am. St. Rep. 794; note to *Byam v. Collins*, 7 Am. St. Rep. 737-741; *Upton v. Hume*, 24 Or. 420; 41 Am. St. Rep. 863, and note.

LIBEL — PRIVILEGED COMMUNICATIONS — BURDEN OF PROOF—INNUENDO.—If a communication, alleged to be libelous, is privileged, the burden is upon the plaintiff to show that it was maliciously made: Note to *Alabama etc. Ry. Co. v. Brooks*, 30 Am. St. Rep. 533; *Byam v. Collins*, 111 N. Y. 148; 7 Am. St. Rep. 728, and note. The office of an innuendo is to aver the meaning of the language published; to define the defamatory meaning the plaintiff put upon the words: Note to *Collins v. Dispatch Pub. Co.*, 34 Am. St. Rep. 640.

CASES
IN THE
SUPREME COURT
OF
MARYLAND.

HEISKELL v. ROLLINS.

[82 MARYLAND, 14.]

EVIDENCE.—ENTRIES MADE BY A CLERK in the regular course of business, he having no interest at the time in the state of the entries, should be received in evidence, if he is beyond the state or otherwise beyond the jurisdiction of the court.

W. I. Hill and Charles H. Stanley, for the appellant.

George C. Merrick, for the appellee.

¹⁵ **McSHERRY, J.** During the last April term of this court, an appeal in this case was dismissed, because it had been prematurely taken. The record is again before us upon a subsequent appeal entered in due season, and the questions that it brings up, or purports to bring up, are contained in two bills of exception. The suit below was instituted by the appellants against the appellee, upon two promissory notes and an open account. Several pleas were filed, and upon these issues appear to have been joined. The verdict of the jury and the judgment thereon were in favor of the appellant, for the amount of but one of the promissory notes. During the progress of the trial, the appellant, to establish the items of the open account, produced a witness to prove the handwriting of the clerk who had made the entries on the plaintiff's day-book. This witness testified that he had been informed the clerk was in England; that an effort had been made to produce him as a witness, and that when last in this country he was beyond the jurisdiction of the court. The defendant objected to any proof of the clerk's handwriting; the court sus-

tained that objection, and the plaintiff excepted. This is the ruling complained of in the first bill of exception.

We think there was error in this ruling. The proffered evidence falls within one of the well-recognized exceptions to the general rule excluding hearsay evidence. It has been long held that entries made by a clerk in the regular course of business, he having no interest at the time in stating an untruth, should be received in evidence after the clerk's death on proof of his handwriting: 1 Smith's Leading Cases, 142. The rule has been extended to cases of insanity: *Holbrook v. Gay*, 6 Cush. 216; and several of the cases referred to in the note in 1 Smith's Leading Cases, have held such entries equally admissible where the witness is absent from the state.

¹⁶ This court adopted that doctrine in *Reynolds v. Manning*, 15 Md. 523, which was approved in *Morris v. Columbian Iron Works*, 76 Md. 357. It is obvious that precisely the same reasons that justify, after the decease of the clerk, the admission in evidence of the entries made by him in the regular and accustomed course of his employment, warrant the admission of similar entries, if his attendance as a witness cannot be procured by reason of his being beyond the seas, or out of the jurisdiction of the court where the cause in which his evidence is required may be pending. The inability to produce the witness if he be dead permits proof of his handwriting to be given as sufficient to establish *prima facie* the truth of the entries he has made; and a like inability arising from his absence from the state, and from his being, therefore, beyond the reach of the process of the court and not accessible to a commission, is equally a good ground for admitting proof of his handwriting. The proffered evidence was, consequently, competent, and should have been admitted.

The second exception is so obscurely and vaguely stated that we are unable to determine what precise question was ruled on or how it related to the controverted issues. We are consequently prevented from expressing any opinion on the question argued in the briefs, but not set forth with sufficient clearness in the exception.

Because of the error indicated in the first exception, the judgment must be reversed, and a new trial will be awarded.

Judgment reversed with costs above and below, and new trial awarded.

EVIDENCE.—AN ACCOUNT-BOOK OF ORIGINAL ENTRIES fair on its face and shown to have been kept in the usual course of business is admissible in evidence even in favor of the party by whom it is kept: *Anchor Milling Co. v. Walsh*, 108 Mo. 277; 32 Am. St. Rep. 600,

and note. Bank-books of accounts and original entries shown to have been accurately kept and written up each day are admissible in evidence in favor of the bank: *Robinson v. Smith*, 111 Mo. 205; 33 Am. St. Rep. 510; but the books of a private corporation are not admissible as original evidence against third persons of facts therein stated, when the person who made the entries in such books is alive and may be, but is not, called upon to testify concerning the facts detailed therein: *Terry v. Birmingham Nat. Bank*, 93 Ala. 599; 30 Am. St. Rep. 87, and note. When the clerk who makes original entries in books of account has no knowledge of their correctness, but makes them as the items are furnished by another, it is essential that the party furnishing the items should testify as to their correctness, or that satisfactory proof thereof from other sources should be produced, before the books are admissible in evidence: *House v. Beak*, 141 Ill. 290; 33 Am. St. Rep. 307, and note.

AGRICULTURAL INSURANCE COMPANY v. HAMILTON

[82 MARYLAND, 88.]

INSURANCE, CONDITION AGAINST PREMISES BECOMING VACANT.—A condition in a policy of insurance against loss by fire that the policy shall be void if the building therein described be or become vacant or unoccupied, and so remain for ten days, is broken, and the policy made inoperative, if, such building being a dwelling, the insured moves his family to another building, taking all the furniture, except a few beds and some trifling household articles, a trunk containing clothing, and some provisions in a pantry, and the only occupancy of the house is by laborers in the employment of the insured sleeping therein part of the time, and his wife going there every day to get provisions.

AN INSURED DWELLING MUST BE DEEMED VACANT and unoccupied unless it is used as a place of abode or habitation. Though used otherwise than as a place of abode, it must be regarded as vacant and unoccupied. Casual sleeping in the house does not constitute an occupancy of it.

INSURANCE POLICY, ENTIRETY OF.—If a policy of insurance covers both a building and personal property therein contained and contains a condition making it void if the building becomes vacant and unoccupied, it becomes wholly void on breach of the condition, and therefore no recovery can be had thereunder as to the personal property.

INSURANCE.—**MORTGAGEE** to whom loss is made payable cannot recover if there has been a breach by the assured of a condition rendering the policy void.

Frank E. Gorrell and Thomas H. Robinson, for the appellant.

Stevenson A. Williams, William Harlan, and J. Thomas C. Hopkins, for the appellee.

⁸⁹ **McSHERRY, J.** On the 11th of June, 1889, the appellant, a fire insurance company, wrote a policy of insurance upon the dwelling-house, barn, and personal property of the appellee insuring the same against loss by fire for the term of three years. Upon the expiration of this policy in 1892, a second one for the same amount, for another term of three years, and covering the same property, was issued by the same company. At the time

the first policy bears date, and continuously on from then until the month of December, 1892, the dwelling-house covered by the policy was actually occupied by the appellee and his family as a place of abode; but in December, 1892, he and his family moved out of the house and went into and occupied another dwelling some few hundred yards away and located on the opposite side of a public highway. He took with him nearly all his furniture, though he left in the house from which he moved a few beds and some trifling household articles, a trunk containing clothing, and some provisions stored in a pantry. He and his family ceased to live in the house mentioned in the policy. On the 27th of December, 1893, the house from which he moved, and which was insured under the policy issued by the appellant, was totally destroyed by fire. Due proof of loss was filed, but the company refused to pay the loss, and based its refusal upon a ground which ⁹⁰ will be stated later on. Thereupon suit was brought on the policy. When both policies were issued the property was subject to a mortgage held by Messrs. Hopkins and Harlan, to whose use the suit was entered just before the trial in the court below, and across the face of both policies there was written in red ink the words, "Loss, if any, payable to mortgagees as interest may appear." Amongst other terms and conditions contained in the policy sued on, it is expressly provided that: "This entire policy, unless otherwise provided by agreement indorsed thereon or added hereto, shall be void . . . if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." For nearly three months after the appellee removed from the insured dwelling no person occupied the house at all, and on March 6, 1893, permission was granted to the insured to remove the household furniture, family provisions, wearing apparel and organ, as insured under the policy, into another dwelling, "the insurance to cease at the former, and apply at the latter, location from" the date just named; but there was no agreement, memorandum, or assent indorsed upon, or added to, the policy that the dwelling-house from which the appellee had previously removed should remain vacant or unoccupied at the risk of the insurer. During a portion of the time from March, 1893, down to the fall of the same year, two and sometimes three of the workmen employed by the appellee upon his farm and in his canning business slept in the house described in the insurance policy, but they did not occupy it during the daytime, and did not cook or eat their meals there. Within a week before the destruction of the house by fire, a man in the service

of the appellee spent one night in the house; and occasionally, whilst the hands slept there, one of the sons of the appellee also slept in the house. During the whole period of time intervening between December, 1892, when the appellee moved out of the house, and December 27, 1893, when the house was burned, the appellee's ⁹¹ wife went daily to the house to get provisions stored and kept there. For a portion of this time a large number of cases of canned goods, manufactured by the appellee, were stored in the house; and at the time of the fire, in addition to the trifling articles of household furniture, the clothing and provisions that were there, some fifty odd bushels of wheat, were stored in one of the first floor rooms. There is no proof as to how the fire originated. When the evidence closed, numerous prayers for instructions were presented by the defendant, but, as the fourth raises the controlling question in the case and embodies the ultimate ground upon which the company resists payment of the demand made upon it, we need neither examine nor consider any of the others. The fourth prayer is in these words: "That there is no evidence in this case that the dwelling-house that was destroyed by fire, as testified to, was occupied as a dwelling, within the proper construction of the policy of insurance offered in evidence in this case, on the twenty-seventh day of December, 1893, or that it had been so occupied at any time within ten days preceding said fire, and that no agreement permitting the property to be vacant and unoccupied was indorsed or added to the policy of insurance offered in evidence, and their verdict must be for the defendant." This, together with several other prayers, was rejected. The verdict and judgment were against the insurance company, and it has brought up this appeal.

The distinct inquiry is thus presented for the first time in this court, as to what is the meaning of the terms "vacant or unoccupied," as applied to dwelling-houses under fire insurance policies embodying a forfeiture clause of the kind we have said the policy sued on contains.

In *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149, and in *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 539, this court repudiated the principle of interpretation adopted in some cases, that insurance contracts are to be construed most strongly against the underwriters; and adopted the sounder view that the intention of the parties, as gathered from the whole instrument, must prevail.

⁹² What, then, is the obvious meaning of the terms "vacant

or unoccupied" as applied to a dwelling-house which, when insured, was inhabited or lived in? A dwelling-house means a place of abode, a habitation—a house occupied or intended to be occupied as a residence. Occupation of a dwelling-house primarily implies a living in it; and, consequently, a fair and reasonable interpretation of the words, "vacant and unoccupied," when used to describe a dwelling-house, would seem to be that the house is without an occupant—without some person living in it. An actual use of the house as a place of abode or habitation is what the insurer contemplates and what the policy designs to secure. When the occupant of a dwelling-house moves out with his family, taking part of his furniture and nearly all his wearing apparel, and makes his place of abode elsewhere, such dwelling-house, whilst thus deserted, must be regarded as unoccupied, that is, vacated, if the word be given its natural and ordinary signification. It is the very situation against the hazards of which the company clearly undertook to guard itself by an express stipulation and condition inserted in the very contract upon which the suit is founded. Obviously, the word "unoccupied," as applied to a dwelling-house in a fire insurance policy, signifies not used as a residence; and, consequently, a designated tenement becomes unoccupied when it is no longer used for the accustomed and ordinary purposes of a dwelling or place of abode. Hence, no matter what other use it may be devoted to, so long as it ceases to be a place of actual abode—a place really occupied as a residence or habitation—it is vacant or unoccupied according to the plain import of those words, and according, too, to the sense in which they are manifestly employed in the contract of insurance. It is not a mere casual or occasional sleeping in a house that constitutes an occupancy of it. The element of a fixed abode is an essential ingredient of every concept of occupancy when applied to a dwelling-house; and the term "unoccupied" is employed to express the directly opposite condition. A political ^{or} a commercial residence does not necessarily involve an actual occupancy of a particular place. Such a residence is largely a question of intention; whereas, an occupancy of a particular place as a dwelling is not a matter of intention at all, but purely one of fact, and is absolutely inseparable from an actual, obvious abiding or living there. The insurance policy has a manifest reference to a continuous physical condition of the house as a habitation, and not to the mental purpose or mere intention of the owner with respect to what he considers his residence. The prohibiting clause was designed to be descriptive of

the thing insured in a particular that affects the hazard of the risk, and was not intended to have relation to the mere intent of the owner. If, therefore, the house be not used as a dwelling-house in which people live and have their abode, it is unoccupied, even though some of the owner's property may be stored there, and even though occasionally someone may sleep there. If used for these last-named purposes, it may be a place of storage or of temporary shelter, but it is obviously no longer occupied as a dwelling-house.

This view is fully supported by numerous well-considered adjudications, to some of which we will now refer. Thus in *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644, the plaintiff was living in the dwelling-house at the time the policy was issued; he left the place in November, leaving the dwelling furnished and in charge of his farmer, who occupied the farmhouse—a different structure—and members of whose family visited and aired the dwelling once a week. The plaintiff and his wife also visited it once a fortnight. Besides the furniture, all the summer clothing of the plaintiff and his family was left in the dwelling. In the following April, the dwelling with its contents was destroyed by fire. In an action upon the policy it was held that the dwelling-house was not occupied within the meaning of the policy, which provided that if the house should “become vacant or unoccupied, and so remain for more than thirty days, without notice,” etc., the policy would be void, and a ⁹⁴ recovery was not allowed. In *Moore v. Phoenix Fire Ins. Co.*, 64 N. H. 140, 10 Am. St. Rep. 384, it was held that a dwelling-house in which no one lived, but in which a former occupant had left some trifling articles of furniture, not of such a character as to be valuable for use elsewhere, was “vacant and unoccupied” within the meaning of those terms as used in the insurance policy. In *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa, 676, it was held that a policy was avoided when the house, between the time that elapsed from the removal of the tenant several days before the fire, until the day of the fire, was unoccupied, except by the presence of the owner for a short time during each day for the purpose of cleaning it up. In *Bonenfant v. American Fire Ins. Co.*, 76 Mich. 653, it was decided that occupancy of premises, within the meaning of a condition in a policy of insurance, implies an actual use of the house as a dwelling-house; and the mere fact that the occupant may have left someone to look after it when he moved out with his furniture and vacated it will not save the forfeiture. In *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99, it was

held that insurers were not liable for loss which occurred at a time when no one lived in the house, though some articles belonging to a recent tenant and some belonging to the insured were in it at the time of the accident, and the land on which the house was situated and which was described in the policy was occupied. In *Halpin v. Aetna Fire Ins. Co.*, 120 N. Y. 70, it was decided that where an insured manufacturing establishment is leased by the insured, and the tenant thereafter ceases business leaving the building closed and in charge of one who lives in a house on the premises some distance from the factory, and who is intrusted with the keys and visited the premises three or four times a week, the premises are unoccupied. In *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 19 Am. St. Rep. 77, it was held that a building is vacant or unoccupied, within the meaning of an insurance policy, which declares that the insurance shall be void in case it ⁹⁵ becomes vacant or unoccupied where a tenant has moved out, although for the purpose of letting new tenants come in, and they intended to move in the next day after the fire occurred, and had already made some repairs on the house, but nothing had been left in it but two or three carpenter's planes. In *Keith v. Quincy Mut. Fire Ins. Co.*, 10 Allen, 228, which case arose under a policy of insurance on a trip-hammer shop, it was held that it was not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around and see if things were right. So a dwelling-house and barn are "unoccupied" if the former is used by the insured and his servants for the sole purpose of taking meals there while working upon an adjacent farm, and the barn is a mere storage room: *Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117; *Reid v. Lancaster Fire Ins. Co.*, 90 N. Y. 382. In *Cook v. Continental Ins. Co.*, 70 Mo. 610, 35 Am. Rep. 438, the court said: "When this policy was issued the plaintiff kept what witness called a 'Ladies' Boarding House,' and had eight girls with her. After she left the premises there was no one living in it. She lived in Kansas City, and Southwick was by her instructed to sleep in the house, but he did not sleep in it after Wednesday night next preceding the Saturday night of the fire. His sleeping there at night was not an occupation of the house within the meaning of the policy. He did not occupy the house during the day. It is true there is more danger from incendiaries at night than in the daytime, but dwelling-houses unoccupied during the day are in more danger from that class than when occu-

pied, and the abandonment of the premises by plaintiff diminished the security against the destruction of the house by fire. . . . 'Occupation of a dwelling-house is living in it.' 'A mere supervision over it is not sufficient.' It was plaintiff's business under the policy, to see that the house was occupied": See, also, *Farmers' Fire Ins. Co. v. Wells*, 42 Ohio St. 519; *Sleeper v. New Hampshire Fire Ins. Co.*, 56 N. H. 401; *North America Fire Ins. Co. v. Zaenger*, 63 ⁹⁶ Ill. 464; *Fitzgerald v. Connecticut Fire Ins. Co.*, 64 Wis. 463; *Stupetski v. Trans-Atlantic Fire Ins. Co.*, 43 Mich. 373; 38 Am. Rep. 195; *Poor v. Humboldt Ins. Co.*, 125 Mass. 274; 28 Am. Rep. 228; *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420; *American Ins. Co. v. Padfield*, 78 Ill. 169.

These adjudged cases, and many more that might be referred to, announce, we think, conclusions entirely in accord with the natural and obvious meaning of the words contained in the restrictive condition to which we have alluded. That the dwelling-house described in the policy sued on was vacant or unoccupied in the sense in which those terms are employed in the policy, at the time the fire occurred, seems to us to admit of no serious controversy, notwithstanding the fact that some of the employes of the plaintiff occasionally slept there, and notwithstanding the further fact that some of the provisions of the plaintiff were kept in the house, and his wife daily visited the house for the purpose of getting provisions therefrom.

But it was insisted that the fourth prayer should not have been granted, because at least some of the personal property contained in the house was covered by the policy, and that the forfeiture of the policy as to the risk upon the house did not involve or carry with it a forfeiture as to the personal property. This position is wholly untenable. When the policy became void because of the nonoccupancy of the house, it became void as an entirety. It was an indivisible and entire contract, and when, by its express terms, it became invalid, it became invalid for all purposes and to all intents. The stipulation in regard to the forfeiture is applicable to the policy as an entirety. This is settled in Maryland beyond contention or controversy: *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 632.

Nor can the fact that the loss was, by indorsement, made payable to the mortgagees as their interest might appear, at all affect the question before us. When a loss has happened that is covered by a valid policy, it is possible that a controversy may arise as to whether a payment has been rightly made to the insured when the policy has prescribed ⁹⁷ that the loss shall be

payable to the mortgagees as their interest may appear. In such cases, it has been held that the insured has no authority by an accord and satisfaction between himself and the company to defeat the right of the mortgagees from recovering the amount due under the policy: *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409. But here the validity of the policy is made to depend upon the insured continuing to occupy the premises, and, no matter to whom the loss may be made payable, it cannot be recovered by anyone, if, by the terms explicitly set forth in the policy, no right of action can accrue at all upon the violation of some specific condition whose observance by the insured is made necessary to fix the insurer's liability.

As we think the circuit court erred in refusing to grant the appellant's fourth prayer, the judgment in favor of the appellee must be reversed; and, as this view of the case is decisive against the right of the appellee to recover at all, a new trial will not be awarded.

Judgment reversed with costs above and below.

INSURANCE—DWELLING-HOUSE—OCCUPANCY—CONSTRUCTION OF.—Occupancy implies actual use of a dwelling-house as such: *Limburg v. German etc. Ins. Co.*, 90 Iowa, 709; 48 Am. St. Rep. 468, and note with the cases collected.

INSURANCE—ENTIRETY OF CONTRACT—REAL AND PERSONAL PROPERTY.—If a policy includes real property and also personal property in the buildings thereon, the risk being distributed—that is to say, certain sums on the buildings and certain other sums on the personal property therein—a misrepresentation in respect to the buildings and which avoids the insurance thereon, also avoids it as to the personal property: *Stevens v. Queen Ins. Co.*, 81 Wis. 335; 29 Am. St. Rep. 905, and note; to the same effect, *Bills v. Hibernia Ins. Co.*, 87 Tex. 547; 47 Am. St. Rep. 121, and note. See, also, the note to *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 28 Am. St. Rep. 677, where the cases are collected.

WESTERN UNION TELEGRAPH COMPANY v. STATE.

[82 MARYLAND, 298.]

STATUTE OF LIMITATIONS, AMENDMENT TO CORRECT A MISNOMER.—Where two corporations have nearly the same name, and the one intended to be sued was designated by the name of the other, and process was served upon an officer who represented both, and the plaintiff, after discovering the misnomer, asked and obtained leave to designate the defendant under its proper name, and amended his pleadings accordingly, such amendment does not operate as the bringing in of a new party or as the commencement of a new action, so as to entitle the defendant to the defense of the statute of limitations, which was not perfect when the action was begun.

NEGLIGENCE.—TO ENTITLE PLAINTIFF to recover in an action alleging his injury by the negligence of the defendant, there should be a stated right on the part of the plaintiff, and duty on the part of the

defendant in respect to that right, and a breach by him of such duty, whereby the plaintiff suffered injury.

TELEGRAPH AND TELEPHONE CORPORATIONS ARE ANSWERABLE IN DAMAGES to a person injured by a wire suspended from one of their poles by their permission, and which, becoming broken, falls across the feed-wire of an electric railway company, and remains there two weeks, and, becoming charged with electricity, is thrown against a person lawfully using a public street, inflicting on him great personal injury.

TELEPHONE AND OTHER CORPORATIONS and persons using electricity in the public streets owe a duty to all persons lawfully using such streets that the use shall be substantially as safe as before the telephone or other electric plant was placed therein.

NEGLIGENCE, PRESUMPTION OF.—Where it is the duty of persons to do their best to keep premises or structures in proper condition, and they are found out of condition, and an accident occurs therefrom, it may fairly be presumed, in the absence of evidence, that they used that care and diligence that they were bound to use, and that there was a defect from which the accident arose.

TELEGRAPH CORPORATIONS—PRESUMPTION OF NEGLIGENCE.—If a wire fastened to a telegraph pole falls upon and crosses the feed-wire of an electric railway, and remains swinging there for two weeks, becoming charged with so much electricity that it inflicts serious injuries to a person with whom it comes in contact, the jury is justified in finding that it became so charged by swinging and rubbing so long against the feed-wire that it wore off the insulating matter.

W. Irvine Cross and George Dobbin Penniman, for the appellants.

Isidor Raynor and Isaac Lobe Strauss, for the appellee.

305 **PAGE, J.** This action was brought against the "Western Union Telegraph Company," and the "City and Suburban Railway Company," to recover damages for the alleged neglect of the defendants, whereby one Michael Nelson lost his life.

In the narratio and summons the telegraph company is referred to as the "Western Union Telegraph Company," but in the bill of particulars, filed with the narratio, the words, "a corporation of the state of New York," are appended to the corporate name. The summons was served on Richard Bloxham, "its manager." During the trial, it appeared from the evidence that there are two companies: one, whose corporate name is the "Western Union Telegraph Company," a corporation of the state of New York, and another whose corporate name is the "Western Union Telegraph Company of Baltimore City," a corporation of the state of Maryland. Richard Bloxham (on whom the writ was served) is the general manager of the former in this state, and the president and manager of the latter. The evidence established the facts, that the pole on which the fatal wire was suspended is the property of the Maryland corporation, and that the New York company neither owned nor controlled poles in that vicinity. There-

upon, the counsel for the plaintiff asked leave to amend the declaration and bill of particulars to conform to the proof, and stated, at the time, that the Maryland company was the one intended to be sued, and it was only because of his want of knowledge as to the correct name of the corporation, that the words, "of Baltimore City," had been omitted. There being no objection, the leave was ³⁰⁶ granted and the amendment made. Mr. Cross, who was the counsel for the defendants, then had his appearance entered for the Western Union Telegraph Company of Baltimore City, and filed the three following pleas, viz: 1. The plea of limitations; 2. That the cause of action did not accrue within twelve months "before the filing of the plaintiff's amended declaration, by which it was made a party to the suit"; and 3. The general issue plea. The plaintiff, having joined issue on the first and third of these pleas, moved to strike out the second; and the action of the court in granting this motion constitutes the defendant's second exception.

It is contended, on behalf of the telegraph company, that by the amendment a new party was made, and was, in fact, so far as it was concerned, the equivalent of bringing a new suit; and therefore a plea which averred that the cause of action did not accrue within twelve months before the filing of the amended declaration, did not improperly set out that provision of the code which provides that actions like the present must be commenced within twelve months after the death of the deceased person: Code, art. 67, sec. 3. But to this we cannot agree. The thirty-sixth section of article 75 of the code provides that no action shall abate by reason of the misnomer of a defendant, but the court, at its discretion, on suggestion, etc., or other proof to the satisfaction of the court, that "by mistake the plaintiff has sued in a wrong name, or that the party summoned in virtue of said writ or action is, in fact, the party intended to be sued by such writ or in such action, may, at any time before judgment, direct the writ or any of the proceedings to be amended by inserting therein the true name" of any defendant. In this case, the summons was served on a person who was an officer of both companies, and upon him as manager of the defendant corporation. He was, in fact, the manager of both. The service was efficient to bring into court either one of the companies. Under the circumstances, it might well happen that an attorney who ³⁰⁷ was closely connected with both, and knew the very slight differences in the two corporate names, might fall into error as to which company was intended to be sued, but, if he did, his

mistake could not operate to deprive the plaintiff of his right, when he discovered there were two companies with names so nearly alike, of designating which of the two he was suing. When, therefore, the suggestion of misnomer was made, with the statement that it was the Maryland corporation which was intended to be sued, and the court, in its discretion, ordered the amendment to be made, not for the purpose of adding a new party, but to correct the name of a party actually summoned, the defendant could thereby acquire no right to interpose any other or different plea than it would have had if it had been correctly named in the first instance. If, upon the amendment being made, the ends of justice required further time, to enable the defendant properly to prepare its case, the court had full power to order a continuance. It does not appear, however, that the counsel for the defendant asked for or desired delay. He could not have been surprised. The narratio disclosed that the negligence complained of was in connection with a wire on Eastern avenue near Luzerne street, and Bloxham, who was manager of both companies, knew, or ought to have known, that the telegraph poles and wires in that locality were owned or controlled by the Maryland company, and that the New York company had none in that vicinity. He therefore must have known that it was the Maryland company that was intended to be sued, and it did not require much mental acuteness to enable him to understand that the misnomer occurred by reason of the very slight difference in the two names. It is plain that the error of the plaintiff's attorney was due to the fact that he did not know that the company he intended to sue had the words "of Baltimore City" as a part of its name, and, as soon as he became better informed, he so stated to the court, and prayed the amendment. To hold, under such circumstances, that the amendment brought in a new party ³⁰⁸ and thereby enabled it to plead limitations, to be computed from the filing of the amended declaration, and not from the commencement of the action, would be a gross injustice to the plaintiff.

It follows from what has been said that we find no error in the second and fourth exceptions, or in the rejection by the court of the second and third prayers of the telegraph company. By the fourth exception, it appears that the defendants were not permitted to offer in evidence the charter of the New York company. But it was not a party to the suit, and the contents of its charter were wholly irrelevant to any of the issues before the court or jury.

The first exception was not referred to in argument, and, we understand, was abandoned. The remaining exceptions present for our consideration the several instructions granted and rejected by the court, and this renders necessary a statement of the main facts of the case.

On August 24, 1893, Michael Nelson, a child of eleven years, while walking on Eastern avenue near Luzerne street, came in contact with a telephone wire which hung from a pole owned and controlled by the Western Union Telegraph Company of Baltimore City. Along that part of Eastern avenue the City and Suburban Railway Company operates one of its lines of electric railway. Its iron poles are placed at intervals along the curb line, and carry wires strung across the street to support the trolley wire in the middle of the street. Besides these, they also support the railway's feed wires, which stretch from pole to pole along the street, over the curb line and parallel to it. The function of these feed wires is to supply electricity to the trolley wire, so that the potential of that wire may be always constant, and, when the road is being operated, they carry a voltage of about five hundred volts, sufficient to produce upon any one receiving it serious injury or death. By means of a preparation of braided cotton, saturated with insulating material and covered with a water-proof compound, feed wires are kept insulated, so that when the insulation is properly ^{so} done and in good condition, there can be no escape of electricity. If exposed, however, long to atmospheric influence, it becomes depreciated, and will not serve its purpose. Defects are also sometimes to be attributed to improper handling of the wire in the process of construction, so that the covering becomes broken. The frictional contact of another wire rubbing against it would cause serious damage to the insulation, and in such a case the current would commence to be carried off before the insulation was "probably absolutely worn through." If imperfect insulation were due to such rubbing, so that the charged wire was laid bare or so worn as that the current found a path to the overhanging wire, there would be no sparks at the point of contact, unless there was an "arcing or air space" between the two. The defendant offered evidence tending to show that the particular feed wire was erected in 1893. It was not contended that the insulating material was not of the best, or that it was not originally put up in a proper manner. The defendants also offered evidence to show that, at the time of the accident, the insulating material was intact at the place where the telephone wire rested on it. It was shown the swing-

ing wire did not belong to the telegraph company, but was suspended from a bracket or lug on one of its poles. It was erected with the permission of the company by a gentleman for his private uses. It had long been unused, but was permitted by the company to remain, a dead wire, on the poles where it was first placed. In some manner, it parted, and one of the ends suspended from the lug passed over or around the feed wire and extended to the pavement, where it swayed to and fro in the wind. In this position it remained for at least two weeks. At first, it seems not to have been charged with electricity, for a policeman at some time during that period gathered up the swinging end and placed it in a tree-box near by, so as to get it out of the way of persons passing along the street. The unbroken portion of the wire passed along for some distance into the city, but further than to show there was no ²¹⁰ contact with other wires for two squares, there was no evidence tending to prove that it received its deadly charge elsewhere than at the place where it crossed the feed wire. It is not contended that Nelson was guilty of contributory negligence. How he came in contact with the wire does not clearly appear. Some of the witnesses thought it was blown against him by the wind. However that may be, it passed between his fingers, and, as he recoiled from the shock, he drew it about his neck and throat. He was badly burned; in a few days lockjaw set in, and he died.

At the conclusion of the plaintiff's testimony, the court was asked by the defendants to instruct the jury that there was no legally sufficient evidence to show that the death of Nelson was caused by the negligence of the defendants, or either of them, and this the court refused to do. To entitle the plaintiff to recover, it was requisite that the proof should establish some duty on the part of the defendants in respect to the person injured, and that the injury was occasioned by reason of the failure of the defendants to perform that duty. This principle is stated in *Maenner v. Carroll*, 46 Md. 212, as follows: "To constitute a good cause of action, in a case of this nature, there should be stated a right on the part of the plaintiff, a duty on the part of the defendant in respect to that right, and a breach of that duty by the defendant, whereby the plaintiff suffered injury." Now the deceased at the time of the injury was upon a public highway, at a spot where he had a right to be, and was going along it to his home in a lawful and proper manner. The sidewalks of the streets in a city are for the use of all persons who have occasion to pass along them, and Nelson, while in the exercise of

this unquestioned right, was entitled to be protected and safe from all injury on account of dangerous obstructions. On the other hand, both of the defendants were using the streets under the permission of the state and municipal authorities, for purposes of private gain, by means of agencies such as could and would become dangerous to human life if not properly and carefully employed. The ³¹¹ railway company pursued its business by means of cars propelled by electricity, partially supplied through feed wires over and along the edge of the pavement. The telegraph company had its poles also along the curb line, and its wires extending along the street were over and along the feed wire, which, though insulated, carried a deadly current. The privileges so granted, thus to encumber the public highway with appliances so likely to become dangerous to the public safety unless properly employed and controlled, imposed upon them, and each of them, the duty of so managing their affairs as not to injure persons lawfully on the streets. They owed it to Nelson that his lawful use of the street should be substantially as safe as it was before the telegraph and railway plants had so occupied it. It was their plain duty, not only to properly erect their plants, but to maintain them in such condition as not to endanger the public. It follows from this, that if the property of the defendants was not in proper condition, and by reason thereof Nelson was injured, these facts alone, in the absence of other evidence to show that the defect originated without the fault of the companies, afford a prima facie presumption of negligence. In such a case, the doctrine of "*res ipsa loquitur*" ("a simple question of common sense": Whittaker's *Smith on Negligence*, 423) fairly applies. In the leading case of *Kearney v. London etc. Ry. Co.*, L. R. 5 Q. B. 411, affirmed in the exchequer chamber (L. R. 6 Q. B. 759), and cited approvingly in *Howser v. Cumberland etc. R. R. Co.*, 80 Md. 148, 45 Am. St. Rep. 332, Cockburn, C. J., said: "Where it is the duty of persons to do their best to keep premises or a structure in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which, it seems to me, may fairly be presumed from the fact that there was the defect from which the accident has arisen." In *Byrne v. Boadle*, 2 Hurl. & C. 722, also cited in *Howser v. Cumberland etc. R. R. Co.*, 80 Md. 148, 45 Am. St. Rep. 332, the plaintiff, while walking in the street, was injured by a barrel falling ³¹² from an upper window of a warehouse

belonging to the defendant, and, on these facts alone, it was held there was evidence of negligence to go to the jury. In *Thomas v. Western Union Tel. Co.*, 100 Mass. 156, where two horses, driven along the highway, became entangled in a telegraph wire, swinging across a public way at such a height as to obstruct and endanger ordinary travel, it was held these facts alone, unexplained and unaccounted for, were evidence of neglect on the part of the company, and should have been submitted to the jury: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786; *Ugla v. West End Street Ry.*, 160 Mass. 353; 39 Am. St. Rep. 481; 2 *Thompson on Negligence*, 1220, et seq; *Thompson on Electricity*, sec. 178; *South Western Tel. etc. Co. v. Robinson*, 50 Fed. Rep. 813; *Stephens etc. Trans. Co. v. Western Union Tel. Co.*, 8 Ben. 502; *Western Union Tel. Co. v. Eyser*, 2 Col. 163; *Blanchard v. Western Union Tel. Co.*, 60 N. Y. 510; *Wolfe v. Erie Tel. Co.*, 33 Fed. Rep. 322.

Was there evidence before the jury when these instructions were asked, from which they could find that the property of the defendants was out of proper condition at the time of the accident, and that, by reason thereof, Nelson was injured? There was evidence that the telephone wire had been hanging over the feed wire for at least two weeks; that in that position it was swayed by the wind, causing it to rub against the insulating material; that such rubbing for two weeks would cause a very serious damage to the insulation. No information had been given to the jury of any means by which the telephone wire was charged, otherwise than from the feed wire, and that could have been possible only by defect in the insulation. This was assuredly evidence tending to prove that the telephone wire was charged through the feed wire. Whether sufficient or not to establish it as a fact was for the jury to determine. It was within the province of the defendants to rebut the plaintiff's case in any manner they were able; to show that the insulation was perfect; or, if that could not be done, that the defect was caused by circumstances over which ²¹² they had no control; or that it existed for so short a time that they could not be reasonably expected to have been informed of it, and thereby have had an opportunity to mend it. To raise the presumption of negligence in this case, however, it was not necessary for the plaintiff to negative all possible circumstances, which could excuse the defendants. If the jury were informed of but one point, where the telephone wire was in contact with a live wire, it would not be a wild speculation for them to infer, in view of all the

circumstances, and in the absence of any evidence of contact elsewhere with the feed wire, or with other live wires, that that was the source from whence the electricity came, although it may have been a physical possibility that there might have been such contact with other wires further along the line. This the defendants might have shown, if they could, by way of defense, but, in the absence of all evidence on the point, the jury could infer, without violence, that the electrical charge was, in fact, obtained by contact of the telephone wire with the feed wire. We find no error in the rejection of the instructions set out in the third exception.

We deem it unnecessary to refer particularly to the action of the court in granting or rejecting prayers in the case; what we have said is sufficient to dispose of them. We are of opinion the case was fairly put to the jury. Finding no error in the rulings of the court, the judgment will be affirmed.

Judgment affirmed.

NEGLIGENCE—DUTY TOWARD PERSON INJURED.—To constitute actionable negligence, a duty must exist on the part of the defendant to protect the plaintiff from the injury of which he complains, coupled with a failure to perform that duty and an injury to the plaintiff arising from such failure: *Faris v. Hoberg*, 134 Ind. 269; 39 Am. St. Rep. 261, and note. To maintain an action for negligence, the plaintiff must show the existence of a duty to him on the part of the defendant: *Bottoms v. Seaboard etc. R. R. Co.*, 114 N. C. 699; 41 Am. St. Rep. 799.

NEGLIGENCE—PRESUMPTION OF.—A presumption of negligence may arise from an accident, and if the circumstances are of such a nature that it may fairly be inferred from them that the reasonable probability is that the accident was caused by the failure of the party to exercise proper precaution, a presumption of negligence arises: Note to *Hart v. Washington Park Club*, 48 Am. St. Rep. 305. See, especially, the extended note to *Long v. Pennsylvania R. R. Co.*, 30 Am. St. Rep. 736-738.

NEGLIGENCE—WIRES IN STREETS.—If a corporation is permitted to maintain electric wires in the public streets, and one of such wires is detached from a tree to which it has been fastened, and is hanging to the ground charged with a deadly current of electricity, which it received in coming in contact with the feed wire of another corporation, and a boy taking hold of the wire is killed, the corporation to which the detached wire belongs is presumed to have been negligent and must assume the burden of proving that there was no negligence on its part: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786, and note. A company or person using wires to convey electricity is required to use very great care to prevent injury to persons or property: *Giraudi v. Electric Imp. Co.*, 107 Cal. 120; 48 Am. St. Rep. 114, and note.

METROPOLITAN SAVINGS BANK v. MURPHY.

[82 MARYLAND, 314.]

WILLS, BANK-BOOKS AS.—The changing of an account in a bank from the name of a husband to that of a husband and wife, and the writing of an agreement at the head of a pass-book, to which the husband and the bank both assent, that the moneys are to be subject to the order of either the husband or the wife, the balance at the death of either to belong to the wife, do not constitute a will of personal property.

A BANK ACCOUNT PAYABLE TO THE ORDER OF HUSBAND OR WIFE, the balance at the death of either to belong to the survivor, constitutes an agreement between the bank and the husband which remains in force after his death, and justifies the payment to her, as survivor, of the moneys remaining on deposit at his death.

Harry M. Benzinger and Alfred Jenkins Shriver, for the appellants.

James L. Lindsay and John S. Ensor, for the appellees.

319 ROBERTS, J. The appeal in this case is taken from an order of the orphans' court of Baltimore county, refusing probate to an instrument claimed to be the last will and testament of Michael Murphy, deceased. There is no controversy as to the facts appearing in the record, which can be briefly stated as follows: Michael Murphy became a depositor in the Metropolitan Savings Bank of Baltimore City, on July 8, 1873, and from time to time thereafter made deposits therein of various sums of money. On the 5th of March, 1885, after he had, at intervals, drawn from said bank different ³²⁰ sums of money, there remained to his credit with said bank a balance of eighteen hundred and forty-one dollars and forty-five cents. This balance was, by his direction, transferred to a new and different account in said bank, which was opened in the names of Michael Murphy and Ann Murphy (his wife), and, at the request of said Michael, which was agreed to by said bank, there was written at the head of the account of said Murphy and wife, in the bank-book No. 7437, with the appellant, the following: "It is agreed that this account is opened subject to the by-laws printed on the first and last pages of this book, subject to the order of either. The balance, at the death of either, to belong to the survivor."

The wife survived her husband, and, at the time of his death, which occurred March 7, 1888, the balance with said bank to the credit of the joint account of Murphy and wife amounted, with certain accretions of interest, to the sum of two thousand four hundred and eighty-two dollars and sixty-seven cents. This sum the appellant, in pursuance of the terms of its contract with

Murphy and wife, paid over to the survivor, Ann Murphy. The only question which we are now called upon to decide is, Had the bank authority in law to make such payment? It is the claim of the appellees that the bank acted without authority in making such payment, and the converse of the proposition is maintained by the executor and residuary legatee of Ann Murphy, now deceased. It is contended by the appellant bank that the two accounts in said bank—that in the name of Michael, and that in the joint names of himself and wife—constituted, in fact, but one and the same continuing account, and both having been opened with said bank prior to the passage of the act of 1884, chapter 293, requiring certain formal prerequisites in the execution of wills of personalty, they are entitled to be considered and construed as testamentary papers; and that the balance in said bank to the joint credit of the husband and wife at the time of his death passed, under the terms of the alleged will, to the wife as the survivor. It is claimed upon the part of the appellees that, when the individual account in said bank in the name of said Michael was closed, it no longer had any connection ³²¹ with, or relation to, the joint account in the names of the husband and wife, and became thereby wholly disconnected with this controversy. We concur in this view, and think that the proper construction to be placed upon the two accounts in their supposed relationship is, that the closing of the one and the opening of the other left them separate and distinct. And, if this be so, there is but one consequence which follows, and it is this: the joint account in the names of the husband and wife ceased to possess a single testamentary attribute, as the entry at the head of the joint account was not, nor was the account itself, written or opened until after the act of 1884, chapter 293, had gone into effect. So that we entertain no doubt about the legal effect of these accounts as testamentary papers. We are clearly of the opinion that the testamentary character claimed by the appellants as adhering to the first and second accounts by reason of their being one and the same continuing paper is without force and untenable. It is too plain for controversy that the accounts are separate and distinct, and in no just sense testamentary. We do not, however, concur in the view taken at bar of the case of *Dougherty v. Moore*, 71 Md. 248, 17 Am. St. Rep. 524, as concluding the question raised by this appeal. The facts of that case differ very materially from the case presented in the record of this case.

At the death of the husband, the bank paid over to the wife

the balance of the account, and, in doing so, carried out in good faith the strict letter of its contract. This is not a case where the husband retained possession and control of the account in bank, and continued to draw therefrom such sums as his wants might indicate, as was the case in *Dougherty v. Moore*, 71 Md. 248, 17 Am. St. Rep. 524, and in many other cases. Nor is the language controlling the ultimate disposition of the joint account in this case in any respect similar to that of *Dougherty v. Moore*, 71 Md. 248, 17 Am. St. Rep. 524. The bank's instructions in opening the account were, that said account shall be subject to the order of either husband or wife, and, at the death of either, the balance shall belong to the survivor. ⁸²² It is neither the object of the law nor the duty of the court to seek, by narrow and technical construction, the means of invalidating a contract clearly expressive of the intention of the contracting parties, and we think nothing could be clearer than the object and intention of the parties to the contract in the language employed by them in opening the joint account.

Whilst we have not been able to recognize the accounts in evidence as testamentary papers, we entertain no doubt as to the legal effect and meaning of the entry at the head of the joint account. It is quite true that the title to the deposits referred to in the first account was originally vested solely in the husband, Michael, and it was his privilege to make such disposition of the same as he thought proper. He had the indisputable right to enter into any contract with the appellant that would accomplish his purpose in securing to his wife the protection which these savings deposits might give to her. After opening said joint account, the husband never drew one farthing from the bank on that account, which from March 5, 1885, to the date of his death, March 2, 1888, remained undisturbed, save by the addition of some interest items, which were made by the officers of the bank.

The property in controversy consisted of deposits in the appellant bank, which, by the direction, authority, and request of the said Michael, assented to by the appellant, was entered in the books of said bank to the credit of himself and wife, with the understanding and contract with the bank indorsed thereon as hereinbefore stated. The parties were *sui juris*, capable of contracting, and, having actually contracted, the law exacts fulfillment, which the appellant has done; and we do not think, after it has fully executed its part of the contract, it ought now to be required to pay to the appellees the money which it promised to

pay, and had already paid, to the appellant's testatrix, unless some legal requirement can be established demanding its payment to the appellee.

523 We have given the most careful consideration to the various cases which have been passed upon by this court bearing any analogy to the facts of this case, but we have found no authority controverting the conclusions at which we have arrived. This transaction partakes somewhat of the nature of an equitable assignment, looking to the interest of the parties rather than to matter of form, and the question of the survivorship depended solely upon mere contingency. But, looking at this controversy from whatever point we may, we think the appellant paid rightly to Ann Murphy the balance standing to the joint credit of herself and husband at the time of his death. We will, for the reasons assigned, affirm the order of the court below.

Order affirmed with costs and petition dismissed.

GIFTS—BANK-BOOK ACCOUNTS.—An entry made by a husband in a pass-book of a savings bank that in consideration of his love and affection for his wife he gave her all the money credited, or to be credited, to him in the book, where, after the making of such entry, he continued to make deposits and draw from the fund from time to time as he saw fit, does not constitute a valid gift to the wife of the money on deposit, nor does it operate as a testamentary disposition thereof, because it is not executed as the law requires: *Dougherty v. Moore*, 71 Md. 248; 17 Am. St. Rep. 524. The cases discussing this subject will be found collected in the note to *Crook v. First Nat. Bank*, 35 Am. St. Rep. 26, and also in the extended notes to *Sheedy v. Roach*, 26 Am. Rep. 684-687, and *Williamson v. Yager*, 34 Am. St. Rep. 319-225.

CHAPPELL v. STEWART.

[82 MARYLAND, 323.]

INJUNCTION TO PREVENT DEFENDANT FROM EMPLOYING DETECTIVES to follow and watch plaintiff will not issue, though the conduct of defendant in so employing them was alleged to have caused plaintiff great inconvenience and annoyance, and to have interfered with his social intercourse, business, and credit, and to have caused great suspicion to be entertained about him.

INJUNCTION.—EQUITY WILL NOT INTERFERE except to property rights.

Thomas C. Chappell, in propria persona, for the appellant.

Redmond C. Stewart, for the appellee.

324 **BRYAN, J.** Thomas C. Chappell filed a bill in equity against David Stewart. Without entering minutely into the details of the bill of complaint, it may be stated that he charged

that the defendant had employed detectives to follow him and watch him wherever he should go; and that this conduct caused him great inconvenience and annoyance, interfered with his social intercourse and his business; and caused grave suspicions to be entertained about him, so as greatly to damage his financial credit. It is also alleged that the defendant intended to continue the same course of conduct towards the complainant. The bill prayed for an injunction to restrain and prohibit the defendant from the aforesaid conduct, and for a decree for damages, and for general relief. He also filed a special motion for a preliminary injunction. The defendant filed a demurrer and answer combined together. It was maintained that the bill of complaint did not entitle the complainant to any relief in equity, because it did not set forth any legal or equitable right which the defendant was injuring; because it did not set forth any danger of irreparable damage, and for other reasons. And the answer denied the charges of the bill. The court refused to grant the preliminary injunction. The defendant, by leave of the court, amended his pleading by changing its form so as to make it simply an answer and nothing more. Afterward, the court passed an order sustaining the demurrer and dismissing the bill with costs.

The court acted inadvertently in passing an order on the demurrer, when, in consequence of an amendment of the defendant's pleading, there was no longer a demurrer in the case. We shall see whether this oversight inflicted any ³²⁵ injury on the plaintiff. As the answer denied the allegations of the bill, and the motion for a preliminary injunction was heard on bill and answer, it was of necessity that the motion should be denied. And as the bill, assuming that all its allegations were true, did not contain any matter cognizable in equity, it ought then and there to have been dismissed. Courts of equity exercise a very extensive jurisdiction in cases involving property rights. The occasion does not require us to state its precise limits. It is usually said, in general terms, that it does not exist where a plain, adequate, and complete remedy can be obtained at law. In this case, it is alleged that rights affecting the complainant's person have been violated, and that there is a purpose to persist in violating them. The ordinary processes of the law are fully competent to redress all injuries of this character. They have always been considered beyond the scope of the powers of a court of equity. In *Gee v. Pritchard*, 2 Swanst. 440, Lord Eldon said: "The question will be whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is

bound to protect." In Bispham's Equity, fifth edition, 584, note 2, it is said: "But it is the rights of property, or rather rights in property, that equity interferes to protect; a party is not entitled to a writ of injunction for a matter affecting his person." In Kerr on Injunctions, 1, 2, it is said: "A court of equity is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. A court of equity has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. If a charge be of a criminal nature, or an offense against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained. The court has no jurisdiction to restrain or prevent crime, or to enforce the performance of a moral duty, except so far as the same is concerned with rights to property; nor can it interfere on ³²⁶ the ground of any criminal offense committed, or for the purpose of giving a better remedy in the case of a criminal offense, or for putting a stop to acts, which, if permitted, would lead to a breach of the public peace." We, of course, do not intend to express an opinion on the merits of any action at law which the complainant may see fit to bring.

Decree affirmed with costs.

INJUNCTIONS—MENTAL DISTRESS.—The erection of a statue to a deceased person will not be restrained merely because a living relative's feelings may be injured: *Schuyler v. Curtis*, 147 N. Y. 434; 49 Am. St. Rep. 671.

BANKS v. McCOSKER.

(82 MARYLAND, 518.)

NEGOTIABLE INSTRUMENTS—PLEADING KNOWLEDGE OF FRAUD.—An answer to a complaint upon a promissory note acquired by an indorser before maturity, alleging that the note was procured by fraud of the original payee, must also allege that the plaintiff took it with knowledge of the fraud.

PLEADING—FRAUD, DEFENSE OF, IN PROCURING PROMISSORY NOTE.—Under the general issue in an action by an indorsee upon a promissory note, the defendant may inquire into the manner in which it was obtained by the plaintiff, and may be permitted to prove that the note was procured by the original payee by fraud, and that the plaintiff acquired it with notice thereof.

CONTRACT FORBIDDEN BY LAW.—If a statute forbids any hawker or peddler from buying, bartering, or selling within the state any goods, wares, or merchandise until he shall have first taken out a license for that purpose, and provides for the punishment and conviction of anyone engaged in selling without a license and the imposition of a fine as a punishment, a promissory note taken by him in payment of goods sold in violation of the statute is not void.

CONTRACT IN VIOLATION OF A LAW which seeks only the collection of revenue is not void. It is otherwise when the design of the law-making power is to protect the public from fraud in the contract or for the promotion of some object of public policy.

NEGOTIABLE INSTRUMENTS—FRAUD, BURDEN OF PROOF RESPECTING.—If fraud in the inception of a note is established, it then becomes incumbent upon the plaintiff to prove that the note came to him before maturity, bona fide, and for value.

PLEADING.—The signature of the payee of a note is admitted by the statutes of Maryland, if the note is filed in the case, purporting to be indorsed by him, and it is not denied by the next subsequent pleading of the opposite party.

F. Snowden Hill, for the appellants.

R. Ford Combs, for the appellees.

220 **ROBERTS, J.** This action was brought in the circuit court for Prince George's county by the plaintiffs, now appellees, to recover from the defendants, now appellants, the amount of a promissory note for the sum of one hundred and twenty-five dollars, dated the 8th of May, 1894, which the appellees had, for value received, drawn payable four months after date to the order of P. O'Brien. Before the maturity of the note, the said O'Brien, for a valuable consideration, indorsed and delivered the same to the plaintiffs. The appellants pleaded in their defense: 1. The nonexistence of the alleged partnership; 2. Nonassumpsit; 4. That the alleged promissory note was procured by the fraud of the payee in said note; 5. That the said note was procured by the fraud of the said payee, who was agent of the appellants. After filing said four pleas, the appellants filed two additional pleas, setting up the defense that the note sued upon had been obtained by O'Brien, the payee in said note, in the course of an illegal sale of goods, in that he was engaged in selling without having previously obtained a license for that purpose.

The fourth, sixth, seventh, eighth, and ninth pleas were demurred to in the body of the record, and among the docket entries is found this printed statement: "1895, Mch. 4th, pleas fd. 1895, Apl. 3, additional pleas fd., demurrer to 4 and 6 pleas, general issue to rest of pleas; joinder on demurrer and replication; demurrer sustained; judgment on demurrer submitted to the court."

The record in its present form is scarcely intelligible. It nowhere appears what disposition was made of the demurrer **221** to the seventh, eighth, and ninth pleas, nor is there to be found in any part of the record a sixth or a seventh plea, yet the record says they were demurred to. This record is too imperfectly and carelessly gotten up to justify passing it by without comment. If

a case is of sufficient importance to be brought here, it is the duty of those who have it in charge to see that the record is properly made up, and that it plainly and clearly presents the questions to be decided. It certainly is no part of the duty of this court to indulge in speculation as to the meaning of records. Such a course could only be productive of very unsatisfactory results. It will not be necessary to make further reference to the sixth and seventh pleas mentioned in the record as having been demurred to, for the reason that they form no part of the record, and are not to be found therein. The demurrer to the fourth plea was rightly sustained. It omits the material allegation that the plaintiff took said note with knowledge of said fraud.

But the court, in sustaining the demurrer to the fourth plea, did not restrict the appellant's right of inquiring into the manner in which the note had been obtained. This he clearly could have done under the issue joined under the general issue plea filed. We are not entirely satisfied from the record that any demurrer to the eighth and ninth pleas was filed, but as the question has been fully discussed at the hearing in this court, and is of importance, we will dispose of it. The question in its present form has never before been considered or passed upon by this court. The facts material to the question are, that O'Brien, the payee, in the note sued upon, was engaged in peddling goods in said county, without having previously obtained a license authorizing him to do so, and it is alleged, that without having a license, he sold certain goods to the appellants. It is claimed by the appellants that such a contract is illegal, and cannot be enforced. There can be no kind of doubt about the fact that there is great diversity of dicta and decisions on this subject. But there are some general principles which run through nearly 522 all of the decisions, English and American, and in great measure declare the law to be in accordance with the views herein expressed. As, for instance, when the question is, "whether a contract has been prohibited by statute, it is material, in construing the statute, to ascertain whether the legislature had in view solely the security and collection of the revenue, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case, the inference is, that the statute was not intended to prohibit contracts, in the latter that it was."

And again, in seeking for the legislative intent in the passage of the law, "it is material also to inquire whether the penalty is imposed once for all, on the offense of failing to comply with

the requirements of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealings. In the latter case, the statute is intended to prevent the dealing, to prohibit the contract, and the contract is therefore void; but in the former case such is not the intention and the contract will be enforced": Benjamin on Sales, sec. 825.

The provisions of the code now under consideration are found in article 56, sections 27-30, under the title of "Licenses," subtitle "Hawkers and Peddlers." Section 27 reads as follows: "No hawker or peddler shall buy for sale out of the state, or buy to trade, or offer to trade, barter, or sell within the state any goods, wares, or merchandise, until he shall have first taken out a license for that purpose." The other sections of the law provide for the apprehension and conviction of anyone engaged in selling without a license, and the imposition of a fine on anyone violating the law. When the law declares the consequence of its violation, the contract can in no sense be regarded as illegal, unless the law itself, either by its manifest intent or in express terms, so declares it. The provisions of the code referred to neither directly nor indirectly refer to any consequences, save the payment of a fine for a violation of the law, and the failure to pay ⁵²³ such fine, so that it can only be regarded as a revenue measure, and does not affect the contract between an unlicensed peddler and the purchaser of goods from him. It will, however, be found to be a question depending in great part, if not altogether, upon the phraseology of the particular statute under consideration. If the statute seeks only the collection of revenue, as ours clearly does, there can be no doubt as to its purpose and meaning, but when, as already stated, it is the design of the law-making power to protect the public from fraud in the contract for the promotion of some object of public policy, the contract is then prohibited. As sustaining the views herein expressed, see *Johnson v. Hudson*, 11 East, 180; *Smith v. Mawhood*, 14 Mees. & W. 463; *Ritchie v. Smith*, 6 Man., G. & S. 474; *Jones v. Berry*, 33 N. H. 209; *Brett v. Marston*, 45 Me. 401; *Justice v. Rowland*, 10 Phila. 623; *Rahter v. First Nat. Bank of Lancaster*, 92 Pa. St. 393; *Mandelbaum v. Gregovich*, 17 Nev. 87; 45 Am. Rep. 433; *Smythe v. Hanson*, 1 Mo. App. 382; *People's Bank v. Alabama etc. R. R. Co.*, 65 Miss. 365; *Haacke v. Knights of Liberty etc. Club*, 76 Md. 438; *United German Bank etc. v. Katz*, 57 Md. 128.

We have been led to a somewhat extended consideration of this subject in passing on the demurrer to the eighth and ninth pleas,

and it results from what we have said that the court below in sustaining the demurrer committed no error.

There are three exceptions in the record, the first and second of which relate to the testimony sought to be offered, and the third to the refusal of the court to grant the appellants' instruction. In the first exception, we think the court was clearly in error in refusing to allow the witness, one of the appellants, to answer this question: "State the circumstances under which you and your wife signed the promissory note offered in evidence." Counsel for defendants following up the question with a statement to the court that he proposed to prove the fraud by which O'Brien had obtained the note. The question being objected to, the court refused to allow the witness to answer it. Under the pleadings in the cause, the appellants had the undoubted ⁵³⁴ right to defend against a recovery by the appellees on the note sued on, upon the ground of fraud. Mr. Chief Justice Alvey, shortly before he retired from this court, in delivering the opinion in the case of Griffith v. Shipley, 74 Md. 599, said: "Fraud in the inception of the note being established by incontrovertible evidence, it was incumbent upon the plaintiff to show that the note came to him before maturity, bona fide, and for value. For even though he may have paid the full face value of the note, still, if he had knowledge at the time of the fraudulent inception of the note or of the want of consideration for the same, he would not be a bona fide holder, and could stand in no better position than the party from whom he obtained the note. This is the settled doctrine in this state, as it is elsewhere: Totten v. Bucy, 57 Md. 446; Williams v. Huntington, 68 Md. 591; 6 Am. St. Rep. 477. In Stewart v. Lansing, 104 U. S. 505, it was held by the supreme court, that the indorsee of negotiable paper which has a fraudulent or illegal inception must, in order to entitle him to recover thereon, prove that he is a bona fide holder thereof for value." This view of the law constitutes a complete summary of the doctrine properly applicable to the question of fraud in this case. It is contended by the appellees that the appellants did not prove, or attempt to prove, that the appellees had knowledge of any fraud alleged to have been practiced upon the appellants by O'Brien, the payee in the note. So far as the record discloses, this is doubtless correct. But the appellants, in making their defense, were not required to follow any particular order of proof, but were at liberty to begin their case with any such questions as were material and relevant to the issues joined. The question put to the witness was, we think, subject to no

legal objection as to its form or substance, and we fail to recognize the force of the objection, and think the court erred in not allowing the question to be asked: *County Commrs. v. Gantt*, 78 Md. 286. The same may be said of the second exception. The question which it submits is substantially the same, and the objection to it ought to have been overruled.

⁵²⁵ It is also contended by the appellants that the failure of the appellees to prove the signature of O'Brien, the payee, in the note, was an omission fatal to their right of recovery in this action, and further that the provisions of article 75, section 23, subsection 108 of the code afforded them no relief. The provision of the code just referred to is a codification of the act of 1888, chapter 248, and is not entitled to the construction which is sought to be given to it by the appellants. The provision of the code referred to reads as follows (subsection 108): "Whenever the partnership of any parties, or the incorporation of any alleged corporation, or the execution of any written instrument filed in the case, is alleged in the pleadings in any action or matter at law, the same shall be taken as admitted for the purpose of said action or matter, unless the same shall be denied by the next succeeding pleading of the opposite party or parties." When the note sued on was filed in this cause, it had the signature of the payee indorsed thereon, and was the means by which the appellees obtained title to the note, and became thereby enabled to maintain this action; the payee's signature was then just as much a part of the instrument sued on as were the signatures of the makers thereof. If, therefore, the next succeeding pleading did not in terms deny the signatures of the makers and of the payee, the law says, "the same shall be taken as admitted for the purpose of said action or matter."

We think it very clear that the legal effect and meaning of the statute is, that the next succeeding pleading must in terms deny the signatures of the maker, and of the payee as well, and we do not think the general issue plea is such a denial as the law contemplates. Before the passage of the act of 1888, chapter 248, under issue joined on the general issue plea, the plaintiff had the burden cast upon him to establish the due execution of the note sued upon. Such being the case, what possible purpose could the legislature have had in the passage of the act in question, if not to relieve the plaintiff from the burden of proving the partnership ⁵²⁶ of parties, the incorporation of an alleged corporation, or the execution of any written instrument filed in the case or alleged in the pleadings. The defendant can always, by

the timely interposition of an appropriate plea denying such partnership, corporation, or execution of a written instrument, place the burden of such proof upon his adversary.

In conclusion, it only remains for us to say that the court below rightly refused to grant the appellant's instruction.

It follows from the views herein expressed that the judgment below must be reversed.

Judgment reversed with costs, and new trial awarded.

NEGOTIABLE INSTRUMENTS—PLEADING KNOWLEDGE OF FRAUD.—An answer in an action by the indorsee of a negotiable instrument which avers fraud in its inception, but does not allege that the plaintiff participated in it or had notice of the fraud at the time of its indorsement to him, is sufficient: *Thalming v. Duffey*, 14 Mont. 567; 43 Am. St. Rep. 658, and note.

NEGOTIABLE INSTRUMENTS.—Validity of, when the consideration is void, as being a violation of the law, is discussed in the extended note to *De Leon v. Trevino*, 30 Am. Rep. 107-112.

NEGOTIABLE INSTRUMENTS—PEDDLER'S LICENSE.—A sale made by a peddler from another state who has not paid a license tax as required by a law of the state in which the sale is made is an illegal contract, and a note given for the price of the article which is the subject of such a sale is void: *Root v. Farley*, 91 Ky. 344; 34 Am. St. Rep. 233.

CONTRACTS—VALIDITY—CONSIDERATION IN VIOLATION OF LAW.—A contract the consideration of which is an act forbidden by law is void: *Linn v. State Bank*, 1 Scam. 87; 25 Am. Dec. 71, and note; *Spalding v. Preston*, 21 Vt. 9; 50 Am. Dec. 68, and note; *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258, and note; *Gravier v. Caraby*, 17 La. 118; 36 Am. Dec. 608, and note. A contract made in violation of a statute is invalid: *Persons v. Jones*, 12 Ga. 371; 58 Am. Dec. 476, and note.

HALL v. COUNTY COMMISSIONERS.

[82 MARYLAND, 618.]

A WITNESS WHO IS CONFINED IN PRISON to insure his being present to testify in a criminal case is entitled to witness fees for each day of his confinement, if it was not due to his being contumacious, or to his having such a bad character that no one would be bound for him, but to his being unable, without fault on his part, to procure security for his appearance to testify. His detention must be treated as such a constructive attendance upon the court as entitles him to the same fees as if the attendance were actual.

MANDAMUS, AND NOT ASSUMPSIT, is the proper remedy when the county commissioners refuse to make provision for the payment of a person entitled to fees as a witness for the state.

Charles O. Melvin and Thomas S. Hodson, for the appellant.

Joshua M. Tull, Joshua W. Miles, and Harry L. D. Stanford, for the appellees.

610 McSHERRY, C. J. The question presented by this appeal arises on a demurrer to the sixth count of the plaintiff's declaration, the other counts having been withdrawn. The action is in assumpsit and was instituted by the appellant against the county commissioners of Somerset county. It appears by the record that the plaintiff, who in an infant under the age of twenty-one years, was, on the eighth day of June, 1894, required by a justice of the peace to give security for his appearance as a witness for the state against one Isaac Kemp, charged with the murder of a certain Edward Carver; that, being unable to furnish a bond for his appearance to give testimony, he was committed to the custody of the sheriff of Somerset county, there to be detained and kept as a witness for the prosecution; that the record of the case was removed from Somerset county to the criminal court of Baltimore City, and upon its transmission the plaintiff was taken by the sheriff of the county and delivered to the sheriff of Baltimore City and was held in custody as a witness by the latter until the trial of the accused, when, on the 4th of February, 1895, he was, after testifying for the state, released and discharged. In July following, he, by his mother as next friend, brought suit against the county commissioners to recover his per diem of one dollar for each of the two hundred and forty-two days he was so detained as a witness. The court below held upon the demurrer that he could not recover, and, from the judgment entered against him, this appeal was taken. The inquiry presented is whether the plaintiff is entitled to the compensation which he claims.

The provision of the code relating to the compensation of witnesses is in these words: "There shall be allowed to each witness attending the circuit court for the counties, ⁶²⁰ the sum of one dollar for each day such witness shall attend for the discharge of his duty": Code, art. 35, sec. 10. By section 7 of article 25 of the code, which defines some of the duties of the county commissioners, it is declared that "they," the county commissioners, "shall provide for the support of the courts, compensate jurors and county or state witnesses . . . and pay and discharge all claims on or against the county which have been expressly or impliedly authorized by law." And by section 13 of article 35 of the code, which is almost a literal transcript of the act of 1752, chapter 13, it is enacted: "Where a witness against any person accused of a crime cannot find security for his appearance to testify against the person so accused, and for want of such security shall be committed to prison, the county where the prosecution

shall be carried on shall be chargeable with and pay the imprisonment fees of such witness; and the county commissioners or the mayor and city council of Baltimore shall levy the same from time to time, as the case may require."

Lord Hale (2 Hale's Pleas of the Crown, 282) states that there are two compulsory means to bring in witnesses, which are: 1. By process of subpoena issued in the king's name by the justices of the peace, oyer and terminer, gaol delivery, or king's bench, where the plea of not guilty is to be tried; and 2. Which is the more ordinary and more effectual means, the justices or coroner that take the examination of the person accused, and the information of the witnesses, may at that time, or at any time after, and before the trial, bind over the witnesses to appear at the sessions, and in case of their refusal either to come or to be bound over, may commit them for their contempt on such refusal.

Now, whilst section 13 of article 35 of the code clearly recognizes the power of a magistrate to commit a witness in order that his attendance to testify against a person accused of crime may be secured, it is a power which can only be exerted after the witness fails to give such reasonable security for his appearance as may be demanded of him. He may ⁶²¹ fail to enter into a recognizance for his appearance, either because, though able to furnish it, he becomes contumacious; or, because, though willing to give it, he is unable to do so. This inability may arise from his poverty or other like innocent cause; or from his bad character and ill-repute. If he belongs to the first category and is imprisoned, his imprisonment is obviously the consequence of his voluntary choice, and, under such circumstances, he would have no claim to be compensated out of the public treasury for a detention resulting solely from his own deliberate election. Not being a witness who could not find security for his appearance to testify, he would not have been entitled under the act of 1752 to have even his imprisonment fees paid by the county. If, on the other hand, his imprisonment has grown out of his nonculpable inability to find security for his appearance as a witness, quite a different condition is presented. His inability to enter into a recognizance is, or may be, his misfortune rather than his fault. And his subsequent commitment, in such an event, would in no sense be the result of his own misconduct or fault. If he be poor, a stranger without acquaintances in the community where by accident he happens to witness a violation of the law, and, because of being so circumstanced, he finds himself unable to furnish the security required of him, and is thereupon detained

in custody as a witness for the state, the gravest injury might be inflicted upon him and upon those who are dependent on his toil and labor for their sustenance, if he were denied compensation for the period whilst involuntarily restrained of his liberty for the benefit of the public, but for no crime or misprision of his own. For an honest, law-abiding, but poor and friendless individual to be confined in a common jail, and there forcibly made the companion of criminals and of the depraved, merely because he is unable, through no fault of his own, to find security for his appearance as a witness in behalf of the commonwealth is bad enough; but when in addition to this, by that very confinement he is deprived of pursuing his avocation, and then is refused compensation as ⁶²² a witness except for the few days he may be actually within the courtroom whilst the trial is in progress, his situation is made immeasurably worse. He is subjected to the same treatment that a criminal is, though confessedly not guilty, or even accused, of crime; and he is deprived of his liberty and his means of livelihood, and denied compensation as a witness, though charged with no transgression of the law. To warrant such a result, even if it ever could be justified, there ought to be the most unequivocal statutory sanction. The plaintiff was committed, and held distinctively and exclusively as a witness for and in behalf of the state. It was in his capacity as a witness for the prosecution, and solely because he was such a witness, that he was or could have been detained at all; and this detention must be treated as a constructive attendance upon the court, unless the flagrant injustice and great hardship which the contrary view will inevitably entail be deliberately inflicted and sanctioned. As, then, the plaintiff was held in custody only because he was a witness for the state, and as it is the duty of the county commissioners to compensate state witnesses and to pay all claims against the county which have been expressly or impliedly authorized by law, and as he must be considered while in custody as constructively in attendance upon the court, he is entitled to the per diem fee allowed by law for each day he was thus in attendance "for the discharge of his duty," as well as for the days he was actually in the courtroom during the trial, if he was, through no fault of his own, unable to furnish the bail required.

A direct precedent for this conclusion is found in *Higginson's case*, 1 Cranch C. C. 73, where the court allowed compensation to such a witness for the whole period of her detention. The attorney for the United States relied upon the Maryland statute of 1752, chapter 13, heretofore alluded to, and contended that its

provisions only embraced the payment of prison fees, and did not include an allowance for the time of the witness; but the court, in deciding in favor of the witness, made no reference to the statute and treated ⁶²³ her inability to enter into a recognizance as her misfortune rather than her fault. And so in *Robinson v. Chambers*, 94 Mich. 471, it was held that a witness, detained by the court in default of bail to appear in a criminal case, is to be deemed in attendance upon the court during the entire period of detention, within the Michigan statute which, by sections 9064 and 9065 of Howell's Statutes, entitles witness attending in a court of record to the sum of one dollar for each day. See also *Hutchins v. State*, 8 Mo. 288, where a Louisiana case directly in point is referred to and is thus stated, though the names of the parties are not given. "McFall was on a trading voyage from Kentucky and recognized and detained till the trial, not having time to go home. His per diem fees were allowed from the date of his recognizance, but not mileage." In *Markwell v. Warren Co.*, 53 Iowa, 422, it was held that a witness whilst detained in jail was not in attendance on court, but the decision is founded on the theory that the detention of the witness was due, not to his inability to find a surety, but to the fact that he could not be trusted to perform his duty as a citizen voluntarily and without compulsion. The Iowa court conceded the hardship to the witness but treated him as to some extent in fault, because it assumed that the magistrate must have found that the witness could not be trusted to appear without security. "But this," as justly observed in the note to *Robinson v. Chambers*, 20 L. R. Ann. 57, "depended entirely on the impression which the witness made upon the magistrate, and it is easy to see that, in many cases, the magistrate might have a bad impression as to the trustworthiness of the witness without any fault of the latter."

If it should appear that a witness could not find security for his appearance because his character is so bad that those who know him refuse to become bound for him, he will have no claim to be compensated, if he should be detained as a witness. His inability to furnish security would then be the result of his own fault and not of his misfortune, and the reason for treating him as entitled to a per diem whilst ⁶²⁴ in custody would not exist. He will not be allowed to invoke and rely on his own bad character to secure for himself compensation as a witness, when, but for that bad character, he would not have been compelled to undergo a detention.

We hold, then: 1. That if a witness can, but will not, give se-

curity for his appearance and is committed for his refusal, he will not be entitled to a per diem fee during any part of the time he may be detained to secure his attendance; 2. That if his inability to find security results from his own misconduct or bad character he will equally not be entitled to a per diem fee; and 3. That if he be committed because of inability to furnish a recognizance, and if this inability arises from his misfortune and not from his fault, he will be considered as in attendance on the court and entitled for the term of his detention.

We have said the pending action was in *assumpsit* and in this respect we apprehend the form of the remedy has been misconceived. There is no element of *assumpsit* in the case. The appropriate proceeding was by *mandamus* to compel the county commissioners to make a levy for the amount due to the appellant, if anything was in reality due to him. If, upon such a proceeding, it should appear that the witness had refused, though able, to give the security, or that he was unable to give it by reason of his misconduct, he would not be entitled to compensation; but if it should be shown that he failed to furnish a bond because he was unable by reason of his misfortune and by reason of no fault of his own, then he would obviously be entitled to relief; provided he has brought himself within the provisions of section 10 of article 35 of the code, by having procured from the clerk of the court, within thirty days after such attendance was rendered, a certificate or order showing the amount due him for such attendance.

As in the present form of action a recovery cannot be had, the court below was right in sustaining the demurrer, and its judgment must therefore be affirmed, but without prejudice ⁶²⁵ to the right of the appellant to invoke the appropriate remedy, if he sees fit to do so.

Judgment affirmed with costs above and below, but without prejudice.

Page and Briscoe, JJ., agree to the conclusion, but dissent from the construction of the statute.

WITNESSES—FEES.—Witnesses may be compelled by the state to attend court and give their evidence without compensation: *Bennett v. Kroth*, 37 Kan. 235; 1 Am. St. Rep. 248, and note.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

STATE *v.* HIGGINS.

[80 MINNESOTA, 1.]

NAME—MATERIAL PART.—The middle name or initial of a person is material, if it appears that with the exception of such middle names or initial, two persons have each the same name, and can only be distinguished by the middle name or initial of each.

NAME—INITIAL MATERIAL.—The middle initial of a person's name is material, when only the initial of the first name is given.

FORGERY—CHANGE OF MIDDLE NAME.—Forgery may be committed by changing, with intent to defraud, the middle initial "F" to the letter "J" in the name "M. F. Higgins," inserted in a contract and signed thereto, making it read "M. J. Higgins."

H. W. Childs, J. H. Quinn, county attorney, and F. E. Putnam, for the state.

Lovely & Edwards, for the defendant.

CANTY, J. The indictment charges Marion F. Higgins with the crime of forgery. It states that on September 1, 1892, he entered into, and by the name of M. F. Higgins, executed with a certain church corporation a contract, and sets out the contract in full, by the terms of which he agreed to build a church for a certain price, which the corporation agreed to pay him. It is further stated that on December 3, 1892, with intent to defraud, he did alter, forge, and change the contract by removing therefrom the second initial letter, "F," where it appears in his name in the body of the contract, and also where it appears in his signature to the contract, and substituting therefor in each place the letter "J," "with the intent then and there to change and alter the identity of the said Marion F. Higgins, the person who signed said contract, and make the same the contract and obligation of another person, to wit, Martha Jane Hig-

gins, who was then and there the wife of him, the said Marion F. Higgins, and whose name was intended by the said Marion F. Higgins to be indicated and made to appear upon said contract, at the time of said change and alteration, in the place and instead of that of said Marion F. Higgins." The defendant demurred to the indictment, on the ground that the facts stated therein do not constitute a public offense. The demurrer was overruled, and the court below certifies to this court the question or proposition, which he states was the only one raised and argued, viz., "that to change the middle letter of the name in question did not constitute any crime, as the same was not a material part of the name, and hence could not defraud anyone."

The middle name or initial is material where it appears to be material. Thus it is material when it appears that, with the exception of the middle name or initial, two persons have each the * same name, and can only be distinguished by the middle name or initial of each. It seems to us that it appears on its face that the middle letter or initial is material when only the initial of the first name is given. In the present case the first name is not given—only its initial. The name was written "M. F. Higgins" in the body of the contract and in the signature. No one would understand "M. J. Higgins" to mean the same person. In speaking of a man it is often customary, among his friends and acquaintances, to call him by his first and last name, omitting his middle name or initial. Thus "Marion F. Higgins" might well be known as "Marion Higgins." But there is no such well-understood custom when the first name is not given, but merely its initial. Thus "M. F. Higgins" would not be known as "M. Higgins." When the initials alone are given, it is not customary to drop the second initial, but it is almost invariably the custom to give both initials.

This disposes of the question certified to this court. Counsel for defendant raises other questions not thus certified, but we cannot pass upon any question not certified to us by the court below. The sufficiency of this indictment is not before us, except so far as it is affected by the question thus certified and answered.

The order overruling the demurrer is affirmed.

MR. JUSTICE BUCK dissented, on the ground that the indictment in question was insufficient in failing to show upon its face, by proper averment, how the alteration in the names under consideration was material. Before reaching this conclusion he said: "If the initial let-

ter 'M,' preceding the name 'F. Higgins,' signed to the contract, represented and stood for 'Marion F. Higgins,' or, rather, if the letter 'M' stood for 'Marion,' it stood for the same after the change of the middle letter 'F' to 'J,' for there was no change of the meaning of the letter 'M,' because no other letters were added to it. Substituting 'J' in place of 'F' could not possibly have changed 'M' to 'Marion,' and it would be a still greater feat of substitution to make 'M' stand for 'Martha Jane,' whether it was intended for 'Marion' or not. It is claimed that it stood for 'Marion' as originally written, and then, by changing 'F' to 'J,' it stood for 'Martha Jane.' But it is not anywhere alleged that the letter 'M,' standing alone, was an abbreviation of the name 'Martha Jane'; nor is it anywhere alleged that the wife of M. F. Higgins was ever known by the name of 'M. J. Higgins,' or that she went by that name, or that she ever signed or used the name of 'M. F. Higgins' as her signature. Such was not her name in fact, and it so appears from the indictment itself. This allegation in the indictment negatives the allegation that the defendant, by changing 'F' to 'J,' intended to substitute 'J' in the place of 'F' so as to represent his wife's name, 'Martha Jane Higgins,' because it did not represent her name even after the change. If 'M. F. Higgins' represented 'Marion F. Higgins' before the change, it represented 'Marion J. Higgins' after the change, and it seems to me illogical to hold otherwise, and especially to hold that it meant 'Martha Jane Higgins.' Under the allegations in the indictment, it cannot possibly mean or represent anybody but the wife, 'Martha J. Higgins,' and, as I contend, it did not even represent her by any well-known rules of interpretation. It is a weakness in the indictment which is fatal to its validity. No one could be deceived or misled or defrauded into believing that it was the wife's signature, because it was not her true name, nor any name by which she was known or went or signed her name, and it is not claimed that such was the fact. The vice in the indictment is, that it states too much in some matters, and not enough in other respects. When a person is indicted for having committed a public offense, there should be a reasonable certainty as to the offense charged, and the material allegations in the indictment should not be contradictory or uncertain."

NAMES—MATERIALITY OF MIDDLE NAME OR INITIAL.—A letter inserted between the christian and surname is not a part of either: *Hart v. Lindsey*, 17 N. H. 235; 43 Am. Dec. 597. The omission of the initial letter of defendant's middle name, in a proceeding against him in a justice's court, is immaterial: *Allison v. Thomas*, 72 Cal. 562; 1 Am. St. Rep. 89. If a complaint charges Charles F. with the commission of a crime, and the subsequent proceedings purport to be against Charles P., evidence is properly received to show that there was but one complaint, and that the subsequent use of the name Charles P. was but a clerical error: *Wheeler v. Hanson*, 161 Mass. 370; 42 Am. St. Rep. 408. See further the extended note to *Choen v. State*, 51 Am. Rep. 181.

HOULTON v. DUNN.

[80 MINNESOTA, 26.]

CONTRACT TO PROCURE LEGISLATION.—An agreement by which one party agrees with another to put him into possession of land belonging to the United States, not then in the market, nor subject to entry, and to keep him in possession until it can be purchased from the government, and, for a consideration to be paid by such party, agrees to procure such legislation from Congress as will enable such party in possession to secure the land in preference to any other party, is a lobbying contract and void as against public policy.

J. M. Gilman, C. D. O'Brien, and R. Howard, for the appellant.

Robb & Slack, for the respondent.

²⁷ BUCK, J. The plaintiff claims to have acquired valuable information in regard to certain pine lands in Bayfield county, Wisconsin, and that the plaintiff and defendant entered into an agreement, by the terms of which the defendant was to enter into possession of one hundred and sixty acres of such pine lands, belonging to the United States, not then in market, nor subject to entry, and to hold the same until it could be purchased from the government; and the plaintiff, for a consideration to be paid by the defendant, agreed to procure such legislation from Congress as would enable the defendant to secure the land in preference to any other party. The plaintiff performed his part of the agreement, and procured the promised legislation; and this action is brought by the plaintiff upon the agreement, to recover from the defendant the sum of three thousand five hundred dollars, the amount claimed by the plaintiff to be the value due him for his services, as well as for certain expenditures made by him pursuant to said agreement. There was an answer by the defendant and reply thereto by the plaintiff, which we need not set out in detail. When the cause was called for trial at a general term of the district ²⁸ court for Sherburne county, the defendant moved for judgment upon the pleadings, upon the ground that the complaint did not state facts sufficient to constitute a cause of action; and the motion was granted by the court upon the ground that the agreement was void, as against public policy.

The principal controversy is over that part of the plaintiff's complaint which is as follows, viz: "And the plaintiff further shows to the court that, during the sessions of Congress of 1887-88, 1888-89, 1889-90 and 1890-1891, he attended at Washington from three to six months each year, and appeared before

the secretary of the interior and appropriate committees of the senate and house of representatives, and employed counsel, for the purpose to urge the passage of a bill declaring said lands forfeited to the government, and also that parties who had in good faith settled upon said lands should have the preference right to enter the same from the government under the homestead laws, when the same should be restored to the market; that by an act of Congress approved September 29, 1890, entitled, 'An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and other purposes,' the lands hereinbefore described, together with other lands, became forfeited to the United States, and, by section 2 of the act, the defendant had the prior right, over anyone else, to prove up and acquire title to the lands hereinbefore described, by reason of his being a settler thereon." It is then further alleged that defendant did make final proof, and acquired title to said land, and that at the time he settled upon the same, and when he acquired the right to make final proof therefor, the land was worth twelve thousand dollars to fifteen thousand dollars, and that the defendant sold the pine timber upon the land for twelve thousand dollars. The business relations between these parties will be better understood by our quoting further from the allegations in the complaint, which we do, one of which is as follows, viz: "That the said defendant was wholly unacquainted with said business, but desired to settle upon a valuable quarter section of said lands, and acquire a title thereto under the homestead or pre-emption laws of the United States, when said lands should be restored to the market, and desired the plaintiff to locate him (the defendant) upon some such quarter section, and instruct him as to what he should do as such settler, and to take charge of ^{so} him, and do all that was necessary or could be done to bring the land into the market, and enable the said defendant to acquire the title thereto, and promised and agreed that he would do what was right with the plaintiff for such information and service, in the way of compensation therefor, when he (the defendant) should acquire the right to make final proof for such land."

The question here involved is a very important one, and we regret that we did not have the benefit of an oral argument by the very able counsel for the plaintiff. If there were services rendered and expenditures incurred by the plaintiff for the defendant as he alleges, entirely disconnected with the services rendered in procuring congressional legislation, they would con-

stitute a good cause of action; but, unfortunately for the plaintiff, he has included the value of the whole services and expenditures in one lump sum, and seemingly as though the contract was entire. Evidently, the court below so treated the transaction; and, from a perusal of the pleadings, we do not see that it could have done otherwise: See *Trist v. Child*, 21 Wall. 441. The courts hold that there are two kinds of agreements relative to the matter of procuring legislation from our state and national legislatures and our municipal bodies, boards, or officers. One is the evil and mischievous agreement which tends to corrupt the lawmaking power, and is accomplished sometimes by subtle acts of personal importunity and intrigue, or by secret and insidious overtures, while at other times corrupt results are reached by startling boldness and daring. Some of the authorities which refuse to enforce this kind of agreements are as follows: *Clippinger v. Hepbaugh*, 5 Watts & S. 315; 40 Am. Dec. 519; *Harris v. Roof*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 361; *Mills v. Mills*, 36 Barb. 474; *Trist v. Child*, 21 Wall. 441; *Spalding v. Ewing*, 149 Pa. St. 375; 34 Am. St. Rep. 608; *Oscanyan v. Arms Co.*, 103 U. S. 261, 274; *Tool Co. v. Norris*, 2 Wall. 45; *Woodstock Iron Co. v. Richmond etc. Co.*, 129 U. S. 643. In the case of *Clippinger v. Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519, it was said by the court: "It matters not that nothing improper was done, or was expected to be done, by the plaintiff. It is enough that such is the tendency of the contract; that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members,³⁰ and the use of an extraneous, secret influence over an important branch of government. It may not corrupt all, but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal." In the case of *Rose v. Truax*, 21 Barb. 361, the agreement was "to use his influence, efforts, and labor in procuring the passage of a law by the" legislature; and the agreement was held void, as against public policy, and that, as the contract was entire, it was wholly void, and that no recovery could be had for even legitimate services performed under the agreement. In the case of *Weed v. Black*, 2 McAr. 268, 29 Am. Rep. 618, the court uses the following language: "If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself." In the case

of Tool Co. v. Norris, 2 Wall. 45, Mr. Justice Field said, in reference to agreements for compensation in procuring contracts from the government: "It [such principle] has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. Further along in the opinion he says: "It is sufficient to observe generally that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void, as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation, by refusing them recognition in any of the courts of the country." It will be observed that many of the decisions are based upon the corrupt tendency of such contracts, rather than the particular wording of the contract itself.

There are very eminent courts holding that contracts for the performance of services in procuring legislation can be enforced, where only fair and honorable means have been used, and especially when such legislation results in great public benefit. The plaintiff seeks ³¹ to bring his services within this rule, alleging that the plaintiff's services were not rendered for the benefit of any one individual, but that his services were rendered in securing the passage of a public act which restored lands to the public domain for the public benefit, to which the railroad companies had no right. It may well be doubted whether the legal effect of the passage of the law has been as alleged by plaintiff, viz., beneficial to the public at large; but we think it is plainly evident from the pleadings that it was not the public weal that concerned the plaintiff, in what he did, but to secure the passage of an act which would secure to the defendant the right to enter and pay for one hundred and sixty acres of pine land for the paltry sum of one dollar and twenty-five cents or two dollars and fifty cents per acre, while the land was actually worth from twelve thousand dollars to fifteen thousand dollars, and for which services and expenses in so doing he was to be paid, as he claims, the sum of three thousand five hundred dollars. Who was to pay this consideration? The plaintiff says that the defendant should do so, but, if the plaintiff was expending money and time

and rendering services for the benefit of the public, why should this defendant alone be responsible therefor? And how the public could be benefited by the passage of a law allowing settlers to enter pine land for the sum of two hundred dollars or four hundred dollars per quarter section, which was worth twelve thousand dollars or more at the time, is not made to appear very satisfactorily. If there were a large amount of these lands which were taken in the manner secured by the defendant through plaintiff's agency, we think it is safe to say that the public were robbed, instead of being benefited. Prolific as have been the schemes for robbing the government of its pine timber, it is seldom that cases have come to the knowledge of our courts where such a gigantic fraud has been practiced in the name of a public benefit. It may be that the defendant's pocket is sweating with ill-gotten gains and public plunder, but this gives no legal cause of action against him by the plaintiff. We are reminded by the plaintiff that these lands had been for many years withdrawn from market for the benefit of certain railroads; that the railroads had forfeited their rights; that the secretary of the interior had so declared; but that there was evidently some doubt as to whether settlers upon these lands would have a right to prove up and acquire title to them without an act of Congress so declaring. It was this doubt which led to the making of the contract sued upon in this action. It is immaterial that the courts subsequently decided that a certain settler upon these lands ³² could hold them under the order of the secretary of the interior made in 1887. The vice of the whole transaction rests in the lobbying influence exerted by the plaintiff in procuring national legislation to remove this doubt, and to enable the defendant to secure forthwith this valuable land for a nominal sum compared with its actual value. Neither party knew the defendant's legal rights to the land, if he had any. The plaintiff was not a legal practitioner, competent to advise upon such matters, but a lobbyist seeking to influence the votes of members of the national legislature during a period of from three to six months each year for four years. It is true that he alleges that he employed counsel to urge the passage of a bill declaring these lands forfeited to the government, and that parties who had settled upon them in good faith should have the preference; but it nowhere appears that either plaintiff or his attorney ever prepared a petition, map, or collected documents or evidence of any kind, or prepared a written argument or made an oral one; yet he alleges that he agreed with the defendant to do all that was neces-

sary or could be done to bring the land into market, and enable the defendant to acquire title thereto, and that for such purpose he spent several months each year, for four years, in Washington, endeavoring to procure the passage of a law by Congress giving the defendant the right to purchase the land occupied by him. The means employed are not particularly stated, but he accomplished his purpose. As it took the defendant several months each year, for a period of four years, to succeed, and the only means disclosed is that he went before the appropriate committees, we think that the unavoidable inference is that he solicited the personal aid of members of Congress in doing all that was necessary or could be done to secure the passage of the law. The earmarks and taint about the whole transaction are too plain to be ignored and disregarded, and public policy demands that such contracts shall not be enforced. The case of *Moyer v. Cantieny*, 41 Minn. 242, is cited by the plaintiff in support of his views of the law. Moyer was an attorney at law, and was employed by Cantieny to procure from the government a pardon for Cantieny's son, who was imprisoned in the penitentiary for a term of years. Cantieny agreed to pay Moyer for his services, if successful in securing the pardon, the sum of two hundred dollars. Moyer performed the services, and was successful. The court upheld the contract upon several grounds; among others, that ^{as} it would be proper, and often expedient, that an attorney at law examine the case upon which the conviction was based, and see whether, notwithstanding the final judgment of the law, the case may not be of such a nature as to justify the extraordinary power of pardon. To the reasons given by the court in this case, we may add that the statute expressly provides that a person convicted of a crime may, by petition, apply to the governor for a pardon. Such petitioner is usually one who is confined in some prison and unable to present the petition personally to the governor. Not only this, but it is very seldom that such petition is made by one learned in the law; and it is therefore a legal right which a prisoner has, under such circumstances, to employ an attorney to prepare his petition, present it to the governor for pardon, and have such argument made in behalf of the petitioner as may be pertinent and advisable. As a petition and pardon are authorized by law, the presentation of a petition duly and legally prepared, accompanied by a legal argument in behalf of the petitioner showing the illegality of his confinement, or its injustice, and that public interests would not be violated by the granting to him of a pardon, cannot be a pro-

ceeding contrary to public policy, and certainly a contract for such purpose should not be declared void.

We do not condemn the attempts to secure legislation for legitimate purposes and in a legitimate manner. Many laws are passed solely for the public good by reason of the presentation of the proper evidence and arguments addressed to legislative bodies or the proper committees by outsiders, done openly, and without corrupting influences having been exercised. Frequently, our educational, charitable, and humane laws are thus procured. There are also many just and meritorious private claims where, through the neglect or wrongful acts of the government, it would not be improper to present them for allowance and payment, and do so by fair argument and legitimate evidence. Many just individual claims have remained unpaid for years through the neglect of our legislative bodies to give them proper recognition, while corrupt legislation has enabled the lobbyist to succeed, to the injury of the public welfare, and deleterious to private morals. In the language of our constitution, each person "ought to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformably to the laws": Const., art. 1, sec. 8; but hiring ²⁴ an agent to lobby a large portion of the year, during several years, in procuring legislation securing to an individual government lands for a comparatively small sum, worth more than twelve thousand dollars, does not come within that class of contracts which is sanctioned by the law, and does not meet with our approval. The prevalent iniquitous system of lobbying with members of our legislative bodies and public officials is fast becoming a menace to our capacity for self-government. Courts can do but little to stop this most pernicious vice, because it is seldom that such cases come before them; but when they do appear, there should go forth from the judicial forum only rebuke, and the ban of disapproval.

The order for judgment in behalf of the defendant upon the pleading in the court below is affirmed.

CONTRACTS TO PROCURE LEGISLATION—VALIDITY OF.—Contracts which have for their subject matter any undue influence with the creation of laws or their enforcement are against public policy and void: *Spalding v. Ewing*, 149 Pa. St. 375; 34 Am. St. Rep. 608, and note with the cases collected.

WASHBURN MILL COMPANY v. FIRE ASSOCIATION OF PHILADELPHIA.

(60 MINNESOTA, 68.)

INSURANCE—CHANGE OF INTEREST—NOTICE OF.—If property is insured for the benefit of the mortgagee, as his interest may appear, after the mortgage on the property has been duly foreclosed, and before the time for redemption has expired and the premium is paid by the mortgagee, the expiration of the time in which redemption may be made from the mortgage sale does not work an alienation of the premises so as to avoid the policy, although the policy provides that the mortgagee shall notify the insurer of any change of ownership of the insured property, and that such change shall be noted on the policy.

Kueffner, Fauntleroy & Searles, for the appellant.

W. A. Lancaster, for the respondent.

•• BUCK, J. On June 11, 1892, the Richland County Agricultural Society, a corporation, owned lot 13 in block 13, in the village of Lidgerwood, Richland county, in the state of North Dakota, upon which was situate a one-story frame building. Prior to this time this society had executed and delivered to the plaintiff a mortgage for more than four hundred dollars, which mortgage had been duly recorded in the office of the register of deeds of the said county of Richland. This mortgage was foreclosed, and such proceedings had therein that judgment and decree of foreclosure was made by the district court of said Richland county on October 16, 1891, and pursuant thereto the premises were duly sold November 30, 1891, for the amount found due by such judgment, viz., five hundred and fifty-six dollars and eighty-three cents; which premises were bid in by the plaintiff, and were not redeemed, and a sheriff's deed was duly executed to plaintiff therefor December 19, 1892, and plaintiff thereupon became the absolute owner of the premises. The sheriff's certificate of sale and his deed to plaintiff were duly recorded. In consideration of the sum of eight dollars paid to this defendant by plaintiff, the defendant made and delivered to the above-named agricultural society its policy and contract of insurance, dated June 11, 1892, whereby it insured said society for the term of one year from the date of the policy against all direct loss or damage to said building by fire, in an amount not exceeding four hundred dollars. On June 3, 1893, the building covered by the insurance policy was totally destroyed by fire, and on June 10, 1893, the plaintiff duly notified the defendant of such loss and destruction of the building; but the defendant refused to pay such loss, and notified plaintiff that it would not do so,

for the reason that the policy was void when written. The defendant's answer contains this allegation, viz: "Said defendant alleges that, at the time mentioned in the complaint, said defendant made and delivered ^{to} its policy of fire insurance, whereby it did insure the said Richland County Agricultural Society for the term of one year, as is set forth in paragraph 5 of said complaint; but said defendant expressly avers and alleges that by and in said policy and contract of insurance it was expressly provided that loss or damage, if any, under said policy, shall be payable to the Washburn Mill Company, as mortgagee or trustee, as interest may appear. For more particular description thereof see Exhibit A hereto annexed and made a part thereof." This Exhibit A also contained a further clause, as follows: "This insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property; . . . provided, also, that the mortgagee (or trustee) notify this company of any change in the ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void." The defendant company reserved the right to cancel the policy upon giving ten days' notice. The case was tried before the court without a jury, and judgment ordered for the defendant. The plaintiff moved for a new trial, which was granted by the court below, and the defendant appealed. The error assigned is, that no indorsement was had or made in the title to the insured property resulting from the mortgage foreclosure, and the vesting of the fee simple out of the insured society into the plaintiff, nor notice thereof given the defendant, and that there was no authority shown in the purported agent to waive any of these conditions. In the view we take of this case, it is not necessary to discuss the question of the proof as to the power or authority to waive any of the conditions referred to. The defendant itself, in its answer, sets up and admits sufficient facts to justify us in holding, as the law applicable to this case, that the defendant is liable. It will be seen, from the foregoing facts, that when this insurance policy was issued the plaintiff's mortgage upon the insured property had already been foreclosed,

and that the foreclosure proceedings ⁷¹ were a matter of public record, and the defendant is presumed to have had notice thereof. But the defendant expressly states in its answer that the insurance policy was issued payable to the plaintiff, the Washburn Mill Company, as mortgagee, as interest may appear. This insurance, then, was given fully as much, or more, for the benefit of the plaintiff as for that of the agricultural society. The defendant knew this fact, and says so, and it knew just what that interest was, viz., a mortgage interest, where the mortgage had been duly foreclosed and the time for redemption had not yet expired. The plaintiff paid the premium or money for the insurance to the defendant. This money the defendant took, kept, and made no effort to return it, or repudiate the insurance contract, until after the fire, and then it sought to repudiate its written agreement upon the ground that it was void in its inception. If this was so, why did it accept and retain the insurance money and issue its policy? The law does not tolerate or sanction such pernicious greed, or allow such contracts to be violated with impunity. It alleges that it did not have notice of the change of title, and therefore, in its innocence and upon its ignorance, it wishes to hold on to the premium money, but defeat the obligation given for its consideration. What was the situation of the property when it was insured, and what was plaintiff's interest therein? It was mortgage interest with such interest foreclosed. Did the defendant need any further notice of those facts? On the contrary, it insured with a full knowledge of those facts, and it took plaintiff's money for so doing. It knew that within a few months the plaintiff's mortgage rights in the property would ripen into a perfect title, unless the property was redeemed from the foreclosure sale. It must have anticipated just such a state of facts. A notice of foreclosure was useless, because foreclosure had already taken place. There is no question of greater hazard, and none in fact existed. What notice, then, would benefit the defendant, and what was the notice to be given? Was it a notice that a sheriff's deed was given? The law implied that, if there was no redemption, and the defendant knew this. This change of interest was brought about by operation of law, and not by an act of the insured. The title ripened in the mortgagee, and it was this interest which it had paid its money to protect, as well as the interest which existed prior to the expiration of the time ⁷² for redemption. Certainly, the plaintiff had as great, and we may say properly a greater, inducement to protect its property and attend to it with

care after the vesting of the title in it than before. There is no claim made that plaintiff did not correctly state its interest in the property. Defendant was in no manner misled, deceived, or its interest jeopardized by any act of the plaintiff. As a matter of fact, it knew the true condition of the property insured, and the plaintiff's rights therein, and it must have known, as a matter of law, that plaintiff would assert its rights in case of loss by fire. There were no facts which could spring into existence to endanger the defendant's risk which it did not know when it issued its insurance policy. We hold, therefore, that there was no such change of interest or ownership in regard to the property or mortgage interest as to legally affect the plaintiff's right, and no other or further notice or acts were necessary to be done on behalf of the plaintiff than were done by it: See *Bragg v. New England Ins. Co.*, 25 N. H. 289; *Bailey v. American Cent. Ins. Co.*, 13 Fed. Rep. 250.

The order appealed from is affirmed.

INSURANCE—ALIENATION.—So long as the right to redeem remains in the mortgagor, an insurable interest exists which the policy will protect, but should he part with his equity of redemption, an alienation defeating the contract takes place: *Extended note to Lane v. Maine etc. Ins. Co.*, 28 Am. Dec. 157; to the same effect see the extended note to *Morrison v. Tennessee etc. Ins. Co.*, 59 Am. Dec. 307.

BABCOCK v. COLLINS.

[80 MINNESOTA, 78.]

WILLS, FOREIGN—POWER OF SALE—NECESSITY OF ADMINISTRATION.—An executor under a foreign will who has duly qualified at the foreign domicile may, subject to the rights of local creditors, make a sale, under a power in the will, of land in Minnesota which becomes effectual when the will is admitted to probate in the courts of the latter state, if the admission of the will to probate in the foreign state conclusively establishes the will and entitles such executor to letters testamentary in Minnesota under then existing statutes. The admission of the will to probate by the court of the latter state relates back, and perfects the sale made under the power.

EXECUTORS AND ADMINISTRATORS.—DEEDS MADE AND SIGNED by "A B, executor," sufficiently show that they were executed by him in his representative capacity.

VENDOR AND VENDEE—RECORD OF DEED AS NOTICE. The recital of a nominal consideration in an executor's deed, duly recorded, and unquestioned for a long period of time, during which the property has been conveyed many times in reliance upon the deed, is not sufficient to put a purchaser upon inquiry as to the consideration; and want of a sufficient consideration does not defeat the title of such purchaser without notice, as against devisees not discovering the fraud of the executor until shortly before such purchase.

Ripley, Brennan & Booth, for the appellants.

Koon, Whelan & Bennett, for the respondents.

75 CANTY, J. This is an appeal from an order sustaining a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The complaint alleges that one Francis M. Babcock died, testate, in 1872, and was at the time of his death the owner of an undivided one-tenth of certain real estate in Anoka county; that thereafter, on April 4, 1872, his last will was duly probated in the surrogate court in New York county, in the state of New York, where he resided at the time of his death; that Phoenix Babcock, one of these plaintiffs, and one John Babcock, were the executors named in said will, and that they then duly qualified as such executors; that, by the terms of said will, said executors were given authority at any time, whenever they deemed it advisable, to sell and convey the real estate left by said testator, or any part thereof; that thereafter, on June 23, 1875, said executors made a deed of said land to one Thompson, which deed is set out, and by its terms it is the deed of "John Babcock and Phoenix Babcock, executors of the last will and testament of Francis M. Babcock, deceased, parties of the first part," to Thompson, and it is signed, "John Babcock, One of the Executors of the Last Will and Testament of Francis M. Babcock, Deceased," and by Phoenix Babcock in the same way. The deed recites that it is made in consideration of one dollar, and the complaint alleges that no consideration whatever was paid for it, but that it was procured by Thompson from the executors by means of false pretenses. It sufficiently appears that the defendants claim title through this deed and subsequent conveyances. A part of the land has been platted and sold as town lots, and there are forty-five defendants. The plaintiffs are the devisees under the will. It is further alleged that on July **76** 6, 1891, said will was duly admitted to probate in said county of Anoka, in this state, and that there are no debts against said estate. The prayer of the complaint is, that said deed from the executors to Thompson be set aside and declared void, and that the real estate be partitioned between plaintiffs and the defendants, who are owners of the other nine-tenths of the same.

1. The appellants contend that the deed from the executors to Thompson, having been made before the will was probated in this state, and before the executors had qualified and received letters testamentary from a probate court in this state, is void. On the

other hand, the respondents contend that the will, having since been probated in this state, relates back, and takes effect from the time of the death of the testator, and validates the execution of the deed. The General Statutes of 1878, chapter 47, section 17, provides that "no will shall be effectual to pass either real or personal estate, unless it is duly proved and allowed in the probate court." However, it is well settled that the probate of a will relates back and gives effect to a deed made by a devisee before the probate. But it does not follow that such probate will relate back and give effect to the deed of an executor who acts merely as a trustee. The General Statutes of 1878, chapter 50, section 2, provide that before entering on the execution of his trust, and before letters are issued to him, an executor shall give bonds; and section 5 provides that, if he neglects to accept the trust and give bonds for twenty days after the probate of the will, he shall not intermeddle or act as executor. At common law, an executor could do nearly all acts under the will before it was proved that he could do afterward, and, when the will was proved, it related back and cured his acts: 1 Williams on Executors, 6th Am. ed., pt. 1, bk. 4, c. 1, sec. 2, p. 347. But this is not the law in the American states having statutes similar to ours: 3 Redfield on Wills, 21. See, also, Wiswell v. Wiswell, 35 Minn. 371. But this will was probated in the state of New York before the deed in question was made, though not in this state until afterward. The provisions of our statute above quoted certainly do not apply with full force to the case of a foreign will duly probated at the place of the domicile of the testator in another state, or to the executor duly appointed by the proper court at that place. It is well settled that, as far as the personal estate is concerned, such foreign executor has a right to intermeddle with the property and ⁷⁷ choses in action found in this state without proving the will or procuring letters in this state, unless ancillary administration in this state is demanded by some local creditor or claimant entitled to demand it. And except where there are paramount local rights, such as those of local creditors, the law of the foreign domicile controls in the disposition of the personal property: Putnam v. Pitney, 45 Minn. 242; 1 Redfield on Wills, *397, subsec. 7, note 4; *409, subsecs. 19, 20; Whicker v. Hume, 7 H. L. Cas. 124; Douglas v. Cooper, 3 Mylne & K. 378; Enohin v. Wylie, 10 H. L. Cas. 1. Our statute expressly recognizes the right of a foreign executor thus to intermeddle in the estate found in this state. The General Statutes of 1878, chapter 77, section 6 (Gen. Stats. 1894, sec. 5917), provides that he

will here was performed. The execution of a power in a will does not stand on the same footing as the execution of a power given by the law. The power in a will is contractual, not statutory: See *Holcombe v. Richards*, 38 Minn. 38, for an illustration of this distinction. When a power in a will is defectively executed, equity will decree its proper execution: Gen. Stats. 1878, c. 44, sec. 57 (Gen. Stats. 1894, sec. 4357); 1 Story's Equity Jurisprudence, secs. 170-175; 2 Pomeroy's Equity Jurisprudence, sec. 834. In the case of *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89, the executor of a last will probated in New York, and containing a power of sale authorizing him to sell the testator's real estate in Illinois, made an executory agreement to sell the same. The court sustained an action for specific performance of the agreement. In the opinion by Denio, C. J., it is said: "It is argued that the defendant's office of executor does not extend to the lands in Illinois, upon the principle that letters testamentary and of administration have no force beyond the jurisdiction in which they are granted: *Schultz v. Pulver*, 11 Wend. 372. Hence it is said the defendant cannot effectually perform the judgment of the supreme court, not being able, as it is insisted, to affect the title to lands out of this state. But the authority of the defendant in respect to real estate is not conferred by the probate court. He is the donee of a power at common law and under the statute, and although it was, by the will, made a condition to ^{so} his acting under the power that he should qualify as executor, when he has performed that condition, he acts in conveying the land as the devisee of a power created by the owner of the estate, and not under an authority conferred by the surrogate": Citing *Conklin v. Egerton*, 21 Wend. 430, 436. While the execution of such a power will be aided in equity, the defective or partial execution of a power created by law will not: 2 Pomeroy's Equity Jurisprudence, sec. 834. If the defective execution of a power in a will is thus aided by a court of equity, surely such defective execution must be good when it is cured without such aid. The deed here in question was but a defective execution of the power, but we are of the opinion that the subsequent probate of the will in this state related back and cured the defect. As said by Judge Story in *Ex parte Fuller*, 2 Story, 327, in discussing the Maine statute, which is the same as ours (Gen. Stats. 1878, c. 47, sec. 17): "The section only provides that no will shall be effectual to pass real estate, unless it shall have been duly proved, not *until* it shall have been duly proved." And

he held in that case that, on being proved, it related back and gave effect to the prior conveyance: See, also, *Spring v. Parkman*, 12 Me. 127. In the case of *Richards v. Pierce*, 44 Mich. 444, after the will was probated and the executor appointed at the foreign domicile, he brought an action. It was held that the subsequent probate of the will in Michigan related back, so as to enable him to maintain it. In the case of *Crusoe v. Butler*, 36 Miss. 150, the facts are very similar to the facts in the case at bar, and it was held that, after the will was probated at the foreign domicile, real estate in Mississippi could be sold under the power of sale, and that, when the will was subsequently probated in that state, it related back and perfected the sale. It was held that, "when the will was admitted to record in this state, it was merely for the purpose of authenticating the evidence by which the special power was established, and of rendering the prior right available here."

It does not appear by the complaint that letters testamentary were ever issued in this state to the executors. For the reasons above stated, we are of the opinion that it was not necessary to issue such letters to perfect the prior exercise of the power of sale. At common law, the executor named in the will could exercise the ⁸¹ power of sale of which he was the donee, though he refuse the administration: See *Conklin v. Egerton*, 21 Wend. 430, and cases cited. So, also, at common law, a sale of personal property by an executor before proof of the will was cured by such proof, though he never qualified, but died before the will was proved: 3 Dyer, 367 a; *Brazier v. Hudson*, 8 Sim. 67. We are of the opinion that the subsequent probating of the will in this state related back and perfected the deed in question.

2. It is urged by appellants that the deed does not appear to be the deed of the executors as such, but merely their deed as individuals; that they did not sign it as executors, or so designate themselves in the body of the deed. It fairly appears that they intended to make the deed in their representative capacity: See *Gen. Stats.* 1878, c. 44, sec. 50 (*Gen. Stats.* 1894, sec. 4350); *Warner v. Connecticut etc. Ins. Co.*, 109 U. S. 366; 18 Am. & Eng. Ency. of Law, 931, note.

3. The deed purports to have been executed in consideration of one dollar, and it is urged by appellants that for this reason it is void on its face, being made by trustees in their representative capacity. Whatever might be said as to such a deed, if it appeared that the property attempted to be conveyed by it was at the time valuable, and parties interested had promptly repu-

diated it, this is not such a case. This deed was made for a one-tenth interest in eighty acres and two government lots. It might have been a partition deed, which the parties interested had procured or ratified. This deed was recorded in 1877, and remained of record unquestioned thereafter until this action was brought. Conceding, without deciding, that the nominal consideration expressed in it was a sufficient circumstance, for some reasonable time after it was made and recorded, to put a purchaser on inquiry, that time has long since passed. After it had remained of record for some years unquestioned, a person about to purchase under it had a right to conclude that there was no vice in the deed; that a sufficient consideration had, in fact, been paid, or it would have been attacked within a reasonable time; and he was justified in relying upon it. It is not claimed that these defendants had any knowledge that there was any fraud in the transaction, unless the face of the deed was sufficient to put them on their guard, and we are of the opinion that after such reasonable time it ⁸² was not. The fact that plaintiffs did not know until the last three or four years that the deed had been procured by fraud is no reason why they should not be estopped as against innocent purchasers.

The order appealed from should be affirmed. So ordered.

EXECUTORS AND ADMINISTRATORS—POWERS OF OVER PROPERTY OUTSIDE OF STATE.—This subject is fully discussed in the monographic note to Shinn's Estate, 45 Am. St. Rep. 664-674.

NOTICE FROM RECITALS IN TITLE PAPERS.—It is well settled that a purchaser is conclusively presumed to have notice of every fact which is disclosed by the records constituting the chain of title under which he holds: Note to McPherson v. Rollins, 1 Am. St. Rep. 829; Kirsch v. Tozier, 143 N. Y. 390; 42 Am. St. Rep. 729, and note.

"TRUSTEE"—SIGNIFICANCE OF WORD AFTER SIGNATURE. When the word "trustee" is inserted in a deed to land after the name of the grantee, and in a subsequent contract relating to the same land he affixes this word "trustee" to his signature, such word is not merely descriptio personæ. It indicates that the grantee takes the title, not in his individual capacity, but in trust for another not disclosed, and parol evidence is admissible to show for whom and for what purpose he was constituted a trustee: Johnson v. Calnan, 19 Col. 168; 41 Am. St. Rep. 224, and note with the cases collected.

McMULLAN v. DICKINSON COMPANY.

[80 MINNESOTA, 156.]

MASTER AND SERVANT—DAMAGES FOR WRONGFUL DISCHARGE OF EMPLOYE—SUCCESSIVE ACTIONS.—If, under a contract for personal service with wages payable in installments, the employé is discharged without his fault before his term of service has expired, the responsibility of the master to the servant is not an absolute liability for wages for constructive service during the balance of the term, but a contingent liability of indemnity for loss of wages. Such liability accrues by installments or successive contingencies, each of which consists in the failure of the servant without his fault to earn, during an installment period, the amount of wages which he would have earned had the contract been performed, and the deficiency is the measure of damages. The original breach is not total, and the failure to pay the successive installments constitutes successive breaches, for which successive actions may be brought.

MASTER AND SERVANT—DAMAGES FOR WRONGFUL DISCHARGE OF EMPLOYE.—If, under a contract for personal service with wages payable in installments, an employé is wrongfully discharged, he may consider the breach of contract total, and bring an action for and recover all damages accruing up to the time of the trial, but prospective damages beyond that time are too contingent and uncertain to be allowed.

H. J. Horn and Penney, Welch & Hayne, for the appellant.

W. H. Donahue and S. Meyers, for the respondent.

¹⁵⁷ CANTY, J. On February 25, 1892, the plaintiff entered into a written agreement with the defendant corporation, whereby it agreed to employ him as its assistant manager, from and after that date, as long as he should own in his own name fifty shares of the capital stock of said corporation, fully paid up, and the business of said corporation should be continued, not exceeding the term of the existence of said corporation, and pay him for such services the sum of fifteen hundred dollars per annum, payable monthly during that time, and whereby he agreed to perform said services during that time. He has ever since owned, as provided, the fifty shares of said stock, and performed said services ever since that time until October 28, 1893, when he was discharged and dismissed by the defendant without cause. He alleges these facts in his complaint in this action, and also alleges that he has been ever since he was so dismissed, and is now, ready and willing to perform said services as so agreed upon, and that there is now due him the sum of one hundred and twenty-five dollars for each of the months of March and April, 1894, and prays judgment for the sum of two hundred and fifty dollars. The defendant in its answer, for a second defense, alleges that on March 2, 1894, plaintiff commenced a similar action to this for the recovery of the sum of

five hundred and twelve dollars, for the period of time from his said discharge to March 1, 1894, alleging the same facts and the same breach, and that on April 16, 1894, he recovered judgment in that action against this defendant for that sum and costs, and this is pleaded in bar of the present action. The plaintiff demurred to this defense, and from an order sustaining the demurrer the defendant appeals.

¹⁵⁸ The plaintiff brought each action for installments of wages claimed to be due, on the theory of constructive service. The doctrine of constructive service was first laid down by Lord Ellenborough in *Gandell v. Pontigny*, 4 Camp. 375, and this case was followed in England and this country for a long time (*Wood on Master and Servant*, 2d ed., 254), and is still upheld by several courts: *Isaacs v. Davies*, 68 Ga. 169; *Armfield v. Nash*, 31 Miss. 361; *Strauss v. Meertief*, 64 Ala. 299; 38 Am. Rep. 8. It has been repudiated by the courts of England (*Goodman v. Pocock*, 15 Q. B. 576; *Wood on Master and Servant*, 2d ed., 254), and by many of the courts in this country (*Wood on Master and Servant*, 2d ed., 254; and notes to *Decamp v. Hewett*, 43 Am. Dec. 204), as unsound and inconsistent with itself, as it assumes that the discharged servant has since his discharge remained ready, willing, and able to perform the services for which he was hired, while sound principles require him to seek employment elsewhere, and thereby mitigate the damages caused by his discharge. His remedy is for damages for breach of the contract, and not for wages for its performance. But the courts, which deny his right to recover wages as for constructive service, have denied him any remedy, except one for damages, which, if seemingly more logical in theory, is most absurd in its practical results. These courts give him no remedy except the one which is given for the recovery of loss of profits for the breach of other contracts, and hold that the contract is entire, even though the wages are payable in installments, and that he exhausts his remedy by an action for a part of such damages, no matter how long the contract would have run if it had not been broken: See *James v. Allen Co.*, 44 Ohio St. 226; 58 Am. Rep. 821; *Moody v. Leverich*, 4 Daly, 401; *Colburn v. Woodworth*, 31 Barb. 391; *Booge v. Pacific R. R. Co.*, 33 Mo. 212; 82 Am. Dec. 160.

No one action to recover all the damages for such a breach of such a contract can furnish any adequate remedy, or do anything like substantial justice between the parties. By its charter the life of this corporation is thirty years. If the action is commenced immediately after the breach, how can prospective

damages be assessed for this thirty years, or for even one year? To presume that the discharged servant will not be able for a large part of that time to obtain other employment, and award him large damages, might be grossly unjust to the defendant. Again, the servant is entitled to actual indemnity, not to such speculative indemnity as must necessarily be given by awarding ¹⁵⁰ him prospective damages. His contract was not a speculative one, and the law should not make it such. That men can and do find employment is the general rule, and enforced idleness the exception. It should not be presumed in advance that the exceptional will occur. This is not in conflict with the rule that, in an action for retrospective damages for such a breach, the burden is on the defendant to show that the discharged servant could have found employment. In that case, as in others, reasonable diligence will be presumed. When it appears that he has not found employment or been employed, there is no presumption that it was his fault, and, under such circumstances, it will be presumed that the exceptional has happened. But to presume that the exceptional will happen is very different. In an action for such a breach of a contract for services, prospective damages beyond the day of trial are too contingent and uncertain, and cannot be assessed: 2 Sutherland on Damages, 472; Gordon v. Brewster, 7 Wis. 355; Fowler v. Armour, 24 Ala. 194; Wright v. Falkner, 37 Ala. 274; Colburn v. Woodworth, 31 Barb. 381.

Then, if the discharged servant can have but one action, it is necessary for him to starve and wait as long as possible before commencing it. If he waits longer than six years after the breach, the statute of limitations will have run, and he will lose his whole claim. If he brings his action within the six years, he will lose his claim for the balance of the time after the day of trial. Under this rule, the measure of damages for the breach of a thirty year contract is no greater than for the breach of a six or seven year contract. Such a remedy is a travesty on justice. Although the servant has stipulated for a weekly, monthly, or quarterly income, it assumes that he can live for years without any income, after which time he will cease to live or need income. The fallacy lies in assuming that, on the breach of the contract, loss of wages is analogous to loss of profits, and that the same rule of damages applies, while, in fact, the cases are wholly dissimilar, and there is scarcely a parallel between them. In the one case the liability is absolute; in the other it is contingent.

If the rule of damages were the same, then, in the case of the breach of the contract for service, the discharged servant should be allowed only the amount which the stipulated wages exceed the market value of the service to be performed, without regard to whether he could obtain other employment or ¹⁰⁰ not. If the stipulated wages did not exceed the market value of the service, he would be entitled to only nominal damages; and in no case could his failure to find other employment vary the measure of damages. Clearly, this is not the rule. In the one case the liability is a contingent liability for loss of wages; in the other case it is an absolute liability for loss of profits. Such contingent liability cannot be ascertained in advance of the happening of the contingency, and that is why prospective damages for loss of wages are too contingent and are too speculative and uncertain to be allowed, while retrospective damages for such loss are of the most certain character. On the other hand, if damages for loss of profits are too speculative and uncertain to be allowed, they are equally so, whether prospective or retrospective. "The pecuniary advantages which would have been realized but for the defendant's act must be ascertained without the aid which their actual existence would afford. The plaintiff's right to recover for such a loss depends on his proving with sufficient certainty that such advantages would have resulted, and, therefore, that the act complained of prevented them": 1 Sutherland on Damages, 107.

It is our opinion that the servant wrongfully discharged is entitled to indemnity for loss of wages, and for the full measure of this indemnity the master is clearly liable. This liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant, without his fault, to earn, during the installment period named in the contract, the amount of wages which he would have earned if the contract had been performed, and the master is liable for the deficiency. This rule of damages is not consistent with the doctrine of constructive service, but it is the rule which has usually been applied by the courts which adopted that doctrine. Under that doctrine, the master should be held liable to the discharged servant for wages as if earned, while, in fact, he is held only for indemnity for loss of wages. The fiction of constructive service is false and illogical, but the measure of damages given under that fiction is correct and logical. It is simply a case of a wrong reason given for a correct rule. Instead of rejecting the false reason and retaining the correct rule, many courts have rejected

both the rule and the reason. In our opinion, this rule of damages should be retained; but the true ground on which it is based is not that of constructive service, but the liability of the ¹⁶¹ master to indemnify the discharged servant, not to pay him wages, and this indemnity accrues by installments. The original breach is not total, but the failure to pay the successive installments constitutes successive breaches. Since the days of Lord Ellenborough, this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception.

Because the discharged servant may, if he so elects, bring successive actions for the installments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all of the same accruing up to the time of trial: *Fowler v. Armour*, 24 Ala. 194; *Strauss v. Meertief*, 64 Ala. 299; 38 Am. Rep. 8. But the wrongdoer can have no such election. He should not be allowed to take advantage of his own wrong, and, for the purpose of preventing the use of any adequate remedy and defeating any adequate recovery, to insist that his own breach is total.

The order appealed from should be affirmed. So ordered.

Remedies of an Employe Wrongfully Discharged.

A servant discharged without sufficient legal excuse before the expiration of his term of service has an election or choice of remedies. He may treat the contract as rescinded, and at once bring an action for the value of the services rendered; or he may treat the contract as continuing, and sue for a breach thereof, and recover his probable damages occasioned by the breach; or, in some cases, he may defer suit until the end of the term, and sue for the actual damage he has sustained, which, however, in no case can exceed the wages for the entire term. No matter which of these remedies the servant elects to choose, his action is one for damages and not for wages, and a recovery is a bar to any other or further action upon the contract of employment: *Colburn v. Woodworth*, 31 Barb. 381; *Saronia etc. Co. v. Cook*, 7 Col. 569; *Booge v. Pacific R. R.*, 33 Mo. 212; 82 Am. Dec. 160; *Soursin v. Salorgne*, 14 Mo. App. 486; *Bennett v. St. Louis etc. Co.*, 23 Mo. App. 587; *Fowler v. Armour*, 24 Ala. 194; *Miller v. Goddard*, 84 Me. 102; 56 Am. Dec. 638; *Britt v. Hays*, 21 Ga. 157; *Rogers v. Parhan*, 8 Ga. 190; *Gardenhire v. Smith*, 39 Ark. 280; *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 235; and cases cited in the note to *Decamp v. Hewett*, 43 Am. Dec. 205, on the subject of the remedy of a servant wrongfully discharged before the expiration of his contract of service. If a servant, employed for a stated term, is wrongfully dismissed from his master's employment, prior to the expiration of the term, he cannot maintain an action to recover subsequently accruing wages as they accrue. His action should be one for damages for breach of the contract of employment, and not for wages: *Weed v. Burt*, 78 N. Y.

191; *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285; *Bennett v. St. Louis etc. Co.*, 23 Mo. App. 587. If a servant is wrongfully discharged, but his wages are paid up to that time, he cannot recover in separate suits for future installments of wages, but only for a breach of the contract of employment, and one recovery is a bar to another action under such contract: *James v. Allen County*, 44 Ohio St. 226; 58 Am. Rep. 821; *Parry v. American Opera Co.*, 19 Abb. N. C. 269; *Olmstead v. Bach*, 78 Md. 132; 44 Am. St. Rep. 273; *Keedy v. Long*, 71 Md. 385. When a servant, upon being discharged without legal cause before his term expires, elects to treat the contract as continuing, and by suit recovers an amount equal to the stipulated wages, until the commencement of the suit, the judgment bars a subsequent suit for damages for breach of the contract, or for further wages: *Richardson v. Eagle Machine Works*, 78 Ind. 422; 41 Am. Rep. 584. Thus, if a person, hired for a term of years, is discharged by his employer during the second quarter, and sues to recover for arrears of wages, and damages for the breach, and recovers for one quarter's wages, this is a bar to a second suit, upon the same contract, for wages of the subsequent quarters of the first year and damages: *Colburn v. Woodworth*, 31 Barb. 381. Or, if a person employed for a year at a specified salary, payable monthly, is discharged before the expiration of two months, and, having been paid one month's salary, sues and recovers judgment for the value of services up to the time of such discharge, such judgment is a bar to any other action for a breach of the contract of employment: *Keedy v. Long*, 71 Md. 385. If a servant, hired for twenty-five weeks, is discharged without legal cause after eight weeks' service, and recovers a judgment for the two weeks' wages following his discharge, this bars any further action for damages or wages for the remaining period of his employment, although his services, had they been rendered, were to be paid for in weekly installments: *Parry v. American Opera Co.*, 19 Abb. N. C. 269. If a party employed to work for a year at a weekly salary is wrongfully discharged, and is paid all the salary then due him, and afterward sues for and recovers an additional sum equal to the amount of one week's wages, such sum must be regarded as damages recovered for a breach of the contract, and no subsequent recovery can be had in his favor: *Olmstead v. Bach*, 78 Md. 132; 44 Am. St. Rep. 273. All of the foregoing cases repudiate the doctrine of constructive service by the discharged employé as a basis upon which to found a subsequent recovery for wages accruing after the discharge, and maintain that a recovery by a servant for a breach of a contract of hiring, in an action brought before the termination of the period for which he is hired, is always a recovery for damages, and not for wages for constructive service, as the servant cannot, after his discharge, treat the contract as still subsisting, remain in voluntary idleness, and recover for constructive service: *Sourain v. Salorgne*, 14 Mo. App. 486; *Bennett v. St. Louis etc. Co.*, 23 Mo. App. 587; *Jones v. Dunton*, 7 Ill. App. 580, in which case it was held that if the contract was to pay the employé in weekly installments, and he is wrongfully discharged before the expiration of the term of service, he cannot sue and recover for the several installments as they become due, averring a readiness to perform, on the principle of constructive service. To the same effect is *Moody v. Leverich*, 4 Daly, 401. After a lengthy review of the cases, the court, in the case of *Olmstead v. Bach*, 78 Md. 132, 44 Am. St. Rep.

273, expressly repudiated the doctrine of allowing the discharged servant to recover on the ground of constructive service under an allegation and proof of readiness and willingness to perform his contract of service. The court said: "Salary, as salary, definitely fixed and agreed to, and not a sum of money as unliquidated damages for a broken contract of hiring, is what is sued for under the declaration in the case at bar. It is a suit to recover wages, though no services have been rendered at all, and, if maintainable in that form, would preclude the defendants from showing by evidence that the plaintiff could have secured other similar employment during the time covered by the contract; because if wages, distinctively as wages, can be recovered under such conditions, instead of damages for a wrongful discharge or dismissal, they must be recovered as specific, ascertained debts, the amount of which is fixed by the contract, and is in no way subject to abatement by circumstances which would reduce the damages in a suit founded on a refusal by the defendant to allow the plaintiff to perform his part of an indivisible contract of hiring. In other words, if under such a contract the plaintiff is entitled to recover wages, as wages, upon a mere offer to perform, he must be entitled to recover just precisely the wages named in the contract, even though he might have obtained other work of the same kind at the same price during the period for which he claims his wages under the contract. This would be recovering for constructive services. That doctrine has been altogether repudiated both in England and in this country: *Keedy v. Long*, 71 Md. 389. "The doctrine of constructive service has, in England, where it had its origin, been repudiated, and the law there established that a servant wrongfully discharged has not an action for wages, unless something is due for past services actually rendered; and, as to any other claim on the contract, it is for a breach of it, and for his damages resulting therefrom, being the ordinary action for damages, and not the common-law action of *indebitatus assumpsit*": *James v. Allen County*, 44 Ohio St. 228, 58 Am. Rep. 821; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285, where *Gandell v. Pontigny*, 4 Camp. 375; *Thompson v. Wood*, 1 Hilt. 96, "and the cases in Alabama, Mississippi, and Wisconsin," are distinctly disaffirmed, and the doctrine of constructive service declared to be "so opposed to principle, so clearly hostile to the great mass of authorities" that it could not be accepted. "We hold, then, that the contract declared on is entire and indivisible; that for a breach of it by the defendants in discharging the plaintiff before the expiration of the year, or in refusing to allow him to work, a right of action arose, not for unearned wages or salary as such, but for damages for a breach of the contract, the measure of which damages would be the stipulated salary for the stipulated period of one year, less the amount the plaintiff actually earned, or might, by due and reasonable diligence, have earned after his dismissal: *Jaffray v. King*, 34 Md. 223. That as there was but one breach, but one action could be maintained therefor. That having recovered before the magistrate in a suit founded on that breach, for he could not have lawfully recovered on any other theory, he is barred upon the satisfaction of that judgment, from again suing on the same contract, because he could have recovered in one action all the damages he sustained, including that for which he now sues: and that, if the pending action be treated as a suit to recover for installments of salary under the contract, not having been rendered

by him, it must fail, because the services were never rendered, but were constructive.

In the case of *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 292, the court, after a thorough and exhaustive review of the authorities, repudiated the right to recover for constructive services in the following forcible language:

"This doctrine is, however, so opposed to principle, so clearly hostile to the great mass of the authorities, and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. If a person discharged from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept another employment, while another rule required him to remain idle in order to recover full wages. The doctrine of 'constructive service' is not only at war with principle, but with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor. Though the master has committed a wrong, the servant is not for one moment released from the rule that he should labor; and no rule can be sound which gives him full wages while living in voluntary idleness. For these reasons, if the plaintiff was discharged after the time of service commenced, she had an immediate cause of action for damages, which were *prima facie* a sum equal to the stipulated amount, unless the defendant should give evidence in mitigation of damages."

A few cases recognizing the doctrine of constructive service hold that a servant whose wages are payable in installments, being wrongfully discharged before the expiration of his term of service, may bring successive suits to recover the several installments of wages as they mature. This rule was early adopted in Alabama: *Davis v. Preston*, 6 Ala. 83; *Fowler v. Armour*, 24 Ala. 194; and has been adhered to on the authority of these cases in *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8, and *Liddell v. Chidester*, 84 Ala. 508, 5 Am. St. Rep. 387. This doctrine is upheld in Georgia: *Isaacs v. Davies*, 68 Ga. 169; and in Mississippi: *Armfield v. Nash*, 31 Miss. 361. It has been recognized in New York: *Huntington v. Ogdensburgh etc. R. R. Co.*, 33 How. Pr. 416; *Thompson v. Wood*, 1 Hilt. 93. This last case is expressly overruled, and the doctrine of constructive service repudiated in *Moody v. Leverich*, 4 Daly, 402, and in *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 292.

GERMANIA BANK v. BOUTELL.

[80 MINNESOTA, 189.]

BANKS AND BANKING—FORGED CHECKS.—A banker upon whom a forged check has been drawn cannot, upon discovery of the forgery, recover the amount from a bona fide holder to whom he has paid it.

C. G. Laybourn, for the appellant.

J. M. Miller and A. Ueland, for the respondents.

¹⁸⁹ MITCHELL, J. This action was brought to recover money paid on a forged check. To the complaint the defendants separately demurred, on the ground that it did not state a cause of action. This appeal is from an order sustaining these demurrers. The complaint is very prolix, but the substance of its allegations is as follows: Osborne & Clark, lumber dealers in Minneapolis, were customers of the plaintiff bank, with which they kept a large deposit. They had in their employ a man named Seymour, at a salary of seven dollars per week, "a man of limited means and small personal resources," which ¹⁹⁰ facts were known to Boutell Bros. Boutell Bros. had sold Seymour some goods on credit on the installment plan, upon which there was due an installment of ten dollars. During business hours of April 11th, Seymour went to Boutell Bros.' place of business in Minneapolis, with a check for four hundred and fifty-seven dollars and ninety cents, payable to his own order, purporting to be drawn by his employers, Osborne & Clark, on plaintiff bank; whereupon Seymour and Boutell Bros. both indorsed the check for the purpose of giving it credit and putting it in circulation, and to enable Seymour to pay the ten dollars, and then went over to the defendant bank, and presented the check thus indorsed (Boutell Bros. identifying Seymour), and requested the bank to cash it, which it did, paying the money to Seymour and Boutell Bros. Although the places of business of both Osborne & Clark and of plaintiff were within a few blocks, and of ready access, Boutell Bros. made no inquiry to ascertain the genuineness of the check, and the defendant bank took no means to assure itself of the fact, except the identification of Seymour by Boutell Bros. and the indorsement of the check by the latter. The next day the defendant bank presented the check to the plaintiff, which, after examining the signature and believing it to be genuine, induced thereto by its apparent genuineness (it not being possible by ordinary care to detect the forgery), and by the financial standing and integrity of the defendant bank, which presented it, and of

Boutell Bros., who had indorsed it, "in the exercise of due care and caution," paid the check.

It is also alleged that it was the custom and practice among all the banks in Minneapolis, well known to the defendants, for the bank upon which any check purports to be drawn to pay it when presented by any other bank (provided the drawer has sufficient funds), relying upon the genuineness of the check and of all prior indorsements; also not to pay a check "of any considerable size" purporting to be drawn by one of its depositors, unless the party presenting it is identified, "save when indorsements of responsible parties known to the drawee bank are indorsed thereon." On April 24th, plaintiff discovered that the signature of Osborne & Clark was a forgery, and immediately notified the defendants of the fact, tendered back the check, and demanded payment of the amount, which was refused. The signature of Osborne & Clark had been forged by Seymour, who absconded April 12th, the same day on which ¹⁹¹ plaintiff paid the check, but whether before or after is not alleged. His whereabouts is still unknown.

These facts present the question, upon which so much has of late years been said and written, whether the drawer of a bill of exchange, or the banker upon whom a check has been drawn, who has paid a bill or check upon which the drawer's signature has been forged, can, upon discovery of the forgery, recover back the amount from the holder, and, if so, under what circumstances he may thus recover. It is a well-settled rule of law that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund. And the tendency of the modern authorities is to extend, rather than to curtail, the operation of this rule. One generally received exception to the rule is, that where the drawee of bill of exchange, or the banker upon whom a check has been drawn, pays a bill or check upon which the drawer's signature has been forged, he must stand the loss, and cannot recover back the amount, if the party to whom he paid it was a bona fide holder.

This doctrine was established in England in 1762, in the leading case of *Price v. Neal*, 3 Burr. 1355, in which Lord Mansfield stopped defendant's counsel, saying the case was one that could not be made plainer by argument; that it was incumbent upon the plaintiff (the drawee) to be satisfied that the bill drawn upon

him was in the drawer's hand before he accepted or paid it. The same doctrine was firmly established in the commercial law of this country in *United States Bank v. Bank of Georgia*, 10 Wheat. 333, in which Mr. Justice Story, referring to *Price v. Neal*, 3 Burr. 1355, said: "After some research, we have not been able to find a single case in which the general doctrine thus asserted has been shaken or even doubted." And, so far as we have been able to discover, this general doctrine is recognized as the law by the courts of every state in the Union except Pennsylvania, where the rule has been changed by statute. The doctrine was announced and applied by this court as early as *Bernheimer v. Marshall*, 2 Minn. 61 (78); 72 Am. Dec. 79. That was a case of a forged draft, but the doctrine is equally applicable to a forged check. Indeed, if there is any difference in the cases, the reasons upon which ¹⁹² the doctrine rests apply with more force to the latter than the former, for not only do checks pass from hand to hand as money more frequently and rapidly than do drafts or ordinary bills of exchange, but a banker is "even more bound" to know a customer's handwriting than a drawee of a bill of exchange is bound to know the drawer's.

Many modern text-writers, some of them of learning and ability, have assailed the correctness of this doctrine, contending that the general rule as to money paid under mistake of fact should apply, and that the law ought to be that the bank, although at fault in not discovering the forgery of its customer's signature, can recover even from an innocent holder, if he will then be in no worse condition than if the bank had refused to pay the draft or check: See 2 *Parsons on Notes and Bills*, 80; *Morse on Banks and Banking*, c. 33; *Daniel on Negotiable Instruments*, c. 42; also, *Am. Law Rev.*, April, 1875, p. 411, and note to *People's Bank v. Franklin Bank*, 88 Tenn. 299; 17 Am. St. Rep. 889. We shall not enter upon a consideration of the soundness of the argument against the doctrine, or as to which rule we would adopt if the question was *res integra*, because we do not feel at liberty to overrule or disregard a doctrine so well established and so firmly rooted in the commercial law of the country. If the rule is incorrect, or works badly in practice, its change must be left to the legislature. We may say, however, that the opponents of the doctrine seem to have found no followers among the courts. We may also suggest that perhaps the courts themselves have given the opponents of the doctrine an unnecessary vantage ground, by frequently placing it exclusively on the narrow ground of actual negligence on part of the drawee in not

discovering the forgery, because he was bound to know the signature of his own customer or correspondent. It is undoubtedly true that he is in better position than a stranger to know his customer's signature, and that men have a right to deal with checks and drafts on that assumption; but it does not seem to us that the doctrine rests entirely on this narrow basis of actual negligence on the part of the drawee. The money of the commercial world is no longer coin. The exchanges of commerce are now made almost entirely by means of drafts and checks. It was largely in deference to this fact that the recovery of money paid on paper of this kind, to which the drawer's signature was forged, was made an exception ¹⁹³ to the general rule as to the recovery of money paid under a mistake of fact. In view of the use of this class of paper as money, it was considered that public policy required that, as between the drawee and good faith holders, the drawee bank should be deemed the place of final settlement, where all prior mistakes and forgeries should be corrected and settled once for all, and, if not then corrected, payment should be treated as final; that there must be a fixed and definite time and place to adjust and end these things as to innocent holders; and that that time and place should be the paying bank and the date of payment; and that, if not done then, the failure to do so must be deemed the constructive fault of the payee bank, which must take the consequences: See dissenting opinion of Mr. Justice Snodgrass in *People's Bank v. Franklin Bank*, 88 Tenn. 299; 17 Am. St. Rep. 884.

The rule that, if a bank pays a check under the misconception that it has funds of the drawer, it cannot recover from a bona fide holder, but must look to the drawer alone for redress, is founded on much the same reasons. There is not as much force as may at first seem in the suggestion of practical objections to the doctrine. In large commercial centers, where vast numbers of checks have to be rapidly exchanged between banks, it is always done through and under the clearinghouse rules, adopted by the banks for mutual convenience, by which checks paid in that way may be returned within a certain time, if it be found that they are not genuine, or that the drawer had no funds. And the doctrine has no application to cases where, as is common in cities, a customer of a bank deposits checks purporting to be drawn on other banks. Entirely different principles apply to such cases. But while the general doctrine is too well established to be overruled or disregarded, yet it is undoubtedly true that the trend of the modern authorities is to impose upon

it some limitations and modifications; so that it is not always easy to definitely state when a case falls within the doctrine or comes within the general rule as to money paid by mistake. From what examination we have been able to make of the authorities, we have arrived at the conclusion that there are very few well-considered cases which go further than to hold that the bank may recover back money paid on a check to which the signature of one of its customers was forged, when there was a lack of good faith on part of ¹⁸⁴ the payee toward the bank, as when he knew he knew the check was forged, or knew of circumstances casting suspicion on its genuineness not known to the bank, and which he did not communicate to it, or where the holder was negligent in not making due inquiry as to the validity of the check before he took it, and the drawee, having a right to presume that he had made such inquiry, was itself thereby excused from making inquiry before paying it. In the first case, the holder is really a party to the fraud, and is not a good faith holder. In the second case, he has, by his negligence, contributed to the consummation of the mistake on the part of the drawee by misleading him.

There is no allegation that either of the defendants knew or suspected that the check was forged. So far as appears, they both acted in entire good faith. All that is claimed against either is negligence. It remains only to consider whether either is charged in the complaint with any act of negligence in failing to make proper inquiry as to the genuineness of the check, and which the plaintiff assumed, and had a right to assume, that they had made, so as to excuse it for not making the investigation as to the genuineness of its own customer's signature which it otherwise would have made. So far as the defendant bank is concerned, there is only one side to the question. When it was requested to cash a check purporting to be drawn by one not its customer, on another bank, payable to a person unknown to it, it took the precautions, which any prudent bank would have taken, to have the payee identified and the check indorsed by a responsible party, and thereby protect itself against loss in case the check was not honored when presented for payment. This is just what any bank would naturally do, and has a right to do, under such circumstances, instead of going in search of the maker of the check to ascertain from him if his signature is genuine, and then going to the drawee bank to ascertain if he has funds on deposit with which

to meet it. It owed the plaintiff no duty to investigate as to the genuineness of the signature of its own customer, and the plaintiff had no right to assume that it had made such investigation. It seems to us that the same is true as to Boutell Bros. The distinction must be kept clearly in mind between their duty and responsibility to the defendant bank or any other bona fide indorsee of the check, and their duty and responsibility ¹⁹⁵ to the plaintiff bank, with reference to the genuineness of the signature of its own customer. By indorsing the check, Boutell Bros. undoubtedly guaranteed to the defendant bank the genuineness both of Osborne & Clark's signature and of Seymour's indorsement as the payee. That was the very purpose of their indorsement. And if the indorsement of Seymour had proved to be forged, they would no doubt have been liable to plaintiff, had it been thus led to pay the check to one not the owner of it; for by indorsing it they guaranteed to all persons, including plaintiff, the genuineness of the preceding indorsement. But upon the question of the genuineness of the signature of Osborne & Clark, the drawee's own customers, the case stands upon an entirely different footing. Not being the original payees of the check, the indorsement of Boutell Bros. constituted no guaranty or representation to the drawee that the signature of the drawer was genuine; and the plaintiff had no right to rely on it as such, or to assume that Boutell Bros. had investigated as to its genuineness. That was a matter which it devolved on the plaintiff to ascertain for itself when the check was presented. In fact, the complaint negatives the idea that the plaintiff acted on any such assumption; for it is alleged that it did examine the signature with due care and caution, that it was to all appearances genuine, and that it was not possible, by any ordinary care or precaution, to detect the forgery.

Our conclusion is, that as to both demurrers the order appealed from must be affirmed.

MR. JUSTICE CANTY dissented, and said: "There is no stronger or better established principle of law or public policy than that which holds that no one shall be allowed to retain the consideration received by him on a forged instrument, however innocent he may be, unless he can invoke the aid of the doctrine of estoppel. Even when a person has been deceived by the forgery of his own signature, and has paid the forged obligation, he may recover back the money so paid from an innocent holder: *Welch v. Goodwin*, 123 Mass. 71; 25 Am. Rep. 24; 2 *Morse on Banks and Banking*, sec. 464. This principle tends to cause greater vigilance on the part of everyone about to take such paper, and to prevent him, when he has taken it, from suppressing his suspicions, and putting the paper off on someone else, instead of investigating the matter and

pursuing the guilty parties. Why should the law in such a case offer a premium on attempting to put the paper off on the drawee bank? The money of a bank is not legitimate plunder, and a person receiving it through mistake and without consideration ought not to be entitled to retain it. The mere fact that a bank pays a forged check drawn upon it is no reason why it should lose its money. It was the absolute duty of the bank to know its depositor's signature, and detect the forgery, and it should suffer any loss caused by its failure to perform that duty; but there is no principle of law which says that, when such failure has caused no loss, the bank shall, as a mere penalty, forfeit the money so paid by it.

The transfer of negotiable paper by one holder to another is accompanied by an implied warranty that the paper is genuine: *Brown v. Ames*, 59 Minn. 476. But, when a bank pays a check drawn upon it, there is no such implied warranty that the signature of the maker is genuine. On the contrary, it is the duty of the bank to ascertain, when the check is presented, whether or not the signature to it is genuine. It owes this duty not only to the innocent holder presenting the check, but also to all prior innocent holders. If it fails in this duty, it can only recover back the money so paid by it, on the ground that it was paid and received by mutual mistake and without consideration, and that none of the successive innocent holders through whose hands the check passed will suffer any loss by reason of such failure if compelled to return the consideration received by him; that is, that none of such innocent holders will be in a worse position when he has returned such consideration than he would be if the check had not been paid by the bank. There is no reason why this rule should lead to multiplicity of actions, or result in conditions too complex for practical solution. When the bank brings suit against the last holder to whom it paid the check, he can give notice of the suit to the next prior holder of whom he received it, and who is liable over to him on such implied warranty, and thereby bind such prior holder by the result of the suit: See *Love v. Gibson*, 2 Fla. 598; *Kip v. Brigham*, 6 Johns. 158; 7 Johns. 168; *People v. Judges of Monroe*, 1 Wend. 19; *Blasdale v. Babcock*, 1 Johns. 517; *Bigelow on Estoppel*, 84. I see no reason why the second last holder of the check cannot, in like manner, give notice of the suit to the third last holder of it, and thereby bind him by the result of that suit. And it seems to me that the defense will be entitled to plead and prove the existence of as many successive innocent prior holders as it can, and thereupon the burden should, perhaps, be thrown on the plaintiff bank to prove that none of these holders will be in a worse position when he has, by reason of the recovery of the bank, been compelled to return the consideration received by him, than he would be if the bank had never paid the check."

BANKS—RIGHT TO RECOVER MONEY PAID ON FORGED OR ALTERED CHECK.—If a payee named in a check indorses it to a bank other than the one on which it was drawn, and receives the amount thereof, he is liable in an action of assumpsit for the moneys so received, if the check has been forged, or, though genuine when issued, has been altered by changing the name of the payee and by raising the amount. That he paid over the moneys so received to another person does not constitute any defense to the action: *Birmingham Nat. Bank v. Bradley*, 103 Ala. 109; 49 Am. St. Rep. 17, and note. See, also, *First Nat. Bank v. Crawfordsville*, 4 Ind. App. 355, ante, p. 221, and note.

NORTHERN TRUST COMPANY v. ROGERS.

[60 MINNESOTA, 208.]

ASSIGNMENT—AN UNACCEPTED DRAFT OR BILL OF EXCHANGE does not operate as an assignment of a debt due from the drawee to the drawer.

ASSIGNMENT.—A CHECK IS AN ASSIGNMENT of the funds of the drawer to the amount of the check, as between the drawer and payee, when the check is given, but, as between the payee or holder and the drawee, the check is not complete as an assignment until presentation for payment.

SETOFF AFTER INSOLVENCY—UNPRESENTED CHECK. If a bank has become insolvent, and has assigned for the benefit of creditors before a check drawn upon it has been presented for payment, the holder of the check is not entitled to any preference, nor to offset the unpresented check against his indebtedness to the insolvent bank.

H. D. Stocker, for the appellant.

J. W. Arctander, for the respondents.

²⁰⁸ **MITCHELL, J.** The Farmers and Merchants' State Bank, being insolvent, on May 15, 1893, closed its doors, and stopped payment, and on June 20th made an assignment of all its property to plaintiff for the benefit of its creditors, pursuant to the provisions of "the insolvent law" of 1881. Among the assets of the bank at the time of its failure was a note for one hundred and two dollars and fifty cents against defendant Rogers as maker and defendant Paulson as indorser. The Farmers' Accident and Mutual Life Association was a depositor of the bank, and on May 13th, and from that date down to June 20th, had a deposit with it, subject to check, to the amount of over three hundred dollars. On May 13th, the Accident and Mutual Life Association, in payment of a debt which it owed defendant Rogers, gave him a check on the bank in the usual form for one hundred and five dollars. This check had not been presented for payment when the bank closed its doors on May 15th, and, as we construe the answer, there is no allegation that it ever has been presented. The sole question is whether, upon these facts, the defendants may set off the check in a suit brought on the note by the assignee of the bank. The case has been argued by the respective counsel upon the assumption that the answer to this question depends upon the further question, whether a check is an assignment of the funds of the drawer to the amount of the check, so that, if the drawee bank improperly refuses payment, the holder may sue the bank. But we do not find it necessary to decide that question in the present case. It is the settled doctrine of the English and federal courts, and of the great ma-

mony of the state courts, that a check is not an assignment of the drawer's funds, either as between drawer and payee or as between the payee and the drawee; that if the check is not paid on presentation, the holder's only recourse is against the drawer; although some of these courts have sometimes, and under certain conditions, given effect to a check at least as an equitable assignment as between drawer and payee. That an unaccepted draft or ordinary bill of exchange will not, before acceptance, operate as an assignment to the payee of a debt due from the drawee to the drawer is the settled law everywhere, ²¹⁰ so far as we know. It has been so held by this court: *Lewis v. Traders' Bank*, 30 Minn. 134. But of late years some text-writers and a few courts, while admitting the correctness of the doctrine as applied to drafts or ordinary bills of exchange, have expressed a strong dissent from its applicability to checks. Anyone interested in examining the arguments on that side of the question will find them fully presented in 2 *Morse on Banks and Banking*, c. 34, 2 *Daniel on Negotiable Instruments*, sec. 1635, et seq., and *Merchants' Nat. Bank v. Coates*, 23 *Am. Law Reg.*, N. S., 188. It is not our intention to enter at this time upon a discussion of the merits of this question, further than to state generally the positions taken by the advocates of what is sometimes called the "new doctrine." They claim that checks are distinguishable from ordinary bills of exchange in this: that a check is always drawn on a bank against funds deposited by the drawer, while an ordinary draft or bill of exchange need not be; that there is no reason for denying to the holder of a check a right of action against the drawee bank, on the ground that a claim or chose in action cannot be split without the consent of the debtor, because there is an implied promise (implied from the course of business) on the part of the bank to pay out the money on the order of the depositor in such sums as the latter may direct; that the old common-law doctrine of the nonassignability of choses in action no longer obtains, and hence is no ground for denying the checkholder a right of action against the drawee bank; that this right of action cannot be denied on the ground of want of privity of contract between the holder of the check and the drawee bank, "because privity is a thing which the law manufactures whenever it sees fit," as where A makes a contract with B for the benefit of C. The advocates of this so-called "new doctrine" do not seem to be entirely agreed as to whether the countermanding of the check by the drawer will justify the bank in refusing to pay it, or as to just what the situation and duty of

the bank will be under such circumstances. We may suggest that this entire question is one which should be determined more upon considerations of business usages and business policy than of mere theoretical logic. The holding of those courts which have repudiated the doctrine that a check does not operate as an assignment under all circumstances may, as we think, be summed up as follows: That a check is an assignment of the ²¹¹ funds of the drawer to the amount of the check, which assignment is complete, as between the drawer and payee, when the check is given, but, as between the payee or holder and the drawee bank, is not complete as an assignment until presentation of the check for payment; that the giving of the check works no instant assignment as to the bank; that, as to it, before demand for payment no assignment exists, no obligation has been created, no privity has grown up, and the very right of the bank to pay may be taken away by any one of a great number of occurrences; that the act of presentment and demand, before any one of these occurrences has taken place, is that which creates at once, by the usage of business and understanding of all concerned, the obligation, the privity, and the appropriation, or at least the right to claim an appropriation. We think this is as far as any reliable authority has gone. In the present case, one of these occurrences happened before the presentation of the check, and hence, according to the doctrine referred to, before any obligation on the part of the bank on the check had been created, or any privity between it and the holder had grown up. The drawee bank had become insolvent, closed its doors, and assigned all its property for the benefit of its creditors, whose rights thereby became fixed and vested. And while the courts adopting the so-called "new doctrine" differ among themselves as to the rights of the holder of a check where the drawer has become a bankrupt or insolvent before the check was presented, yet we have found no case where they have held that, in case of the insolvency of the drawee bank before presentment of the check, the holder would be entitled to any preference, or to offset the unrepresented check against his indebtedness to the insolvent bank. Even if it be not strictly logical, there is a controlling practical reason why the right of setoff should not be allowed in such cases. To allow it would be to open the door for the commission of fraud on the great body of the creditors of the insolvent bank, and would practically defeat the great object of the insolvent law, which is the equal distribution of the assets of the insolvent among all the creditors. In every case where a bank failed, having a large number of both

creditors and debtors, it would be the easiest matter in the world for a number of each class to collude together, and, by the former giving antedated checks to the latter, to absorb all the assets of the bank to the exclusion of the other creditors. ²¹² Hence, in our opinion, whichever rule is adopted as to the effect of a check, the defendants were not entitled to the setoff. It does not follow from this that, in the settlement of the estate of the bank, the check may not be given effect as an assignment as between the holder and the drawer, so as to entitle the former to his pro rata share of the dividend paid on the amount of the drawer's deposit.

Order reversed.

ASSIGNMENT—BILL OF EXCHANGE.—An ordinary negotiable bill of exchange, unaccepted in writing and not drawn against any particular fund, does not operate in the hands of the payee as a legal or equitable assignment of a debt due by account from the drawee to the drawer: *Baer v. English*, 84 Ga. 403; 20 Am. St. Rep. 372. A bill of exchange or draft drawn generally and not upon any particular fund, whether accepted or not by the drawee, does not operate as an equitable assignment, even when funds have been placed in the drawer's hands as a means of payment: *Commonwealth v. American etc. Ins. Co.*, 162 Pa. St. 586; 42 Am. St. Rep. 844, and note.

ASSIGNMENT—CHECKS.—A check as to the drawer thereof is an assignment to the holder of the deposit to the amount specified in the check, but it does not create a lien as against the bank: *Hawes v. Blackwell*, 107 N. O. 196; 22 Am. St. Rep. 870, and note. A check drawn upon an existing fund in a bank is an absolute transfer or appropriation to the holder of the amount designated in the check then in the hands of the drawee: *Fonner v. Smith*, 31 Neb. 107; 28 Am. St. Rep. 510, and note. A check drawn by a depositor on the bank, unless it has been accepted, does not constitute an assignment so as to vest the fund against which it is drawn, nor any part thereof, in the payee or holder: *Bank v. Windisch-Mulhauser Brewing Co.*, 60 Ohio St. 151; 40 Am. St. Rep. 660, and note. See, also, the extended note to *Hemphill v. Yerkes*, 19 Am. St. Rep. 609.

SETOFF AFTER INSOLVENCY is the subject of the extended note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 578-595.

JOHNSON v. AVERY.

[60 MINNESOTA, 202.]

JUDICIAL SALES—INADEQUACY OF PRICE.—If land worth eight thousand dollars is sold at partition sale for one thousand five hundred dollars, the sale is for a price so grossly inadequate as to raise an inference of unfairness, and should be set aside.

JUDICIAL SALES—INADEQUACY OF PRICE.—If land is sold at partition sale for a price so grossly inadequate as to raise an inference of unfairness, the sale should be set aside, especially when the interests of minors are involved.

J. T. Avery, for the appellants.

W. G. White, for the respondent.

²⁶³ BUCK, J. This action was brought for the partition of the south one-third of lots numbered 6 and 7 of block numbered 2 in Roberts & Randall's addition to St. Paul, upon which lots are situate a dwelling-house and barn, and the same are rented for twenty dollars per month. The complaint also prays for a sale of the premises, for the alleged reason that they are so situated that a partition cannot well be made. There are six owners of the premises, of whom two defendants were under the age of fourteen years at the time of the commencement of this action in the month of October, 1892. The plaintiff owns three-fifteenths of the premises. Pursuant to a judgment of the lower court, the premises were sold on June 16, 1893, and bid in by this plaintiff for the sum of two thousand dollars, which sale the court refused to confirm, and, upon appeal, this court affirmed the order of the lower court in so doing: *Johnson v. Avery*, 56 Minn. 12. Afterward, and on June 15, 1894, the premises were again offered for sale, and bid off by this plaintiff for the sum of fifteen hundred dollars, and the court made an order confirming the referee's report of the sale. From this order the defendants appeal, and their contention is, that under the statute the sale should not have been confirmed; that the price bid was grossly inadequate; and that it would be inequitable to allow the sale to stand.

The property is worth at least eight thousand dollars. It was satisfactorily established to the court, after the first sale, that the exceptional financial stringency prevailing at the time, and which paralyzed real estate sales, prevented a sale at a reasonable price, and the court, in its discretion, refused to confirm the sale. Within six months after this order was affirmed, there was a resale of the premises, upon a bid at twenty-five per cent less than the former one, and the record does not show any change for the better as to the financial stringency and the sale of real estate. So far as anything does appear, the depression in real estate sales continued until the time of the second sale. Upon the interest of one of the defendants there is a mortgage of fifteen hundred and eighty-eight dollars and fifty-two cents; and upon the interests of three others of the defendants there is a mortgage of eleven hundred and thirteen dollars; and upon the interests of the other two owners, one of whom is the plaintiff, there are no liens, by mortgage or otherwise. One of the defendants, who is an appellant, owns three-fifteenths of the property, free from any encumbrance. This share is presumed to be worth three-fifteenths ²⁶⁴ of the value of the whole

property, or the sum of sixteen hundred dollars, one hundred dollars more than the bid for the whole premises. Certainly, such a sale would be grossly unjust to him, and he is one of the appellants. This property was bringing a rental of two hundred and forty dollars per annum. The bid on the last sale, viz., fifteen hundred dollars, if invested, would, at the legal rate of interest of seven per cent per annum, bring an income of only one hundred and five dollars annually, or considerably less than one-half of the rental income from the premises. The three defendants who resist the confirmation of the sale own more than half of the premises in controversy.

With all these facts before us, it seems to us that the inadequacy of the price bid is so great as to raise an inference of unfairness, and that the order confirming the report of the sale should not have been confirmed, and that the bid should have been set aside. None of the parties attended the sale except the plaintiff, and it does not appear that there were any other bidders present. Even if interested parties do not attend the sale, they have a right to expect and presume that the property will be sold at such a time and place as to produce a fair competition among bidders: *American Ins. Co. v. Oakley*, 9 Paige 259. And they have a right to expect that it will only be sold for a fair and reasonable price. And this is particularly so where the rights and interests of infants are involved. "Where the property rights of infants are concerned, courts will exercise the most vigilant care in protecting their interests, and will hold guardians and all who are engaged in managing or disposing of their property to a rigid adherence to principles of good faith not only, but to a strict performance of every duty": *Howell v. Mills*, 53 N. Y. 322. It is true that the infants do not appeal from the order confirming the referee's report of the sale, but the fact that there are two infants interested in the sale may be considered by the court in connection with the other various facts in the case, in the exercise of its well-established equitable principles. It is not necessary that the aid of the court should be especially invoked to exercise its protective jurisdiction in behalf of infant parties; but, when it sees that the rights of infants are in jeopardy, it may interpose and exercise its equitable powers to protect those rights and see that their interests are preserved inviolate: *Lefevre v. Laraway*, 22 Barb. 167. Formerly, the courts of chancery were regarded as the universal guardians for all infants, and now, in ²⁶⁵ proper cases, courts of equity, or those exercis-

ing equitable powers, can apply such powers for the benefit of those of tender years.

We have examined all of the cases cited by the respondent's counsel upon the question of setting aside a sale for inadequacy of the price bid, but most of them, except those made by the courts of the state of Illinois, relate to execution sales. The purchasers' rights in such sales are generally absolute, subject, however, to a right of redemption. There is a vast difference in such cases from sales made in partition, because such sales are always under the control of the court, and because in partition cases there is no opportunity or right of redemption. While there are cases holding that mere inadequacy of the price bid is not of itself sufficient ground for setting aside the sale, yet there are decisions holding to the contrary: *Loyd v. Loyd*, 61 Iowa, 243; and especially where the rights of minors are involved: *Lefevre v. Laraway*, 22 Barb. 167. But where, as in this case, inadequacy of the price bid combines with other matters in the case, fully justifying an inference that the sale was unfair and grossly injurious to the rights of the various owners, the sale should not be confirmed.

We think the learned judge, usually so careful, must have overlooked some of the salient points in the case, and erred in confirming the referee's report of the sale. Such order is therefore reversed.

JUDICIAL SALES—INADEQUACY OF PRICE. — Inadequacy of price, however gross, does not invalidate a judicial sale made in the manner prescribed by law, upon due notice, without proof of any fraud or unfairness or means used to prevent competition: *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497, and note. Inadequacy of price at a judicial sale, caused by any act done by the defendant in execution, or by his direction or authority, is not ground for setting aside the sale, except, perhaps, where it may injure third persons who are not in fault. To justify the setting aside of the sale, it must be shown that there were irregularities, and that they tended to cause the inadequacy, and were not caused by the defendant: *Weaver v. Nugent*, 72 Tex. 272; 13 Am. St. Rep. 792, and note. Mere inadequacy of price of a previous sale cannot affect a subsequent bona fide purchaser, and is no evidence of any other fraud: *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210; 17 Am. St. Rep. 131.

KROESSIN v. KELLER.

[60 MINNESOTA, 372.]

HUSBAND AND WIFE—CRIMINAL CONVERSATION.—A MARRIED WOMAN cannot maintain an action in the nature of criminal conversation against another woman.

T. Bruener and D. T. Calhoun, for the appellant.

G. H. Reynolds, for the respondent.

373 COLLINS, J. This is an action brought by a married woman against one of her own sex to recover damages, following, in a general way, the common-law form of declarations in crim. con. A general demurrer to the complaint was overruled in the court below, and by this appeal we are required to determine whether such an action can be maintained, the right to recover being based solely on alleged adulterous acts between plaintiff's husband and the defendant. It is to be noticed here that it is not alleged that the defendant was a seducer of the husband, or that plaintiff has been deprived of his support; nor is it an action for enticing the husband away, nor for inducing him to abandon or desert his wife. We are quite safe in saying that at common law no such action could have been maintained. The injured husband alone brought crim. con., **374** and he could sustain the action by simply showing adulterous intercourse. The grounds on which the right to recover was based are well stated in Cooley on Torts, 224, and the principal elements were the disgrace which attached to the plaintiff as the husband of the unfaithful wife—and no such disgrace has ever rested upon the wife, if there was one, of the guilty defendant—and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but, still worse, cast discredit upon the legitimacy of those really begotten by him. Because of these elements, the man was always conclusively presumed to be the guilty party. In the eye of the law, the female could not even give her consent to the adulterous acts, and, as a result, it was no defense in this form of action that the defendant had been enticed into criminal conversation through the acts and practices of the woman. From this statement as to the grounds or elements constituting this action, it will be seen that the principal ones cannot possibly exist or be involved in a similar action brought by a wife. And what has been said about the unavailability of the defense that the defendant himself was the victim, and not the seducer, is suggestive of what the courts might have

to hold to be the rule of pleading, and what they might have to inquire into, upon the trial of an action of this kind. Would it be held, following the old rule we have mentioned, and for which the reason seems well founded, that it was no defense for the female sued to allege and prove that she was the party seduced, and that the greater wrong and injury had been inflicted upon her, not upon the plaintiff wife, or would the contrary rule prevail? But we need not consider the subject further, for a moment's reflection will suggest the remarkable results flowing from the adoption of either rule.

We have been cited to quite a number of cases, determined in the courts of last resort in this country, in which it has been held, without much stress being laid on statutes concerning the rights of married women, that an action may be maintained by a wife against one who wrongfully induces and procures her husband to abandon or send her away. *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, the court being divided in opinion, is a leading case on this view of the subject. A later one, announcing the same doctrine, but made to rest much ³⁷⁵ more on the married woman's acts, in the state of Michigan, and similar to our own, is *Warren v. Warren*, 89 Mich. 123. The plaintiff's counsel has been industrious in collecting this class of cases in his brief, and to them we add *Price v. Price*, 91 Iowa, 693; ante, p. 360. But even on this proposition, and despite broad statutory enactments affecting the rights of married women, the courts are not entirely agreed, for in Maine and Wisconsin it has been held that such an action cannot be maintained: *Doe v. Roe*, 82 Me. 503; 17 Am. St. Rep. 499; *Duffies v. Duffies*, 76 Wis. 374; 20 Am. St. Rep. 79. But we need not decide, as between these cases, for the exact question raised by the demurrer here was not the one under consideration in any we have cited. They were brought for enticing away the husband; causing him to withdraw his support from the wife; to abandon or desert her—an entirely distinct and separate cause of action from that set out in the plaintiff's complaint. At common law, this form of action was wholly different in pleadings and proof, as well as parties, from crim. con. It proceeded, and still proceeds, upon different grounds, and we do not regard cases of that nature as authority in this. We are not unmindful of the fact that plaintiff's counsel has presented two cases—*Seaver v. Adams*, 66 N. H. 142, 49 Am. St. Rep. 597, and *Haynes v. Nowlin*, 129 Ind. 581, 28 Am. St. Rep. 213—in which it is held that an action by a wife against another woman, based on a complaint very much like this,

will lie. But, in these cases, the authorities before referred to are cited and relied on as directly in point. The courts rendering these decisions do not seem to have considered that there is, and inevitably must be, a marked distinction between an action charging a defendant with having induced and enticed a husband to withdraw his support from his wife and to abandon and desert her, and one similar to crim. con. We think the difference noticeable and material, although we do not wish to be understood as holding that the one first mentioned will lie. That question is not before us, and we simply express our conviction that a wife cannot maintain an action in the nature of crim. con. Such actions would "seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured." The power to bring such actions would furnish wives "with the means of inflicting untold misery upon others, with ³⁷⁶ little hope of redress for themselves." We find nothing in our statutes in respect to the rights of married women which indicates that the power to proceed in this form of action was intended to be conferred. Attention has been called to the General Statutes of 1894, section 5530 (Laws 1887, c. 207, sec. 1). We have heretofore had occasion to comment upon that act, and have not changed our views as then expressed: *Althen v. Tarbox*, 48 Minn. 18; 31 Am. St. Rep. 616.

Order reversed.

HUSBAND AND WIFE—ACTION BY ONE WOMAN AGAINST ANOTHER FOR SEDUCTION OF HUSBAND.—A wife may maintain an action against another woman for seducing her husband and alienating his affections, provided the wife is allowed by statute to sue for her own personal benefit or for personal wrongs suffered by her: *Seaver v. Adams*, 66 N. H. 142; 49 Am. St. Rep. 597, and note. See, also, the extended note to *Clow v. Chapman*, 46 Am. St. Rep. 473.

CAPLIS v. AMERICAN FIRE INSURANCE COMPANY.

[60 MINNESOTA, 576.]

INSURANCE—ASSIGNMENT OF LEASE—CONCEALMENT OF MATERIAL FACT.—If the assignee of a lease takes out a policy of insurance on the leased premises the day after the assignment to him, and such policy contains a clause prohibiting assignment of the lease without first obtaining the consent of the lessor, the fact of such assignment does not avoid the lease, although consent is not first obtained; nor in such case is the insurer relieved from liability by a condition in the policy that it shall be void if any material fact or circumstance concerning the risk has been misrepresented or concealed, nor if the interest of the insured is not truly stated.

INSURANCE—PLEADING—MISREPRESENTATIONS.—If an insurance company desires to rely upon the defense of concealment or

misrepresentation by the insured as avoiding the policy, such defense must be set forth in the answer, and proved upon the trial, together with the materiality of the concealments or misrepresentations. The materiality of the facts is a question for the jury.

INSURANCE—INTEREST OF INSURED—ENCUMBRANCES. A condition in a policy of insurance that it shall be void in case the interest of the insured be other than unconditional and sole ownership, has reference only to the quality of the estate or interest, and is not avoided by any sort of an encumbrance.

INSURANCE.—LIEN FOR RENT NOT CHATTEL MORTGAGE. A covenant in a lease providing that the lessor shall at all times have a first lien upon all buildings for any unpaid rental or taxes, does not create a chattel mortgage, within the meaning of a condition in a policy of insurance on such buildings that it shall be void if the buildings "be or become encumbered by a chattel mortgage."

INSURANCE—CHATTEL MORTGAGE.—An insurance policy containing a condition that it shall be void if the building "be or become encumbered by a chattel mortgage" must be construed as meaning an interest guarding against only the common ordinary chattel mortgage and instruments of that general nature, use, and purpose.

Action to recover on an insurance policy. Verdict for plaintiff, who appealed from an order granting defendant's motion to set aside the verdict and for a new trial.

H. H. Phelps, for the appellant.

L. A. Reed, for the respondent.

377 COLLINS, J. The building destroyed by fire, and insured by the policy on which this action was brought, stood upon leased ground, it being so stated in the policy, which was of the standard form. In the lease was this clause: "And it is further agreed that said lessor shall at all times have a first lien upon all buildings for any unpaid rental or taxes." And at the date of the policy, and also when the fire occurred, ground rent was due and unpaid for more than three months. The lease also contained the usual provision prohibiting an assignment thereof without first obtaining the written consent of the lessor. It had been assigned by the original lessee to the insured just before the issuance of the policy, but the lessor had not consented to the assignment. The question in the case is, whether these facts operated to discharge and release the insurance company from liability on account of the fire because of the existence of either of two clauses in the policy—one, that it should be void if any material fact or circumstance concerning the insurance, or the subject thereof, had been misrepresented or concealed, or if the interest of the insured be not truly stated, or if his interest be other **378** than unconditional and sole ownership; the other, that the company should not be liable if the subject of the insurance be

personal property, and be or become encumbered by a chattel mortgage.

1. The claim is made that the clause first above mentioned was violated, because the lessor had refused to consent to an assignment of the lease to the insured. It was not shown at the trial that there had been a refusal on the part of the lessor to consent to the assignment prior to the issuance of the policy, the assignment having been made the day before. It was shown that on one occasion—whether before or after the fire the witness could not state—the lessor had declined to consent until all rent arrearages had been paid. But the effect of an assignment of a lease where, by its terms, the lessor's consent must be first obtained, is simply that the assignee takes the premises subject to the right of the lessor to cancel the lease. The assignment is not void, but voidable, at the lessor's option. An assignment of a lease, even where expressly forbidden, and where, by its terms, a forfeiture is provided for its breach, is, nevertheless, valid, and passes the estate to the assignee, subject to the consequences of the breach; and the landlord may waive the forfeiture, either expressly or impliedly: 1 Wood on Landlord and Tenant, 711; Shattuck v. Lovejoy, 8 Gray, 204; Brummell v. MacPherson, 14 Ves. 173. Again, if the insurance company desired to rely upon the defense of concealment or misrepresentation by the insured, such defense should have been set forth in the answer, and proved upon the trial, together with the materiality of the concealments or misrepresentations. And the materiality of the facts is a question for the jury: 11 Am. & Eng. Ency. of Law, 297, cases cited in note 1. This defense, even if admissible under a general allegation in the answer that there had been concealments and misrepresentations of material facts, was not made upon the trial. To the contrary, it was practically waived by defendant's counsel when the motion was made and granted that the jury be directed to return a verdict for plaintiff.

2. As to the language in the policy that it should be void in case the interest of the insured be other than unconditional and sole ownership, we need but to say that a citation of authorities to the proposition that these words have reference only to the quality of the estate or interest, and are not avoided by any sort of an encumbrance, seems unnecessary. The adjudications are all one way ³⁷⁹ upon the effect of such language in an insurance policy. This brings us to the claim that the insurance company was discharged and released from liability by reason of the stipulation in the lease that the lessor should have a first lien on all

buildings for unpaid rent and taxes. This stipulation, counsel insists, was a chattel mortgage upon the insured building, within the meaning of that condition in the policy which rendered it nonenforceable if the property be or become encumbered by such an instrument. The court below, when granting a new trial, seems to have thought that, within the rule laid down in the case of *Merrill v. Ressler*, 37 Minn. 82, 5 Am. St. Rep. 822, this clause in the lease constituted a chattel mortgage on all buildings situated on the leased land, and, as a necessary consequence, the policy condition was applicable. It may be that, as between the lessor and the lessee, the former had an equitable mortgage upon the building; but that is not before us for determination. The question here is not what might constitute a mortgage, legal or equitable, as between the parties or their privies, as was that in *Merrill v. Ressler*, 37 Minn. 82, 5 Am. St. Rep. 822, but as to what construction should be placed upon the clause in the policy in reference to encumbrance by chattel mortgage—an altogether different question. We have in this state an instrument in common use known as a "chattel mortgage." Its character, form, uses, and purposes are well known. It may have its equivalent in the instruments usually known as "bills of sale," where such bills are given as security for a debt, but we do not decide that question. But we have no doubt as to how the words, as used in the policy, should be construed on this occasion. The authorities adopting and putting out the standard form of an insurance policy meant an instrument which would come within the commonly understood meaning of the words when they used the expression "encumbered by a chattel mortgage." They used the term "chattel mortgage" in its popular sense. They had no intention to include by this language every kind of an instrument which could be enforced in a court of equity as a lien or mortgage upon personalty; for, if such had been the intention, it would have been extremely easy to have said so. And, if the lessor's lien in this case was covered by the language found in the policy, every kind and sort of an instrument creating an equitable lien on the insured property would be included and covered as well, and no such broad construction as ⁸⁸⁰ that can be allowed to prevail. The clause must be construed as simply guarding against the common, ordinary chattel mortgage and instruments of the same general nature, use, and purpose.

Order reversed.

INSURANCE—INTEREST.—An interest in property, to be insurable, does not necessarily depend upon the sole ownership of the property. It may be a special or limited ownership, disconnected from any

title, lien, or possession: Rochester Loan etc. Co. v. Liberty Ins. Co., 44 Neb. 537; 48 Am. St. Rep. 745, and note. A condition in a policy of insurance that a transfer, if made without the consent of the insurers, shall render the policy void, relates to conveyances by which the interest of the insured is absolutely and permanently divested: Power v. Ocean Ins. Co., 19 La. 28; 38 Am. Dec. 665, and note. See, also, the extended notes to Lane v. Maine etc. Ins. Co., 28 Am. Dec. 154-159, and Morrison v. Tennessee etc. Ins. Co., 59 Am. Dec. 304-312.

INSURANCE—PLEADING.—If an insurer relies upon a special matter in defense, he must set it forth by proper pleas: Benjamin v. Connecticut Indemnity Assn., 44 La. Ann. 1017; 32 Am. St. Rep. 362. A pleading in which a party seeks to excuse himself from obligation to comply with the terms of an insurance policy, on the ground of ignorance of its contents, but not alleging fraud, misrepresentation, or concealment, is bad on special exception: Morrison v. Insurance Co., 69 Tex. 363; 5 Am. St. Rep. 63.

WISCONSIN RED PRESSED BRICK COMPANY v. HOOD.

[80 MINNESOTA, 401.]

SALES—IMPLIED WARRANTY.—An executory sale, by a manufacturer, of a specific article of a well recognized kind or description in the market, as a good quality of bricks of the grade known as "common," carries an implied warranty that the goods shall conform to the description, be of good material, and well made according to the description, but none that they shall answer the purpose for which they are purchased. As to this the rule of caveat emptor applies.

SALES—LATENT DEFECTS.—If a manufacturer knowingly uses unsuitable and defective material in the manufacture of an article sold in the market by description, he is liable for any latent defect not disclosed to the purchaser.

SALES—LATENT DEFECTS—EVIDENCE.—If the goods delivered are not of the kind which the manufacturer agreed to deliver, and do not conform to the conditions of his contract as to kind, quality, or grade, by reason of latent defects of such character as to mislead and deceive, evidence of such latent defects is admissible as a defense in an action to recover the price of the goods sold.

Action to recover the price of bricks sold, and to enforce a lien therefor. Judgment for plaintiff. Appeal from an order denying defendants' motions for a new trial.

White & McKeon and W. B. Phelps, for the appellants.

W. A. Lancaster, for the respondent.

⁴⁰² COLLINS, J. The general nature of this triangular contest is stated in the opinion on a former appeal: Wisconsin etc. Co. v. Hood, 54 Minn. 543. A second trial having been had before the court, without a jury, findings of fact were made and judgment ordered for different specified amounts in favor of the plaintiff and defendant Hood, and for these amounts equal and co-ordinate liens were adjudged upon the real property in ques-

tion. Thereupon, the defendants Hurd Refrigerator Company and Hood separately moved for a new trial, and, on the refusal of the court to grant their motions, both appealed.

The assignments of error made by counsel for appellant first named are directed to rulings made by the court below when hearing the evidence, and, as a consideration of one of these assignments compels a reversal, we shall not go further into the case. One of the material issues made by the pleadings was as to the kind, quality, and grade of the bricks which plaintiff, the manufacturer, agreed to sell and deliver to the contractor Hood, and which he had agreed to purchase and receive, and whether plaintiff had complied on its part with the requirements of the contract in this respect, or had furnished and delivered a much inferior or worthless article; and it must be borne in mind that these bricks were to be shipped in carload lots, for immediate use in the walls of buildings then in process of erection for defendant company. Hood, in his answer to the complaint, alleged that he had contracted for bricks of the first quality, and in all respects fit and suitable for use in such buildings; that, as the bricks were received, they appeared to be of the quality agreed upon; that he relied upon such appearance; that he was unable ⁴⁰⁸ to discover any defects, and so put them into the walls; but that there were latent defects in the bricks not apparent or discoverable until they had been placed in the buildings, and exposed to the wind, weather, and changes of temperature; and that by reason of these latent defects they were not of the quality agreed upon, nor of the value stipulated to be paid when the contract was made. In the answer made by defendant company, this same defense was interposed, but in different language. It was averred that plaintiff agreed with Hood to furnish to him a grade of bricks known as "common," to be of good quality, and equal to samples which had been sent by plaintiff's superintendent; that the bricks furnished and delivered were not of the grade known as "common"; that they were not of good quality, and that they were not equal to the samples; that they were valueless by reason of a hidden fault, or through a hidden defect, in their construction, which fault or defect could not be detected by mere inspection or examination; and that while the bricks were apparently good, and fit for use, they would disintegrate and fall to pieces upon exposure to the weather, after being put into the buildings. The substance of this defense was, that although the bricks appeared on inspection and examination to be up to the requirements of the contract as to grade and

quality, they were not; that they were not of the grade known as "common," but of an inferior grade; that they were not of good quality, nor did they correspond with the samples; and that this inferiority and failure to comply with the contract conditions or requirements arose from hidden or latent defects, which could not be, and were not, detected or discovered until the bricks had been used in the buildings.

There was no finding that this was a sale by sample—and of this no complaint is made by an assignment of error—so that we shall consider the contract, as we did on the former appeal, as an executory sale, by the manufacturer, of a specific article of a well-recognized kind or description in the market, namely, a good quality of bricks of the grade known as "common." There was an implied condition of this contract that the bricks should conform to the description, be of good material, and well made, according to the description, but none that they would answer the purpose for which they were purchased. As to this, the rule of caveat emptor applies: ⁴⁰⁴ *Goulds v. Propoy*, 42 Minn. 109. Part of the testimony stricken out related to an alleged defect in the clay used in making the bricks, and tended to show that plaintiff must have known of the unsuitability of the material. A good deal has been written on the subject, and the confounding of conditions precedent with implied warranties has resulted in great confusion and conflict in the decisions; but we hold the only just rule in such cases to be, that if a manufacturer knowingly uses unsuitable and defective material in the manufacture of an article sold in the market by description, he is liable for any latent defect not disclosed to the purchaser: *Hoe v. Sanborn*, 21 N. Y. 552; 78 Am. Dec. 163; *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13. See, also, 10 Am. & Eng. Ency. of Law, 85, tit. "Implied Warranty," particularly par. 7; also, *Randall v. Newson*, 2 Q. B. Div. 102; 19 Moak, 243.

On the trial, there was considerable testimony offered and received, and some offered and rejected, with respect to hidden or latent defects in the bricks, but finally the court struck out all evidence theretofore received as admissible, under the allegations concerning hidden or latent defects, each of the defendants duly excepting. At the time of the ruling, the court gave no reason for it, so far as is shown by the record before us, and we are at a loss to understand why the ruling was made. Counsel for respondent seeks to sustain it by urging that such testimony was inadmissible under the pleadings, because the allegation in the answer of the Hurd company was, that the hidden defect of

which it complained was in the "construction" of the bricks, while all the evidence brought under the ruling showed, if anything, that the defect was in the clay used by plaintiff. If this was a fair statement of the allegations of the answer mentioned—and we do not think it is—the argument possesses no merit, for the word "construction" referred to the making of the bricks. They could be "constructed," or made, so as to be defective, by using poor or worthless clay, as well as by using defective machinery, or by the employment of incompetent workmen. Again, counsel's criticism of this answer does not reach that made by defendant Hood. No other suggestion is made by counsel as a ground for sustaining the ruling, and we have none in mind. If the bricks were not what plaintiff agreed to deliver, did not conform to the conditions of its contract as to kind, quality, or grade, and this was ⁴⁰⁵ visible when they reached the purchaser, or could then have been discovered by the use of ordinary means, the latter could have refused to accept them. No one can question this right. If, as alleged, they were apparently of the kind, quality, and grade contracted for, were used in the belief that they fully answered the conditions of the agreement in this respect, and it was then discovered that, by reason of latent defects of such a character as to mislead and deceive, having a fault which could only be determined and developed by exposure in the walls, the bricks did not conform to the conditions, as to kind, quality, or grade on which they were purchased and used, the defense attempted was open to defendants. The testimony stricken out tended to prove part of such a defense, and was admissible under the pleadings.

We feel compelled, in conclusion, to allude to certain italicized language found in the brief of counsel for appellant Hurd company, which was designed to and does reflect severely upon the trial court, and not only to express our surprise that it should appear as part of an argument presented to this court, but to say, further, that it is unworthy of counsel, uncalled for, and that on all occasions counsel must not forget to be respectful to the courts.

Orders reversed.

SALES—IMPLIED WARRANTY OF QUALITY.—The sale of a chattel by a particular description is a warranty that the article sold is of the kind specified: *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753, and note. In executory sales, as of a large quantity of brick to be delivered from time to time, an implied warranty of quality exists: *Bushman v. Taylor*, 2 Ind. App. 12; 50 Am. St. Rep. 228, and note. See, also, the note to *Morse v. Moore*, 23 Am. St. Rep. 794.

SALES—LATENT DEFECTS.—A manufacturer who sells goods of his own manufacture impliedly warrants that they are free from any latent defects growing out of the process of manufacture; but he is not liable for any latent defect in the material which he is not shown and cannot be presumed to have known: *Hoe v. Sanborn*, 21 N. Y. 552; 78 Am. Dec. 163, and note.

CATER v. NORTHWESTERN TELEPHONE EXCHANGE Co

[60 MINNESOTA, 539.]

TELEPHONE COMPANIES—POLES IN HIGHWAY—ADDITIONAL SERVITUDE.—The erection and maintenance under legislative authority of poles and wires in a rural highway for a telephone line for public use is not an additional servitude, for which the abutting landowner, who is also the owner of the fee in the highway subject to the public easement, is entitled to compensation.

Action to compel defendant to remove its telephone line from the public highway, and to enjoin it from maintaining such line. Judgment dismissing the action. Appeal from an order denying a motion for a new trial.

O. Taylor and Bruckart & Brower, for the appellant.

Hale, Morgan & Montgomery, for the respondent.

543 MITCHELL, J. The defendant is a domestic corporation authorized to erect and maintain telephone exchanges and lines. It has constructed a telephone line between the cities of Minneapolis and St. Cloud, a part of which is on and along the side of a rural highway, the fee of which, subject to the public easement, is in the plaintiff, who is the owner of the abutting land. It was built without his consent and against his protest. It consists of poles planted in the soil at a distance of one hundred and seventy feet from each other, upon which wires are stretched. The defendant claims the right to construct and maintain this line solely by virtue of the General Statutes of 1894, section 2641. This action was brought to compel the defendant to remove its poles and wires from the highway. It is not claimed that the line is not constructed in strict accordance with the requirements of the statute. Neither did the plaintiff either allege or prove that it has caused any substantial pecuniary damage or injury to himself or his property. He plants himself squarely upon the proposition that the erection and maintenance of telephone poles and wires is not within the public easement in a highway, but constitutes the imposition of an additional servitude upon his land; and that is the question presented by this appeal. The question is *res integra* in this state, and the decisions in other

states upon it, as well as upon the kindred one as to telegraph lines, are conflicting. Hence we feel at liberty to decide the question entirely upon principle.

From the manner in which the case has been discussed by counsel, we assume that defendant's telephone line is for the use of the public upon payment of certain charges. Therefore the use to which ⁵⁴⁸ the highway has been appropriated by the defendant is a public one. The transmission of intelligence by telegraph or telephone is a business of a public character, to be conducted under public control, in the same manner as the transportation of persons or property by common carriers. But, of course, the fact that this is a public use gives the legislature no right to authorize the taking of private property for it without paying compensation. The proposition is equally elementary that the acquisition by the public of one easement in land gives no right to another and different easement. The public cannot go beyond, but must be confined within, the general purpose for which the easement was granted or acquired from the owner of the soil. Hence, whether an easement authorizes the use of land in a particular way depends upon the nature and extent of the easement. These propositions are so nearly axiomatic that they will not be disputed by anyone.

The question, then, is, What is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society, the conception of a highway was merely a footpath; in a slightly more advanced state, it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals—constituting, respectively, the “iter,” the “actus,” and the “via” of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterward be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was

acquired, and are more onerous to him than those then in use. Another proposition, which we believe to be sound, is that the public easement in a highway is not limited to travel or transportation of ⁵⁴⁴ persons or property in movable vehicles. This is, doubtless, the principal and most necessary use of highways, and in a less advanced state of society was the only known use, as the etymology of the word "way" indicates. And the courts, which, as a rule, are exceedingly conservative in following old definitions, have often seemed inclined to adhere to this original conception of the purpose of a highway, and to exclude every form of use that does not strictly come within it. But it is now universally conceded that urban highways may be used for constructing sewers and laying pipes for the transmission of gas, water, and the like for public use. Some courts put this on the ground that these uses are merely incidental to, and in aid of, travel on the streets. Other courts put it on the ground that such uses are contemplated when the easement in urban ways is acquired, but not in the case of rural highways. But it seems to us that neither of these reasons is either correct or satisfactory. The uses referred to of urban streets are not in aid of travel, but are themselves independent and primary uses, although all within the general purpose for which highways are designed. Neither can a distinction between urban and rural ways be sustained on the ground that such uses were contemplated when the public easement was acquired in the former, but not when the easement was acquired in the latter. As a matter of fact, most of these uses were unknown when the public easement was acquired in many of the streets in the older cities. Indeed, many of what are now urban highways were merely country roads when the public acquired its easement in them, and doubtless many highways that are now merely country roads will in time become urban streets. When such changes occur, will the abutting owners be entitled to new compensation before the public can build sewers or lay water or gas pipes in these streets?

It seems to us that a limitation of the public easement in highways to travel and the transportation of persons and property in movable vehicles is too narrow. In our judgment, public highways, whether urban or rural, are designed as avenues of communication; and, if the original conception of a highway was limited to travel and transportation of property in movable vehicles it was because these were the only modes of communication then known; that as civilization advances, and new and improved methods of communication and transportation are developed, these are

all in aid of and within ⁵⁴⁵ the general purpose for which highways are designed. Whether it be travel, the transportation of persons and property, or the transmission of intelligence, and whether accomplished by old methods or by new ones, they are all included within the public "highway easement," and impose no additional servitude on the land, provided they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided they do not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air. It is impracticable, as well as dangerous, to attempt to lay down, except in this general form, any rule or test of universal application as to what is or what is not a legitimate "street or highway use." Courts have often attempted to do so, but have always been compelled by the logic of events to shift their ground. The only safe way is to keep in mind the general purpose of highways, and adopt a gradual process of inclusion and exclusion as cases arise. This court has held, in common with the great majority of courts, that an ordinary commercial railroad imposes an additional servitude on a street, and we applied a test as to what did and did not constitute an additional servitude. As far as it went, and as applied to such a case, the test was doubtless correct; but, after all, the bottom fact upon which the decision really rests was, that such an appropriation of a street was practically subversive of its use by the public in the ordinary way, and also unreasonably impaired the special easements of abutting owners. So, too, the New York elevated railway cases were discussed and reasoned at great length; but in their final analysis the real ground upon which those structures were held to impose an additional servitude was, not that they were immovable, or were above the surface of the ground, but because they unreasonably impaired the easements of abutting owners in the streets for purposes of access, light, and air. How far a particular method of using a street must interfere with other methods of its use by the public, or with the special easements of abutting owners, in order to constitute an additional servitude or amount to a nuisance, is not involved in the present case.

An argument sometimes advanced why telegraph and telephone lines constitute an additional servitude is, that the structures are immovable. It is said that "the primary law of the street is motion." ⁵⁴⁶ It is true, motion is the law of the street, in the sense that the person or thing to be transmitted or transported must move; but it is not true in the sense that the

medium or agency by or through which it is conveyed or transmitted must move. Pipes laid for the transmission of water, gas, and steam are immovable. So are the tracks of street railways, also the poles and wires of the trolley system. And it can make no difference in principle whether the immovable structure is on, under, or above the surface of the ground, for the rights of the owner of the fee are the same in either case. Subject only to the public easement for highway purposes, he remains the owner of the land upward and downward indefinitely. If the transmission of intelligence by telegraph or telephone is not included in the public easement in a highway, it would be equally an invasion of his rights of property, even if the wires were placed underground. If an immovable structure in a highway constitutes an additional servitude, it is not merely because it is immovable, but because it unreasonably interferes with the general use of the street by the public, or because it unreasonably impairs the special easements of abutting owners.

It can hardly be necessary to say that the fact that telephone and telegraph lines are owned by private companies, and not by the state, is not material, provided they are authorized by the state, and are devoted to a public use. No such structures can be put in the highways except by authority of the state, and then only for a public use. The state can say how they shall be constructed and operated. When public interest demands, the state can require the wires to be put under ground, as they, doubtless, should be in cities of any considerable size. So far as there is any distinction between rural and urban highways, there would be much more reason for holding such structures an additional servitude in the latter than in the former. It is a matter of common knowledge that telegraph and telephone lines along the side of a country road rarely, if ever, appreciably interfere with either public travel or the easements of the abutting landowners; whereas, in the cities, especially on business streets, where the buildings extend out to the line of the street, the numerous wires stretched upon the cross-arms frequently materially interfere with access, light, and air, as well as render protection of the buildings more difficult in case of fire.

547 There is a further consideration that is entitled to weight. We cannot pretend ignorance of the fact that in this state, from the earliest times, the right to appropriate highways for telegraph lines has been asserted, and almost universally acquiesced in

by the owners of abutting estates. The legislature has for nearly thirty years assumed that this right existed, by enacting a statute authorizing it. In 1881, when the newer invention of telephones was coming into general use, the legislature amended the statute extending the same right to telephone companies. This has also been generally acquiesced in by the public. This constitutes a popular construction of "the law of the road," and a popular verdict as to what public convenience requires, which courts can hardly afford to ignore. The telephone is still a comparatively new invention. Notwithstanding the high charges for its use which the proprietors of the patents have been enabled to exact, it has already become a common medium of communication, not only between residents of the same city, but also between neighboring towns and villages, and, with the development of the long-distance telephone, even between towns and cities hundreds of miles apart. With the expiration of the patents, the charges for its use are now being rapidly reduced. The present possibilities of the telephone as a means of communication are very great. It is not impossible that it may soon become a common and cheap mode of communication, not merely between towns, but also between residents of the country and of the towns, or even between the rural residents themselves. It may be, as advocated by many as to telegraphs, that the government will at some day assume the function of furnishing all such service to the public. Telephone lines must be placed in the highways. It is the only practicable place to put them. The only question is, whether a new right to do so must be acquired from the owners of property abutting on the highways.

We are not unmindful that private property cannot be taken for a public use without compensation, however important that public use is. We are not forgetful of the fact that care should be taken that, in the popular zeal for modern public improvements, the burden of furnishing these improvements should not be shifted from the public, and imposed upon any particular class of individuals. But viewing, as we do, highways as being designed as public avenues of ⁵⁴⁸ travel, traffic, and communication, the use of which is not necessarily limited to travel and the transportation of property in moving vehicles, but extends as well to communication by the transmission of intelligence, it seems to us that such a use of a highway is within the general purpose for which highways are designed, and, within the limitations which we have suggested, does not impose an additional

servitude upon the land; in short, that it is merely a newly discovered method of using the old public easement.

We have thus far referred to the appropriation of highways for telegraphs and for telephones as if both stood on the same ground, and involved the same principle. But the only question before us is, whether a telephone line imposes an additional servitude on a highway; and the decision of the court must be deemed to be confined to that question, leaving the question as to telegraph lines to be authoritatively decided when it is presented and argued, so that, if there be any distinction between the two, an opportunity may be given to point it out.

Order affirmed.

MR. CHIEF JUSTICE START dissented, and in the course of his remarks, said: "A highway primarily is simply a public easement or servitude, for travel and passage of persons, animals, and things, carrying with it, as an incident, the right of the public to use the soil for the purpose of the repair and improvement of the way, and, in cities and populous places, the further right to use the street for the more general purposes of sewerage, the distribution of water and light, and the furtherance of public health, safety, and convenience. The owner of the land over which the highway passes retains the fee thereof and all rights of property therein not incompatible with the public easement therein as here defined: 2 Dillon on Municipal Corporations, sec. 688; Angell & Durfee on Highways, sec. 301. While the fundamental idea of a highway is that it is for public travel, yet the purposes for which it was acquired are not limited to travel and passage in the then known vehicles and methods, for all new vehicles and methods of travel thereon, which are not inconsistent with the safe and practicable use of the highway for travel in the ordinary methods are included in the public easement. Accordingly, it has been held by nearly all of the recent authorities that the operation of a street railway for the transportation of persons only, whether the motive power is animal or mechanical, including electricity, with the necessary poles and wires to communicate the power to the car or vehicle to be moved, is not an additional servitude: Taggart v. Newport Street Ry. Co., 16 R. I. 668; Halsey v. Rapid Transit etc. Ry. Co., 47 N. J. Eq. 380. The authorities, in reference to such street railways, proceed upon the basis that such new use of the street is similar to that for which the street was originally acquired, or, in other words, it is merely a newly discovered method of exercising the old public easement for travel and passage of persons and things along the public street. This principle has been extended, by a limited number of adjudged cases, to the erection and use of telephone and telegraph poles and wires in the streets for the purpose of transmitting intelligence. The analogy, however, between a telephone line and the purposes for which a country highway is acquired is remote, if not fanciful; and it is safe to say that such use of the highway was not within the contemplation of the parties when the damages for the public easement were assessed or the right of passage dedicated. The use of the highway for a telephone line is essentially distinct from its use for travel. The

right of the public in the ordinary highway is to pass along upon it, not to remain stationary; and it would be just as reasonable to claim that towers erected in the highway for the purpose of transmitting intelligence by signal lights were not an additional servitude, as to make such a claim for telephone poles. In each case, there would be an exclusive use and possession of a portion of the highway, in no manner connected with the movement of vehicles or cars of any kind, which cannot be properly regarded as a new method of exercising the old public easement for travel and passage. The adjudged cases upon this subject are conflicting, but the later cases and the weight of authority sustain the doctrine that a telegraph or telephone line along the highway, where the fee thereof is in the abutting owner, is foreign to its use, and an additional servitude, for which such owner is entitled to compensation; and that the legislature cannot authorize the imposition of such servitude without also providing for such compensation: *Willis v. Erie etc. Co.*, 37 Minn. 347; *Board of Trade etc. Co. v. Barnett*, 107 Ill. 507; 47 Am. Rep. 453; *Broome v. New York etc. Co.*, 42 N. J. Eq. 141; *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 906; *Stowers v. Postal etc. Co.*, 68 Miss. 559; 24 Am. St. Rep. 290; *Chesapeake etc. Co. v. Mackenzie*, 74 Md. 36; 28 Am. St. Rep. 219, and notes; *Pacific etc. Co. v. Irvine*, 49 Fed. Rep. 113; *Lewis on Eminent Domain*, sec. 131; *Eels v. American etc. Co.*, 143 N. Y. 133; *Elliott on Roads and Streets*, 534; *Tiedeman on Municipal Corporations*, sec. 297. The opposite doctrine is held in the following cases, by a divided court, except in the last case cited, and in that one the fee was in the public: *Pierce v. Drew*, 136 Mass. 75; 49 Am. Rep. 7; *Julia Building Assn. v. Bell Tel. Co.*, 86 Mo. 258; 57 Am. Rep. 398; *People v. Eaton*, 100 Mich. 208; *Irwin v. Great etc. Co.*, 37 La. Ann. 63. In the first two cases, the dissenting opinions are so vigorous as to largely neutralize the decisions as authorities outside of the jurisdiction of the court announcing them. The latest decision upon this question is that of the New York court of appeals in the case of *Eels v. American etc. Co.*, 143 N. Y. 133, which was in all substantial particulars similar to the one at bar. It ably discusses the question on principle, and reaches the unanimous conclusion that the occupation of a rural highway by a telegraph and telephone company for the erection of its poles is an additional servitude, for which the owner of the fee is entitled to compensation.

"I am of the opinion, upon both principle and authority, that the planting of telephone posts upon a public highway in the country, the fee whereof is in the abutting owner, is an additional servitude, an appropriation of private property, and unlawful as to such owner, unless the right to do so is acquired by contract or condemnation. In reaching this conclusion, I am not unmindful of the fact that the use of the telephone is a beneficial and public use; but private property cannot be taken for public use without compensation first paid or secured, no matter how small its value. This is the constitutional right of the humblest individual, which must not be lost sight of in our enthusiasm over the public benefits conferred by the telegraph and telephone, or in our desire to promote the public welfare."

BUCK, J., also dissented, and said: "There are several methods by which a highway may be established; for instance, by condemnation,

dedication, and by prescription. In the case of condemnation, damages are usually assessed by way of compensation for the injury sustained. But, in case of dedication and prescription, damages are not assessed, although in law all of these methods are equally effective. Yet, as in cases of prescription where a man's property is secured for public use without compensation, there should not be added to such property a greater burden than was contemplated by the owner when he offered his rights in the premises to become inferior to those of the public. It is a well-established rule of law that the owner of land burdened with a highway has all of the rights of the soil not inconsistent with its use for public purposes, and for which it was originally established. The title to the soil remains in the owner, and any interference with it by anyone to the injury of the owner, and not consistent with the purpose for which it was originally established, renders the person so interfering liable in damages. The constitutional provision, so familiar to all, that private property shall not be taken for public use without just compensation first paid or secured, ought to stand as a continual barrier against all wrongful encroachments upon private rights. The aggregate of the private rights injuriously affected by the majority opinion in this state is very great, possibly greater than those which will be benefited by the result of that opinion. The owners of urban, suburban, and rural property are very numerous, and must necessarily be thus seriously affected in many instances. Now, a public highway is established for an uninterrupted passage for animals and vehicles, and to allow persons to pass and repass, go and return at their pleasure, and without interruption. It is an easement which the public have in the land, with the incidental right on the part of the public authorities to keep it in repair. The damages are accepted by the owner with the understanding that it is for this purpose that the highway is established. Or, if the highway is established by dedication or user, the same implication would arise. Now, is the erection of telephone poles in a street or highway, with its numerous wires connecting the poles upon crossbars, an entirely new use of the highway, and an additional burden to the owner, for which additional compensation should be provided, or is it a mere modification of the public servitude? If it is a change wholly foreign to the ordinary purposes of a highway, then the adjoining owner is entitled to compensation.

Dillon on Municipal Corporations, volume 2, section 698 a, says: "On the whole, the safer, and perhaps sounder, view is, that such a use of the street or highway, attended, as it may be, especially in cities, with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wire placed in front thereof." In the prevailing opinion in this case, it is said that, "if there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances." If by this is meant that certain changed conditions may arise which, for the first time, demand the application of the common law to such changed conditions, the statement may be correct; but the law itself always existed, although it may never before have been applied or called into actual operation, and especially so as to establish a prece-

dent. Public sentiment may change, and the onward spirit of the times demand that it shall have its way, but the well-established principles of the common law are unchangeable, and the private right which existed fifty, one hundred, or one thousand years ago should now be as sacred and inviolate as then. The current of public sentiment, changing though it may, does not create new rights; and while it does, step by step, insidiously attempt to appropriate private property for new uses, it should not be granted success, under the guise of great public benefit, to the injury of the individual. And while we speak of private or individual rights in this case, where only one individual's rights are to be determined, yet, in a broader sense, a great body of the public may be seriously affected by it, who are remediless under the rule laid down in the majority opinion.

"Now, a new use, even if beneficial to the public, does not necessarily create a new right as against the owner of the land. The primary question is, Does it constitute an essential change, so as to create an additional burden? If so, then it is immaterial how beneficial the new and improved methods of public travel or the transmission of intelligence by telegraph or telephone, or whether the business is to be conducted under public control. It is also quite immaterial that the erection of these telephone poles was authorized by a legislative enactment. It needs something more than a legislative consent to deprive a man of his property or prevent his absolute control of it. The state itself would have just as much right to erect telephone poles in the highway as to authorize any corporation or private person to do so, and in neither case should it be permitted without compensation. Such an appropriation of the streets is destructive of the ordinary use as public ways, and inconsistent with the purpose for which they were originally established.

"In the case of *Eels v. American etc. Co.*, 143 N. Y. 133, Justice Peckham, speaking of certain prior decisions of the New York Circuit Court of Appeals, said: 'They show that the primary or fundamental idea of a highway is, that it is a place for uninterrupted passage by men, animals, or vehicles, and a place by which to afford light, air, and access to the property of abutting owners, who, in this respect, enjoy a greater interest in the street than the general public, even though their title to the land stops with the exterior line of the street. It is not a place which can be permanently and exclusively appropriated to the use of any person or corporation, no matter what the business or object of the latter might be. It was because the highway was permanently, and, to some extent, exclusively, appropriated by the elevated railroads that it was held that their erection, without the consent of the abutting owners, was illegal.' This was said of the streets in New York city, where the title of the streets is in the city. It seems to me that this rule can be applied in this state with much greater force, where the fee in the street is in the abutting owner. The principle announced in the majority opinion would, of course, apply to our large and populous cities, as well as to rural property. It is a well-known fact that the streets in our cities are lined with these telegraph and telephone poles, covered with crossbars, and strung with numerous wires, making these erections in some respects dangerous, and interfering with the free and convenient use of the property. If one person or company can do this, an-

other one may do the same. The mere fact that the owner may have access to his abutting property, because there is a sufficient space left between those poles for him to pass, is certainly a poor justification for creating an additional burden upon his property, without giving him any remedy for damages. In large cities, these numerous erections may exclude light and air, besides being an inconvenience in the use of the street, and a nuisance in several other respects. And the erections are not to be temporary, but permanent, continuous, and excluding the use by the public of that portion of the highway occupied by them. Such an exclusive use of a portion of the highway, whether old or new, it seems to me, is not included within the public highway easement. If telegraph and telephone poles two feet in diameter, and thirty or forty feet high, covered with crossbars and numerous wires strung from one pole to another, erected in the highway in front of a man's residence or business property, can be there permanently maintained, why cannot a guardhouse be erected there also as a permanent structure, upon the ground that the poles and wires need protection against depredators or injury? The erection of telegraph and telephone poles is not merely a new method of exercising old rights, but the addition of a new servitude and essentially a new burden upon the street. Viewed in this light, if the necessities or luxuries of modern life are needed, let those who seek their enjoyment and benefit pay for them and not secure them at the expense of additional burdens imposed upon private property. It is this compulsory yielding up of private rights and private property to concentrated power and wealth in the hands of the few, under the demands of a so-called 'progressive civilization,' that needs judicial care and its conservative force to see that no new appropriation of lands not embraced in the original dedication or condemnation shall be permitted. If the erection of telephone and telegraph poles in our public streets and highways is simply a new and improved method of the use of the street, I fail to see why any legislative permission was necessary, because the telephone company would, in such case, have the same right to the use of the street as any traveler thereon.

"But suppose the right to erect these electrical lines was included in the original establishment of the public streets and highways, yet it must be conceded that they do constitute damages in a greater or less degree, and, in condemnation cases, must the municipalities pay the abutting owner for such damages? By what constitutional provision or statutory law are municipal corporations authorized to levy a tax to pay the damages for a private individual or a corporation to erect these poles and carry on the telephone or telegraph business? I assume that no such right exists, and shall we not in the coming time be met with this serious question of whether, upon the exercise of the power of eminent domain by condemnation proceedings, the possible or probable erection of such poles will not constitute an element of damage, to be assessed and paid by the people to the abutting owner before his property can be taken for public use? And in such case will not further complications arise in case of the vacation of the streets or highways where these erections have been made? The great weight of authorities is against the view of the majority of this court, and the late decisions of eminent courts are in accordance with the views which I have endeavored to express."

TELEPHONE COMPANIES—POLES IN STREETS—ADDITIONAL SERVITUDES.—When the fee in the bed of a street or highway is in the abutting landowner, the planting of a telegraph or telephone pole therein is an additional servitude imposed upon the land, for which such owner is entitled to compensation, of which he cannot be deprived by statute: *Chesapeake etc. Telephone Co.*, 74 Md. 36; 23 Am. St. Rep. 219, and extended note fully discussing the subject.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

HITE v. METROPOLITAN STREET RAILWAY COMPANY.

[130 MISSOURI, 122.]

PRACTICE—PLEADING.—Plaintiff cannot allege one cause of action, and recover upon another not stated.

CARRIERS—NEGLIGENCE—PRESUMPTION.—An injury to a passenger, shown to have been caused by reason of some defect or imperfection in the carrier's appliances, or by some omission of duty or negligent act of his servants, raises a presumption of negligence on his part.

STREET RAILWAYS—NEGLIGENCE—PRESUMPTION.—An accident to a passenger on a street railway, shown to have resulted from operating the train in such a way as to produce a jerk or lunge by which such passenger was precipitated from the car, raises a presumption of negligence on the part of the company or its servants, but such presumption may be overcome by proof that it had used the utmost care and diligence to prevent the accident, and that it was produced by some cause beyond its control, or that the passenger was guilty of contributory negligence.

CARRIERS OF PASSENGERS, NOT BEING INSURERS of their safety, are not responsible for injury to them, if all reasonable care, skill, diligence, prudence, and foresight for their safety have been employed.

PRACTICE DIRECTING VERDICT.—If the evidence is of such character that the trial judge would have a plain duty to perform in setting aside the verdict as unsupported by the evidence, it is his duty and prerogative to interfere before submission to the jury, and direct the verdict.

W. Pratt, W. J. Ferry, and L. P. Dana, for the appellant.

Beebe & Watson, for the respondent.

124 **BURGESS, J.** An action for personal injuries sustained by plaintiff, who was a passenger on one of defendant's cable cars, in Kansas City, Missouri, by being thrown from the car, by reason of its negligent management in being run "at a care-

less and rapid rate of speed and with a jerk," while rounding a curve at the east end of the Twelfth street line. The case was tried before a jury, which rendered a verdict in favor of plaintiff in the sum of four thousand nine hundred and fifty dollars. Defendant then filed motions for new trial and in arrest, which were overruled, and it appealed.

The accident occurred on the afternoon of August 4, 1891. Plaintiff was thrown or fell from the car, the fall resulting in a fracture of the skull at the base of the brain and other injuries.

Just before the car reached the point of the curve where the accident occurred, the speed of the train was increased, it made a sudden lunge, and she was thrown ¹³⁵ or fell out onto the ground. She was accustomed to riding on the cars around this curve, and knew the danger attending it, and that sometimes it was more dangerous than others, depending upon the smoothness or roughness with which the curve was rounded.

At the end of the line where the accident happened, there is a loop, so as to permit the cars to turn around and go back upon the same street. The loop has two curves about seventy feet apart. The train coming from the west stops, facing east, at the usual stopping place, just before reaching the first or south curve. It then rounds the first curve on a down grade by momentum, the road being so constructed that the cable rope can be picked up at the end of the first curve while the train is in motion. From the pickup to and around the second curve, there is a rise in the grade of six feet to one hundred feet. From the pickup the train faces north, and runs sixty-four feet until it reaches the second or east curve, and this it rounds until the straight track is reached, leaving the train facing west.

The only witnesses who seemed to know anything about the matter testified that the only practicable way to operate a cable road around this second curve on the up grade is at the full speed of the cable rope, and in passing around it there are jars and jerks incident to its movement; that sometimes the jars are greater than at others, depending on whether the rope is slack at the curve when the train reaches that point, and that no known method has been discovered by which these difficulties can be avoided.

Plaintiff boarded at a hotel just south of and adjoining the first curve. On the morning of the accident, she and a couple of lady friends started to town, boarding a car on the same line on which the accident occurred, at the stopping place just west of the first ¹³⁶ curve. She then informed them of the danger of

rounding the curve, and that they must hold on, but on that trip the train went round with little jarring. On the same evening, they again boarded a train at the same place for a similar purpose, when plaintiff again warned them of the danger of rounding the curve. Her friends, Mrs. Bowles and Mrs. Miles, took seats on the north side of the car, while plaintiff took a seat on the south side. At her request, Mrs. Bowles afterward took a seat with her, on the inside, next to the aisle, which left plaintiff seated on the outside of the curve, the most dangerous position. The car was an open one, and, as it proceeded on, passed around the first curve, and had gone about two hundred feet, and while rounding the second curve plaintiff fell from the car. She testified that while the train was rounding the curve, she had a firm hold on the back of a seat, and had her feet braced, but, notwithstanding this, she was thrown off.

Defendant's first contention is, that the court committed error in refusing to instruct the jury to return a verdict for defendant. The cause of action alleged in the petition is, "that defendant so ran its cars around said loop at a careless and rapid rate of speed and with a sudden jerk," so as to cause the injury complained of. It is argued that, at most, the allegation is, that the rate of speed was negligence, and that plaintiff is confined to the action of negligence pleaded. It is well-settled law that a plaintiff cannot allege one cause of action in his petition and recover upon another cause not stated: *Waldhier v. Hannibal etc. R. R. Co.*, 71 Mo. 514; *Harty v. St. Louis etc. Ry. Co.*, 95 Mo. 368. It must, therefore, follow that unless defendant's servants in charge of the cars at the time of the accident were guilty of negligence in running around the loop at a careless and rapid rate of speed and with a sudden jerk, and that was the direct ¹²⁷ cause of the injury, plaintiff was not entitled to recover.

The burden was upon plaintiff to establish these facts, by evidence, in addition to the injury, unless it be the law, when a person is shown to have been injured without his fault, while the relation of carrier and passenger exists, that the presumption of negligence on the part of the carrier arises, and the burden is on it to overcome that presumption. While it may be conceded that the mere fact that a passenger on board a train of cars is found to be injured, for instance with a bullet hole through his brain, or a limb broken, would raise no presumption of negligence on part of the carrier, the law is otherwise when the injury is shown to have been occasioned by reason of some defect or imperfection of the appliances, or by some omission of duty

ces by which the cars were operated, or in the construction of the road, nor was there any negligence or carelessness on the part of those in control of the car at the time of the injury. Whatever presumption of negligence there was arising from the injury, and the lurch or jerk in the cars at the time, was completely overcome by the evidence, which showed that all reasonable skill and diligence had been employed by defendant, and everything had been done which human prudence, care, and foresight could suggest, in order to prevent injuries to its passengers, and to enable them to be carried safely. No one was to blame for the accident, so far as the record discloses. It was simply one of those unfortunate accidents for which the law holds no one accountable, an injury without a remedy. The instruction asked by the defendant in the nature of a demurrer to the evidence should have been given.

The judgment is reversed.

All of this division concur.

ON REHEARING.

BURGESS, J. It is insisted by plaintiff that the evidence adduced by her made out a prima facie case, which entitled her to a verdict, unless overcome by defendant, which was a question for the jury. This is unquestionably the law where there is any substantial evidence introduced on the part of a plaintiff to sustain the allegations in the petition, as the authorities cited by counsel for the plaintiff in their brief abundantly show, but is not the law where the facts necessary to be proven in order to entitle plaintiff to recover are merely conjectural. The evidence clearly showed that the only way the cars could be operated around the curve where the accident happened was by the speed ¹⁴¹ of the cable, and that the lurch or lunge which precipitated plaintiff from the car was incident to its operation, and could not be avoided. These facts were undisputed; therefore, the demurrer to the whole evidence should have been sustained.

There is no evidence upon which to predicate the verdict, and it was the plain duty of the trial court to have sustained the demurrer thereto, as well also as to have set the verdict aside on motion of defendant, because of the want of evidence to support it. The interposition of the demurrer at the close of the case requires us to review the evidence taken as a whole (*Hilz v. Missouri Pac. Ry. Co.*, 101 Mo. 36), and, when this is done, there can be but one conclusion, and that is, that the plaintiff was not entitled to recover.

"Where the evidence is of that character that the trial judge

would have a plain duty to perform in setting aside the verdict as unsupported by the evidence, it is his duty and his prerogative to interfere before submission to the jury and direct a verdict for the defendant": *Jackson v. Hardin*, 83 Mo. 186; *Powell v. Missouri Pac. Ry. Co.*, 76 Mo. 80; *Reichenbach v. Ellerbe*, 115 Mo. 588.

We have carefully considered the motion for a rehearing filed by plaintiff and all of the authorities cited in support thereof, but see no reason for departing from our original opinion.

The motion for rehearing is overruled.

All of this division concur.

PRACTICE.—SUIT CANNOT BE BROUGHT ON ONE CAUSE OF ACTION and recovery had on another: *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558; 38 Am. St. Rep. 615, and note.

CARRIERS—INJURY TO PASSENGER—PRESUMPTION OF NEGLIGENCE.—Injury to a passenger in consequence of something, one or not done by the carrier or his employés or connected with the appliances of transportation raises a presumption of negligence which the carrier is required to rebut: *Fleming v. Pittsburgh etc. Ry.*, 158 Pa. St. 130; 38 Am. St. Rep. 835, and note with the cases collected.

CARRIERS OF PASSENGERS, WHETHER INSURERS.—Carriers of passengers are required to exercise the highest care, skill, and diligence in their transportation, and are held responsible for the consequence of the slightest negligence resulting in injury to the persons sustaining that relation to them, but they are not insurers of their absolute safety: *Note to International etc. Ry. Co. v. Welch*, 40 Am. St. Rep. 833.

STREET RAILWAY—PRESUMPTION OF NEGLIGENCE FROM INJURY TO PASSENGER.—The fact that a passenger on a cable car in a city is injured without fault of his own does not raise a presumption of negligence against the company: *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. 592; 28 Am. St. Rep. 72, and note. See, also, the note to *Birmingham etc. Ry. Co. v. Hale*, 24 Am. St. Rep. 752, 753.

TRIAL—DIRECTING VERDICT.—If there is no evidence upon an issue before a jury, and the weight of evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit or to direct a verdict as the case may require: *Linkauf v. Lombard*, 137 N. Y. 417; 33 Am. St. Rep. 743, and note. When the evidence given at a trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant: *Woolwine v. Chesapeake etc. Ry. Co.*, 36 W. Va. 329; 32 Am. St. Rep. 859, and note.

SEEHORN v. HALL.

[120 MISSOURI, 257.]

VENDOR AND VENDEE—FRAUD ON JOINT PURCHASER—COMMISSIONS.—If two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that certain property can be purchased for a certain price, which he procures to be paid by his associates, when, in fact, he receives a difference between said sum and a less one as commissions, unknown to them, he may be compelled to account to them for such difference, without rescission of the contract, and although the property may be worth all or more than was paid for it. In such case, the parties are not partners, and no resort need be had to equity for an accounting in order to recover.

AGENCY—QUESTIONS OF LAW AND FACT.—Whether an agency exists, under an ascertained state of facts, is a question of law, to be determined by the court, but it is within the province of the jury to find whether the facts necessary to establish the agency exist.

C. H. Nearing, for the appellants.

Warner, Dean, Gibson & McLeod, for the respondent.

²⁵⁸ **MACFARLANE, J.** Plaintiff Seehorn, as administrator of P. T. Scruggs and Mortimer Deering, prosecutes this suit against William A. Hall and Nathan J. Hall, the object of which is to recover one-half of a commission received by defendants for effecting a sale of a cattle ranch in the state of Colorado.

The petition charged, and the evidence tended to prove, in substance, the following facts: Defendants were engaged as partners in the cattle business in Kansas City. One James Wilcox lived in Trinidad, Colorado, and was the owner of a cattle ranch, consisting of land and cattle, which was located about thirty miles from Trinidad. At this time, October, 1883, one Barillo and defendants had an option for the purchase of this ranch for the sum of two hundred and twenty-five thousand dollars. This option was held with a view of selling the property to others, and the time limited had about expired.

Plaintiffs desired to purchase a ranch, and, hearing that defendants had this one for sale, went to see them with a view of purchasing. After being informed by defendants that the property could be bought for two hundred and twenty-five thousand dollars and no less, plaintiff and one of the defendants went to Colorado for the purpose of examining the ²⁵⁹ property. They, with Wilcox, the owner, spent several days in making such examination.

Afterward, plaintiffs, defendants, and Barillo entered into an agreement that they would together purchase the property, on the best terms possible, plaintiffs each to take one-fourth, Barillo one-fourth, and defendants, as partners, one-fourth thereof.

Under this agreement, the purchase was made for the sum of two hundred and twenty-five thousand dollars, each agreeing to pay one-fourth of the purchase price, one-third in cash and the balance on time. The cash payments were made, and one-fourth of the property was conveyed to each as agreed.

Prior to the consummation of this contract, the purchasers agreed verbally among themselves that if they made the purchase they would hold and manage the property as partners, each to have a one-fourth interest therein. After the purchase a written partnership agreement was made.

Immediately on the conclusion of the purchase, Wilcox, in pursuance of a previous agreement, paid defendants and Barillo about nine thousand dollars, by way of commission for making the sale, which was divided equally between them. Plaintiffs were not informed that a commission was to be paid, or that it had been paid, until long after the sale had been consummated, but believed they were purchasing on the best terms that could be obtained. The suit is to recover from defendants one-half the sum so paid them by Wilcox.

The court gave the jury this instruction: "If the jury find from the evidence that defendants represented to plaintiffs that the property in question could be purchased at the price of two hundred and twenty-five thousand dollars, and no less, and agreed with plaintiffs to join them and Barillo in purchasing same at that price, and the sale was consummated at that price, plaintiffs each buying one-fourth, and defendants jointly one-fourth, and that ²⁶⁰ Barillo at that time and before had an option upon the property at that price, with agreement between them and Barillo to divide any commission for the sale received by Barillo from the vendor, and plaintiffs were ignorant of that fact until after the sale; and that defendants did receive from the vendor an amount of money as commission for making the sale, plaintiffs are entitled to one-half of the amount so received by defendants, with interest thereon at six per cent per annum from the time it was received."

The court refused this instruction asked by defendants: "The court instructs the jury that, notwithstanding you may believe from the evidence that the amount received by these defendants from James Wilcox, the vendor of the range and cattle in question, was a part of the purchase price of said property, which was the basis of the partnership consummated October 30, 1883, known as the Trinidad Cattle Company, these plaintiffs are not entitled to recover such assets in their own name, and your ver-

dict must be for defendant, unless you believe from the evidence defendants were acting as agents of plaintiffs in their individual capacity."

The verdict and judgment were for plaintiff, and defendants appealed.

1. The agreement between these parties to act together in the purchase of the property in question placed upon each the obligation to act with perfect fairness and good faith to his associates. No one of them could justly obtain a secret individual advantage over another. Each had the right, in the absence of any contrary agreement, to rely upon the others to secure the property on the best terms possible. To apply any other rule of conduct in such case would open the door to fraud and collusion between the seller and any one of the purchasers who might be willing to deceive ²⁶¹ his associates and impose terms upon them, which, if uninfluenced, they might be unwilling to accept. One might yield his judgment to that of another, and be thus led into a most disastrous agreement.

The relation of these parties, after their association had been agreed upon, was analogous to that of persons who associate themselves for the purpose of organizing a corporation. In such case, it is well settled that a relation of trust and confidence exists among the promoters, which requires each to make full disclosures to the others of all profits made, and forbids speculations at their expense: *South Joplin Land Co. v. Case*, 104 Mo. 579, and cases cited.

The principle is thus expressed in a recent case: "It is an undoubted rule of law that where two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that particular property can be bought for a designated price, which he procures to be paid by his associates, when in fact he receives a difference between said sum and a less one, he may be compelled to account for such difference without any rescission of the contract, and although the property may be worth all or more than was paid for it": *Yale Gas-Stove Co. v. Wilcox*, 64 Conn. 101; 42 Am. St. Rep. 159, and cases cited.

The instruction given by the court declares correct principles of law.

2. The record contains an express waiver of all objections on account of misjoinder of parties. No objection on that account was made by answer or demurrer, and such defects, if they exist,

must, under the express terms of the statute, and independent of the stipulation, be taken as waived: Rev. Stats. 1889, sec. 2047.

Defendants do not now make formal objection to the proceedings, on account of misjoinder, but they do ²⁶³ object to the form of the action. They insist that the commission received by defendants was on partnership account, and the action should have been in equity for an accounting by defendants as partners.

We do not think this objection tenable, for the reason that the partnership agreement was not finally consummated until after the property had been purchased and the wrongs complained of accomplished. The agreement recites that "said parties have this day purchased from said Wilcox" the property. It further recites that "said parties are the owners of said property," and defines the interest held by each. The property was not transferred by Wilcox to the partnership, but to each individual the interest purchased and paid for by him. The transaction, out of which the cause of action arose, was an individual and not a partnership matter, and objection to the form of the action cannot be sustained.

3. The petition states the facts upon which plaintiffs predicate a right to recover. The charge in conclusion is, that defendants were, in the purchase of the property, acting as the agents of plaintiffs. Defendants now insist that the question of defendants' agency was not submitted to the jury under the instructions.

Whether an agency exists, under an ascertained state of facts, is a question of law to be determined by the court. The province of the jury is to find whether the facts necessary to establish an agency exist. Assuming that the evidence, as to the relation of those parties to each other, was conflicting, the jury should only have been required to find what the evidence established in that respect. To have instructed them, as requested by defendants, that there could be no recovery unless defendants were acting as agents of plaintiffs, without informing them what facts would ²⁶³ constitute an agency, would have been a submission of questions of both law and fact to the jury, which would have been improper.

The instruction given by the court requires the finding by the jury of all the facts necessary to impose upon defendants the duty of acting in good faith and fairness to their associates in the purchase of the property, and that there was a disregard and breach of that duty. The real question is whether, under the facts submitted for finding by the jury, the relation of defendants

to plaintiffs was such as to impose upon them the duty which is required of one sustaining a fiduciary relation to another. The question is answered affirmatively in the first paragraph of this opinion.

The judgment is affirmed.

All concur.

VENDOR AND PURCHASER—FRAUD ON JOINT PURCHASER—ACCOUNTING.—Where two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that particular property can be bought for a designated price, which he procures to be paid by his associates, when, in fact, he receives a difference between said sum and a less one, he may be compelled to account for such difference without any rescission of the contract, and although the property may be worth all or more than was paid for it: *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101; 42 Am. St. Rep. 159, and note.

AGENCY—EXISTENCE, HOW DETERMINED.—Agency or not is a question of law, to be determined by the relations of the parties as they in fact exist under their agreements or acts: *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768, and note.

SYLVESTER COAL COMPANY v. ST. LOUIS.

[130 MISSOURI, 322.]

INJUNCTION AGAINST VOID ORDINANCES.—The enforcement of a void municipal ordinance may be enjoined in equity, although its invalidity has not been determined in an action at law.

INJUNCTION IS AN INDEPENDENT GROUND OF EQUITY JURISDICTION, by which courts may prevent municipal corporations from transcending their powers, to prevent vexatious litigation, and a multiplicity of suits.

MUNICIPAL ORDINANCES, THOUGH PENAL, are not criminal statutes, so as to prevent their validity from being tested, or their enforcement restrained, in the civil courts.

MUNICIPAL ORDINANCES—VALIDITY.—A city ordinance requiring coal dealers to have their coal officially weighed, to pay a small fee therefor, and to furnish official certificates of weights to consumers, is valid under a charter authorizing the city to provide for weighing coal and to regulate retailers thereof.

L. Bell, for the appellants.

W. C. Marshall, for the respondents.

325 **BRACE, P. J.** This is an appeal from a judgment of the circuit court of the city of St. Louis, sustaining a demurrer to plaintiffs' petition. The material allegations of the petition are, that the plaintiffs, the Sylvester Coal Company, the Berry-Horn Coal Company, the St. Louis Fuel Company, and the Lebanon Machine Association, are, respectively, corporations created under

the laws of the state of Missouri and engaged in the business of selling and delivering coal by the wagonload, to be used as fuel in the city of St. Louis; that they are licensed merchants, and have paid their tax as such; that each of the plaintiffs maintained in its business a private scale, on which all coal sold and delivered is weighed, the weigher of which has been ³²⁶ approved by the mayor, taken an oath before the city register, and filed bond as required as weigher at public scales; that fifty other persons or corporations are engaged in the same business in like manner; that the city has adopted, and there are now, ordinances in force in said city as follows:

"Sec. 1593. No public scales belonging to private persons or companies shall charge a greater fee for weighing than is allowed in section 1603, nor shall they charge a less fee than city scales charge, except as hereinafter provided, nor deliver tickets without payment therefor at the time of the delivery, upon penalty of loss of privilege conferred by ordinance, and the abolishing of the defaulting scales. It shall not be lawful for any person to do any weighing on any scales constructed in any public street or place, and to receive a fee for such weighing, except as follows: 1. The public scales for which a weigher has been appointed by the mayor; 2. On scales owned by private parties, which have been authorized by acts of the legislature, and the owners of which have complied with the provisions of the act or acts; 3. All private scales, the weighers of which shall have been approved by the mayor, and have taken an oath before the register, and filed a bond as required as weigher at the public scales.

"Sec. 1594. The comptroller shall furnish the collector weighers' certificates in blank, signed by the register and countersigned by the comptroller, for the use of the weighers of all private scales who have been or may be appointed with the approval of the mayor, and who shall file a bond in the sum of one thousand dollars, with two or more securities, to be owners of unencumbered real estate, located in the city of St. Louis, to be approved by the mayor and council. The certificates so issued and furnished private scales, authorized ³²⁷ by the ordinances of this city or acts of the legislature to do public weighing, shall be printed on red paper for weights of coal over twenty-five bushels, and also for weights of all other articles where a fee for weighing is charged, and on green paper where no fee for weighing is charged, and on the back of every red and green ticket shall be printed the words, 'the weigher of this scale has filed a bond with the register,' and the further words, 'dealers in coal are not au-

thorized to charge a fee for weighing their loads of twenty-five bushels, or less, on their own scales, except hard or anthracite coal.' The collector shall furnish to weighers of private scales blank certificates at the rate of ten dollars per hundred for red certificates and three dollars per hundred for green certificates, and no certificates, except those furnished by the collector, shall be issued by any person doing weighing at such scales. Each weigher shall furnish a separate certificate for each and every load weighed, and only on the kind of blank provided by this section; and no weigher shall sell or dispose of any blank certificate or certificates received from the collector, except for loads actually weighed upon his scales. Any violation of the provisions of this section shall be deemed to be a misdemeanor, and, upon conviction thereof, the offender shall be fined as provided in section 1608. The books kept by said weighers shall at all times be opened to the inspection of the collector, the inspector of weights and measures, and such officers as may be designated by the collector for that purpose."

"Sec. 1608. No person shall buy or sell any hay or stone-coal in this city until the same has been weighed by one of the legally authorized weighers, and a certificate of the weight thereof given, as required in the provisions of this article; and any person violating this section shall be deemed guilty of a misdemeanor, ³²⁸ and, upon conviction thereof, be fined not less than ten dollars for each offense."

That said sections 1594 and 1608, aforesaid, are invalid and of no force or effect, because the system established by them constitutes a tax on sales and deliveries of coal in St. Louis for fuel, and exacts three cents for each load so sold and delivered, which sum is paid into the treasury of the city of St. Louis; because said system is an unlawful interference with, and burden on, the sale and delivery of coal as fuel in St. Louis; because said system is unauthorized by the charter of St. Louis and the law of the land; because said system and said ordinance regulations are unreasonable and oppressive; because said regulation requiring a green ticket to be delivered with each load of coal adds no security to the purchaser as to the weight of the coal delivered, nor does it operate or constitute any check on the seller of the coal as to such weight; that the expense to each of these plaintiffs for green tickets so to be used by it respectively and purchased of the city of St. Louis, exceeds one hundred and fifty dollars annually; that the said defendants the city of St. Louis and the mayor thereof, notwithstanding the manifest illegality of said ordinance, have

thereafterward published and declared that they will enforce the observance of the provisions thereof. Wherefore, they pray that they and their servants be restrained from so doing.

1. The demurrer is general, and the only question to be considered is, whether the facts stated are sufficient to entitle the plaintiffs to the relief sought. It is contended that, though it be conceded that the ordinances are invalid, the plaintiffs are not entitled to injunctive relief on the facts stated, for the reason that they have an adequate remedy at law.

But is the remedy at law adequate? It must be remembered that the injury complained of here is continuous. ³³⁰ The ordinances are continuous, and plaintiffs' business is continuous, and, under the ordinances, for each wagonload of coal sold and delivered in violation of the restrictive provisions thereof the plaintiffs each become subject to an action in the municipal courts of the city for such violation. The fact that in each of such suits the plaintiffs might plead successfully the invalidity of the ordinances as a defense thereto does not give them an adequate remedy. They are entitled to be protected from the expense, vexation, and annoyance of such a multiplicity of suits in consequence of their continuance of a legitimate business, except upon compliance with the condition of ordinances which it is alleged are and may be utterly void: *Mayor etc. v. Radecke*, 49 Md. 217; 33 Am. Rep. 239; *Davis v. Fasig*, 128 Ind. 271; *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575; *Third Avenue R. R. Co. v. Mayor etc.*, 54 N. Y. 159.

"The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction": *High on Injunctions*, 3d ed., 12. This has been frequently recognized as a ground for the exercise of such jurisdiction in this state (*Swope v. Weller*, 119 Mo. 556; *Michael v. St. Louis*, 112 Mo. 610; *Carroll v. Campbell*, 108 Mo. 558), and is an independent ground of equity jurisdiction upon which such courts may interfere to prevent municipal authorities from transcending their powers: 2 *Dillon on Municipal Corporations*, 4th ed., secs. 906, 908; and cases cited above.

While under the former system of jurisprudence, in which relief in equity was administered by a different tribunal and by a different procedure from those that gave relief at law, courts of equity have sometimes refused to interfere before the right was established at ³³⁰ law (*West v. Mayor etc.*, 10 Paige, 539), there seems no good reason, under the present system in code states

where both are blended, why such relief should not be granted in the first instance by injunction; and so it was ruled in the analogous cases of *Mayor etc. v. Radecke*, 49 Md. 217; 33 Am. Rep. 239, *Davis v. Fasig*, 128 Ind. 271, and *Rushville v. Rushville Nat. Gas Co.*, 132 Ind. 575, above cited, which are on all fours with the case in hand. And so it would seem it must be ruled here, where we have, in addition, a special and liberal statutory provision in regard to injunction: Rev. Stats. 1889, sec. 5510.

The doctrine that criminal statutes cannot be tested, or their enforcement restrained, in the civil courts has no application to the case. Municipal ordinances, though penal, are not criminal statutes: *Kansas v. Clark*, 68 Mo. 588; *Ex parte Hollwedell*, 74 Mo. 395; *St. Louis v. Marchel*, 99 Mo. 475. They are quasi criminal in form, but not so regarded in procedure.

We think the petition presents a case in which the validity of the ordinances may be inquired into by a court of equity, and, if found to be invalid, the relief prayed for may be granted.

2. By the charter of the city of St. Louis, the mayor and assembly have power by ordinance "to license, tax, and regulate retailers," "to regulate and establish the standard of weights and measures to be used in the city of St. Louis, and to provide for the inspection of the same," "and for the inspection and weighing or measuring hay or stone-coal, charcoal, firewood, and all other kinds of fuel to be used in the city of St. Louis": Scheme and Charter, art. 3, sec. 26, pp. 2097, 2098; 2 Rev. Stats. 1889.

The plaintiffs, as retailers of coal by the wagonload in said city, are amenable to all ordinances of the city within the scope of the powers thus granted. The ³³¹ purpose of the ordinances is plain. It is to protect the citizen from being imposed upon by false weights and measures. To accomplish this purpose, while dealers in coal may weigh the coal which they sell on their own scales, they are not permitted to sell a wagonload of coal that has not been weighed by a weigher approved by the mayor and authorized by law to weigh the same. That it may be weighed by such a weigher and no other, and the citizen have the assurance of the fact, weighers' certificates of that fact are "furnished" to such dealers for such weighers, and such weighers are required to "furnish" one of such certificates for each load weighed by him. Surely nothing can be found in the purpose of this municipal law, nor in the means by which it is sought to be accomplished, that is without the express power granted by the charter to the city to regulate the weighing of coal in the city, and the

fact that a few cents are charged by the city for furnishing each of the certificates surely cannot be beyond the power expressly given to tax and regulate "retailers" of that commodity. Whether the mayor and assembly have selected the best means, by these ordinances, to accomplish the purpose, is a matter with which we have nothing to do. The power exercised being within powers granted by the charter, the plaintiffs have no cause of action. The demurrer was properly sustained, and the judgment is affirmed.

All concur, Barclay, J., in the result and in the second paragraph.

INJUNCTIONS AGAINST VOID ORDINANCES.—Injunction lies to restrain the enforcement of municipal ordinances admitted to be invalid, the execution of which injuriously affects private rights: *Deems v. Mayor*, 80 Md. 164; 45 Am. St. Rep. 339, and note. An injunction against a void municipal ordinance should be granted, when there is no plain adequate remedy at law, and it is necessary to prevent irreparable injury: *Austin v. Austin etc. Cemetery Assn.*, 87 Tex. 330; 47 Am. St. Rep. 114.

ORDINANCES—JUDICIAL INQUIRY.—The reasonableness of a municipal ordinance is a proper subject for judicial inquiry, if enacted under a general grant of authority not prescribing the manner of its exercise: *Champer v. Greencastle*, 138 Ind. 339; 46 Am. St. Rep. 390, and note.

STATE v. CROSSWHITE.

[130 MISSOURI, 359.]

APPELLATE PRACTICE.—Objection to evidence not made at the time it is introduced is waived.

EMBEZZLEMENT—SEPARATE OFFENSES—EVIDENCE.—The embezzlement of personalty and of the proceeds arising from its sale are two separate and distinct offenses; and evidence in proof of one is not permissible for the purpose of proving the other.

EMBEZZLEMENT—GOODS CONSIGNED ON COMMISSION. A commission merchant may be held criminally liable for the embezzlement of goods consigned to him on commission; and it is no defense that he paid the money arising from their sale to his partner.

EMBEZZLEMENT.—AN INDICTMENT for the embezzlement of goods need not allege by whom they were delivered to the accused.

EMBEZZLEMENT—INSTRUCTIONS.—Under an indictment simply charging the embezzlement of goods, and not the proceeds thereof, it is error to instruct that if the accused sold the goods with intent to appropriate the proceeds of the sale, he was guilty.

J. B. Hammer, for the appellant.

W. F. Walker, attorney general, M. Jourdan, assistant attorney general, and W. T. Jamison, prosecuting attorney, for the state.

301 **BURGESS, J.** At the April term, 1895, of the criminal court of Jackson county, Missouri, defendant was convicted of

the crime of embezzlement, and his ³⁰² punishment fixed at two years' imprisonment in the penitentiary. From the judgment and sentence he appealed.

There were six counts in the indictment, but, after the evidence was all in, the court withdrew the first five, and the conviction was under the sixth count, which, leaving off the formal parts, is as follows:

"And the grand jurors aforesaid, on their oath aforesaid, do further present, that on the seventeenth day of December, A. D. 1894, at said Jackson county, state aforesaid, the said Robert H. Crosswhite was a commission merchant and agent, and, as such, a member of the firm of Crosswhite & Co., composed of him, the said Robert H. Crosswhite, and one J. O. R. Campbell, and he, the said Robert H. Crosswhite, as such commission merchant and agent, and as such member of said firm, then and there became the consignee and bailee of one David H. Biethan, in possession of seven carloads of potatoes, of the value of five hundred and twenty-five dollars, and the property of said David H. Biethan, and which potatoes then and there came into the possession and care of said Robert H. Crosswhite as such commission merchant, and as the said consignee and bailee of said David H. Biethan, and he, the said Robert H. Crosswhite, then and there, the said seven carloads of potatoes unlawfully and feloniously did embezzle and convert to his own use, and so the jurors aforesaid, on their oath aforesaid, do say that the said Robert H. Crosswhite, the said seven carloads of potatoes, in manner and form aforesaid, feloniously did steal, take, and carry away, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state."

The salient facts, as disclosed by the record, are briefly as follows: During the latter part of the year 1894, defendant and J. O. R. Campbell were copartners ³⁰³ engaged in the commission business in Kansas City, Missouri, under the firm name of Crosswhite & Co. In the months of October and November of that year, David A. Biethan shipped to said firm from Blackfoot, Idaho, seven carloads of potatoes, to be sold by them for him on commission. The potatoes were sold by the firm, who received the purchase money therefor, but no part of it was ever turned over to Biethan. Defendant received between four hundred dollars and five hundred dollars of it, and Campbell the balance. Campbell fled the country, and had not, up to the trial of defendant, been arrested.

Defendant's first contention is, that the court committed error

in admitting, by the state, on the first five counts in the indictment, in one of which, the fifth, he was charged with embezzling the money arising from the sale of the potatoes, evidence tending to show that he was guilty of that offense, then afterward withdrawing said counts, and in not excluding such evidence from the consideration of the jury.

No objection seems to have been made to the introduction of this evidence, and, if defendant was of the opinion that it was inadmissible under the sixth count, he should have made timely objections thereto, stating the specific grounds of his objection, and, as this was not done, all objection thereto must be deemed to have been waived.

Had objection been properly made, such evidence would have been clearly inadmissible under the sixth count: *State v. Dodson*, 72 Mo. 283. The embezzlement of the potatoes and the proceeds arising from them were two separate and distinct offenses, and evidence in proof of one was not permissible for the purpose of proving the other.

State v. Adams, 108 Mo. 208, does not announce, as supposed, a different rule. In that case, defendant ³⁰⁴ was indicted for embezzling a piano, and the state read without objection some letters and statements between the owner of the piano and defendant, and then read, over the objection of defendant, letters written to him by said owner in regard to his failure to remit collections made by him on sales of pianos. The court said: "There can be no doubt that the statement and letters made and written by the prosecuting witness would not have been admissible as original evidence to prove a conversion of the piano. As independent evidence, they were mere hearsay, and inadmissible. . . . The sale of the piano and appropriation of the proceeds were not denied, and the letters were not prejudicial." For these considerations this point must be ruled adversely to defendant.

Defendant offered evidence tending to show that he had turned the proceeds arising from the sale of the potatoes over to his partner, which, upon objection by the state, was excluded, and in this it is insisted that error was committed.

This contention is untenable. He was not in the employ of Campbell, and was under no obligations, legal or otherwise, to turn the proceeds over to him, but it was his duty to turn over to Biethan whatever money he received belonging to him, and he should not be permitted to escape the consequences of a criminal prosecution by showing that he turned the money over

to another person, who was no more entitled to retain it than he was. His first duty was to comply with his obligations to his bailor.

Another contention is, that the defendant was improperly convicted as bailee because, under the decision of this court in *State v. Grisham*, 90 Mo. 163, it was held that the section of the statute as it then was (Rev. Stats. 1879, sec. 1322; Rev. Stats. 1889, sec. 3551), under which the indictment in the case at bar was drawn, was not ³⁰⁵ designed to apply to a case of this kind, and only applied to those who occupied the relation of common carrier or some similar contractual relation.

It is worthy of observation that, in that case, no contractual relation existed between the parties, while in the case in hand there was an express contract by which the firm of Crosswhite & Co. were to sell the potatoes for Biethan at five per cent commission.

The statute as it then stood, read: "If any carrier or other bailee shall embezzle," etc. In the revision of 1889, the words "or other person" were added after the words "if any carrier or bailee," so that it now reads, "If any carrier, bailee, or other person shall embezzle," etc. The amendment of the statute was evidently for the purpose of meeting the ruling in the *Grisham* case, so as to make it apply to all cases of bailment.

The indictment in *State v. Adams*, 108 Mo. 208, was drawn under section 3549 of the Revised Statutes of 1889, and what was said in that case with respect to the indictment under consideration does not militate against what has been said in this.

That defendant was bailee of the potatoes there can be no question (*Middleton v. Stone*, 111 Pa. St. 589; *Furlow v. Gillian*, 19 Tex. 250; *Bourg v. Lopez*, 36 La. Ann. 439), and it is equally clear that he comes within that class of bailees embraced in section 3551 of the Revised Statutes of 1889.

The indictment contains all necessary allegations, and the objection taken to it on the ground that it does not allege by whom the potatoes were delivered to defendant is without merit. It does allege that the potatoes were the property of Biethan, and that they came into the possession and care of defendant as commission merchant, and as the consignee and bailee of said Biethan. It is in the language of the statute, and unquestionably good.

³⁰⁶ The sixth instruction given in behalf of the state is criticised in that it told the jury that, if defendant sold the potatoes with the intent to appropriate the proceeds derived therefrom to his own use, they would find him guilty. The charge in the in-

dictment is for selling the potatoes with intent to convert them to his own use, and not the proceeds arising from their sale. As has been said, they are two separate and distinct offenses, and, while evidence tending to show the embezzlement of the proceeds of the sales of the potatoes by defendant went to the jury without objection, that did not authorize an instruction predicated upon such evidence, when the indictment under which he was being tried contained no such averment: *State v. Dodson*, 72 Mo. 283. Because of this erroneous instruction the judgment is reversed and the cause remanded.

All of this division concur.

EMBEZZLEMENT—SEPARATE OFFENSES.—A person embezzling several articles of property at one time may be indicted and convicted of embezzlement of each article separately: *Commonwealth v. Butteick*, 100 Mass. 1; 97 Am. Dec. 65, and note. See, also, extended note to *Calkins v. State*, 98 Am. Dec. 159.

EMBEZZLEMENT.—THE PROCEEDS of property may be embezzled: Extended note to *Calkins v. State*, 98 Am. Dec. 129, 166.

EMBEZZLEMENT—GOODS CONSIGNED ON COMMISSION.—A right to deduct commissions out of an amount received is held to give the defendant such an interest in the property that he cannot be convicted for the embezzlement of it: Extended note to *Calkins v. State*, 98 Am. Dec. 137.

STATE v. LAWLER.

[120 MISSOURI, 364.]

ROBBERY.—AN INDICTMENT for robbery, charging that the act was committed with violence, need not allege that the person robbed was put in fear.

ROBBERY—EVIDENCE OF VIOLENCE.—Proof that the accused and another entered a shop in charge of two attendants, and that the accused forcibly held one of them, and disabled the other by a kick, while his accomplice took the cash drawer, when both ran away, shows violence sufficient to sustain a conviction of robbery, without proof of actual fear on the part of the parties robbed.

ROBBERY—INDICTMENT—OWNERSHIP OF PROPERTY. An indictment for robbery must allege the ownership of the property taken to be in the party alleged to have been robbed. If it alleges that the property taken was owned by one person, and taken in the presence, and out of the possession, of another, it is bad on its face, and may be reached by motion in arrest of judgment, or on appeal without such motion.

ROBBERY—INDICTMENT—OWNERSHIP OF PROPERTY. An indictment for robbery, alleging the ownership of the property taken to be in one having such special property or right of possession thereto as enables him to maintain an action for its recovery if taken from him, is sufficient.

J. A. Genez and J. C. Robertson, for the appellant.

R. F. Walker, attorney general, and C. O. Bishop, for the state.

SHERWOOD, J. Being adjudged guilty of robbery in the first degree, and his punishment assessed at imprisonment for five years, defendant appeals to this court.

This prosecution is founded on section 3530 of the Revised Statutes of 1889, which reads in this way: "Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree."

The indictment, so far as necessary to quote it in illustration of this opinion, is the following:

"With force and arms, in and upon one Lizzie Sexauer, feloniously, did make an assault, and the said Lizzie Sexauer in fear of an immediate injury to her person then and there feloniously did put, and by force and violence \$25 good and lawful money of the United States of the value of \$25, all of the goods and property of George Sexauer, in the presence of and against the will of the said Lizzie Sexauer, by then and there putting her in fear of an immediate injury to her person, then and there feloniously and violently did rob, steal, take, and carry away."

"WILLIAM ZACHRITZ,

"Circuit Attorney."

The testimony in substance is this: George Sexauer was the proprietor of a saloon and sampleroom at number 2236 Wash street, in the city of St. Louis, and resided with his wife, Lizzie Sexauer, upstairs; his wife's niece, Lizzie Grof, was living with them at the time of the alleged offense. On Friday evening, May 3, 1894, Mr. Sexauer left the saloon about 9 o'clock to retire for the night. His wife and her niece came ³⁷⁰ down and took charge; there were about twenty-five dollars in money in a cash drawer behind the counter. The women sat together in the rear of the saloon sewing and chatting, and were there alone. Between 9 and 10 o'clock defendant and another man hastily entered the place, and, without saying a word, started to go behind the counter. Miss Grof saw them and gave the alarm, when both ladies sprang to their feet and rushed forward to intercept the men. Defendant pushed Miss Grof aside, seized Mrs. Sexauer by her hands, and held her forcibly against the wall, and, when Miss Grof undertook to pass him toward the other man, gave her a vicious kick upon the shin, forcing her over a chair, and causing her such pain as to disable her. The other party got behind the counter, drew out the cash drawer entire, and ran out of the

saloon with it. Defendant then let Mrs. Sexauer go, and ran out also. The cash drawer, emptied of its contents, was found near the saloon that night. Defendant was arrested Sunday, May 5, about 2 o'clock A. M., and was fully identified by the ladies. His confederate was never identified, nor was any of the money recovered.

The testimony on the part of the defense tended to show that defendant was elsewhere at the time of the robbery, that he was of good character, and that the women had failed to identify him at the time of the arrest, but had been prevailed upon by police officers to swear that he was the man. Defendant, testifying in his own behalf, claimed to have been elsewhere all that night; disclaimed all knowledge of the robbery, and stated under oath that "the man that done this robbery is down in the jail now."

1. There is abundant evidence in the foregoing statement to show such circumstances of violence as are sufficient to sustain a prosecution for the crime of robbery, for it is said to be unnecessary to lay a putting ³⁷¹ in fear in the indictment or to prove the circumstance of actual fear upon the trial; for if the fact be laid to be done violently and against the will, the law, in circumstances like those in the case at bar in odium spoliatoris, will presume fear: 2 Russell on Crimes, 9th ed., *122; State v. Stinson, 124 Mo. 447; Foster, 128, 129; 5 Burns' Justice, 778; 2 East's Pleas of the Crown, 711, 719.

2. The crime of robbery at common law has had frequent definition. Hale says: "Robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling": 1 Hale's Pleas of the Crown, 532. Hawkins gives a definition substantially identical with the one just quoted: 1 Hawkins' Pleas of the Crown, 147. East defines the crime thus: "A felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear": 2 Hawkins' Pleas of the Crown, 707.

It will be observed that the definition as given by East is more full than those given by the other authors, in that the words "or in his presence" and "against his will" are used alone by East, and not by the others, in defining the crime. The words "in his presence" were added to the words "from his person" by judicial construction, as substitutionary of, and tantamount in meaning to, "from his person," and this in order to prevent an evasion of the law: East's Pleas of the Crown, 723, 725, 728.

The common-law authorities all agree that, in order to consti-

tute the crime of robbery, the taking must be laid in the indictment, and proven on the trial to be from the person or in the presence of the owner. Thus Russell: "The taking need not be immediately from the person of the owner. . . . But it is clear that the property must be taken in the presence of the owner," etc., giving instances: 2 Russell on Crimes, 9th ed., *106, *107; 2 East's Pleas of the Crown, c. 16, sec. 126, p. 707; Roscoe's Criminal ³⁷² Evidence, 7th ed., 908, 911; 3 Greenleaf on Evidence, 14th ed., secs. 224, 228; Barbour on Criminal Law, 2d ed., 143.

In an early case, it was ruled that if a man's servant be robbed of his master's goods in sight of his master, it shall be taken for a robbing of the master: Wright's case, Style, 156.

In *Rex v. Francis*, 2 Strange, 1015, where some thieves gently struck the hand of the prosecutor, whereby some money, which he had taken out of his pocket to give change, fell to the ground, and he offering to take it up, they threatened to knock his brains out, whereupon he desisted, and the thieves "immediately" took it up, all of which matters were set forth in a special verdict, the judges were of opinion that, inasmuch as it was not sufficiently expressed in the verdict that the money was taken by the thieves in the "sight or presence of the owner," that therefore they could not be held guilty of robbery.

In Tennessee this case arose: The dwelling-house of the prosecutor was entered while he and his family were asleep; and he was aroused by the presentation of a pistol at his head, and a demand for money. Alarmed and excited, he sprang from his bed, and he and his sister, Winnie Barnly, in whom the property taken is laid in one count of the indictment, rushed out of a door and fled to a neighboring house. In their absence, and before their return, one of the prosecutor's daughters was compelled to go upstairs and bring down their father's box, which was broken open in the presence of the remaining members of the family, and some money, articles of clothing, etc., taken away. At the trial, evidence to the effect aforesaid was introduced, and the defendants requested the court to instruct the jury that, "to constitute the offense of robbery, the goods or property must be taken from the person of the party named in the indictment, as the owner, or ³⁷³ in his presence and against his will. And if the jury believed, from the evidence, that the property alleged to have been taken belonged to Stephen Barnly (the prosecutor) or Winnie Barnly, and they became frightened and ran off, nothing being taken from their persons, or in their presence—that it would not be rob-

bery, but larceny, and they could not find the defendants guilty under the indictment."

This instruction was refused, but the court gave the following one: "If you believe the defendants put Stephen Barnly in fear, and caused him to run off, and then took from him his money, or hat and other goods, which was in his possession, this would be robbery. The same principle applies to Winnie Barnly's property. So, if Stephen's goods were left in possession of his wife, and the defendants put her in fear, or, by violence, took possession of the goods or money left in her possession, this would be robbery. After quoting from some of the authorities already cited, it was held that no robbery had been committed, by reason of the absence of the owners at the time the taking occurred: *Crews v. State*, 3 Coldw. 350.

The common-law precedents of indictments bear out the idea that the property must be alleged to be that of the party robbed. Thus Train and Heard give this form: "Indictment for robbery at common law.—The jurors, etc. upon their oath present, that C. D., late of, etc., on the first day of June in the year of our Lord —, with force and arms, at B., in the county of S., in and upon one J. N., feloniously did make an assault, and the said J. N., in bodily fear and danger of his life, then and there feloniously did put, and one gold watch of the value of one hundred dollars, of the goods and chattels of the said J. N., from the person and against the will of the said J. N. then and ³⁷⁴ there feloniously and violently did steal, take, and carry away; against the peace, etc.": Train and Heard's Precedents of Indictments, 461. A similar form is given by Chitty, which he says was settled by a very eminent crown lawyer: 3 Chitty's Criminal Law, 806.

That it is necessary to allege the property to be that of the person named as the owner in the indictment is conclusively shown by the further necessity of establishing this fact by proving it on the trial: 3 Greenleaf on Evidence, sec. 224. Surely nothing need be proved, except it be alleged. And the same rule which governs as to alleging and proving ownership in robbery prevails as to proving and alleging it in larceny: 2 Bishop's Criminal Procedure, sec. 1006; 2 Bishop's New Criminal Law, sec. 1152. If the owner is known, the prisoner must be tried on an indictment for stealing the goods of the owner by name: 1 East's Pleas of the Crown, sec. 88, p. 651; Long's case, Cro. Eliz. 490; Commonwealth v. Morse, 14 Mass. 218.

There is no doubt but that goods may be laid to be either in the general owner or in a special owner, with the like result of convic-

tion where the evidence corresponds with the allegation. Thus they may be laid to be in a bailee, pawnee, carrier, or the like: *State v. Moore*, 101 Mo. 316. But in such category a wife or servant cannot be included, inasmuch as neither has the property or possession, and, in consequence of this, a person indicted for stealing goods laid in the indictment as that of the wife or servant must be acquitted on that indictment: 2 *East's Pleas of the Crown*, sec. 90; 2 *Bishop's Criminal Procedure*, sec. 726; *Kelley's Criminal Law*, 435.

Russell says: "It is necessary that there should be in some person a sufficient ownership of the things stolen; and that they should be stated in the indictment as the goods and chattels or property of such person": 2 *Russell on Crimes*, 9th ed., *282. "Where goods are in the possession of the wife, they must be laid as the goods ³⁷⁵ of her husband; thus if A is indicted for stealing the goods of B, and it appears that B was a feme covert at the time, A must be acquitted": 2 *Russell on Crimes*, *287. To the same effect is 1 *Hale's Pleas of the Crown*, 513, though he adds the party may be indicted *de novo* for stealing the goods of the husband.

Abundant adjudications announce the same doctrine enunciated by the text-writers. Thus in *Commonwealth v. Williams*, 7 Gray, 337, the property which was charged to have been stolen was alleged to be that of a man who, it turned out in evidence, was the husband of a certain woman, and it was objected that, as the property was "found in her possession, it should have been averred to have been her property." But Shaw, C. J., speaking as the organ of the court, ruled that, notwithstanding the alteration in the common law, by statutory provision allowing femes covert to have property in their own right, etc., that still such enactment did not overthrow the usual presumption that personal property held by the wife is that of her husband, and that such presumption must be rebutted by the party whose case requires it, by proving property in the wife. This was the precise point adjudicated in that case. A previous ruling to the same effect in *Commonwealth v. Cullins*, 1 Mass. 116, where the indictment charging larceny laid the property in the first count in the wife, and in the second in the husband who had been absent in the *East Indies* six or seven years, and it was ruled that the prisoner could not be convicted on the first count.

In *Commonwealth v. Clifford*, 8 Cush. 215, the only point in judgment was, that the indictment for robbery did not allege whose property it was that was taken. It was loosely remarked,

however, in that case that if the "indictment were for the common-law offense of robbery, it would be fatally defective for want of the averments that the articles alleged to have been stolen and ³⁷⁶ taken from Pendexter were his property or the property of some third person," and 2 Hawkins' Pleas of the Crown, chapter 25, section 71, is cited in support of the observation, which the authority cited does not do. The remark adverted to is not incorrect, if it be taken to mean such "third person" is a bailee or the like; otherwise it is.

In California, it has been ruled that an indictment alleging in effect the robbery of money "from the person and control" of Wyckoff, etc., was good, though it also alleged that the money was the "property and money of B. F. Whiting": *People v. Shuler*, 28 Cal. 490. But that ruling was not put upon common-law grounds at all, but was based on the reason that, as the indictment does state the money was taken from the possession of Wyckoff, the law deems that possession rightful, and therefore the right of Wyckoff to the possession needed not to be stated in the indictment, and for this position an express statutory enactment is cited which provides: "Neither presumption of law, nor matters of which judicial notice is taken, need be stated in an indictment": *Laws*, 1851, sec. 248, p. 239. And it is to be observed that, in that state, "the criminal code has worked the same change in pleading in criminal actions which has been wrought by the civil code in civil cases": *People v. King*, 27 Cal. 507; 87 Am. Dec. 95.

After all, then, *People v. Shuler*, 28 Cal. 490, is in line with the common-law authorities; but for the indulgence of a statutory and otherwise unauthorized presumption, the indictment in that case must have been ruled bad. But still, with all that, it seems quite odd that Whiting's name should have been obtruded on the indictment, *cui bono*.

In Massachusetts, it has been ruled in an indictment for larceny which charges that the property of a wife may be sustained by proof of larceny of property ³⁷⁷ of her husband in her possession: *Commonwealth v. McLaughlin*, 103 Mass. 435. But this ruling is also bottomed on a special statutory provision declaring that: "In the prosecution of offenses in relation to, or affecting, real or personal estate, it shall not be deemed a variance, if it is proved on the trial that, at the time when the offense was committed, either the actual or constructive possession, or the general or special property in the whole or any part of such real or personal estate, was in the person or community alleged to be the owner thereof": *Gen. Stats.*, c. 172, sec. 12. This last section, formerly

known as section 12, chapter 133, of the Revised Statutes, has been on the statute books of that state since or before 1845. This statute was said to have been passed to cure the defect which defeated the indictment in *Commonwealth v. Wade*, 17 Pick. 395.

In Virginia, however, where a statute has been enacted substantially identical with, and evidently derived from, that of Massachusetts before quoted, it has been ruled, in an indictment for larceny, that the name of the owner of the property charged to have been stolen must be stated; and, if it appears that the person so stated to be the owner was a married woman at the time of the larceny, it is error, and the prisoner should be acquitted. *Moncure, P.*, after adverting to the familiar rules requiring that, in an indictment for larceny, the ownership of the goods stolen must be stated as the property of such owner, and that the goods of a married woman must be laid as the goods of her husband, remarks: "This statute was not intended to dispense, and does not dispense, with the necessity of stating in an indictment for larceny the name of the owner of the property stolen, nor to enable any person to be such owner who was not capable of being so at common law. Its only object was to get rid of the difficulties which often existed at common law in regard to ³⁷⁸ the proper person to be stated as the owner of the property in an indictment for larceny or other offenses against property. It therefore declares that, in all such cases, 'it shall be sufficient to prove that when the offense was committed the actual or constructive possession, or a general or special property in the whole or any part of such estate, was in the person or community alleged in the indictment or other accusation to be the owner thereof.' But the person named in the indictment as owner of the property must still, under the statute, as under the common law, be a person competent in law to be such owner": *Hughes v. Commonwealth*, 17 Gratt. 565; 94 Am. Dec. 498.

Other illustrations may now be given, supporting the view that unless a person alleged in an indictment for larceny to be the owner of property stated therein to have been stolen occupies a position other than that of servant, the prosecution of the thief on such indictment must fail. Thus in *Regina v. Green*, 37 Eng. L. & Eq. 597, the property in two pairs of women's boots was laid in the son about fourteen years of age, who resided with his father, who supported him, received no wages, and worked at the shop under his father's orders; that on the day of the larceny, the father returned home, and he was left in charge of the stall, and, on this state of facts, it was ruled that the son was but the servant

of his father, in whom the possession remained, and therefore the goods were improperly laid in the son, and the prisoner went acquit on that indictment, but was remanded and convicted on an indictment which laid the goods in the father.

So, too, in *Rex v. Hutchinson*, Russ. & R. C. C. 412, where a servant had the custody and care of a chapel, the title thereof being vested in trustees, and he having the only key to the chapel, could not be properly described as the owner of certain articles which belonged in the chapel.

³⁷⁹ In *State v. Jenkins*, 78 N. C. 478, in an indictment of the larceny of certain meat belonging to a railroad company, the property was laid in the depot agent of the company who had possession and control of it for the company for the use of its hands, it was held the prosecution on that indictment could not be maintained, because the agent had neither a general nor a special property in the articles stolen.

So in *Heygood v. State*, 59 Ala. 49, it was ruled that the overseer of another's plantation could not be alleged to be the owner of corn grown thereon in order to a prosecution for the larceny thereof, because he was to be deemed a servant of his employer, and, therefore, had no special property in the grain stolen.

In *State v. Ayer*, 23 N. H. 301, it was ruled that where leather was delivered to a person to be manufactured into shoes, which were to be delivered to the employer, if, while the shoes remain in the hands of the manufacturer, they be stolen, they may be laid to be his property in an indictment for their theft, and this because, by reason of his employment, he had a special property in the shoes.

On the same principle, wherever it is shown that the person alleged to be the owner had such special property, or that he held it to do some act upon it, or for the purpose of conveyance, or in trust for the benefit of another, would be sufficient to support an allegation of ownership in an indictment: *State v. Somerville*, 21 Me. 14; 38 Am. Dec. 248.

In *State v. Addington*, 1 Bail. 310, the mare stolen never had been in the possession of the trustee of the wife, but in that of the husband, who held the animal in trust for the benefit of his wife, and with the presumed assent of the trustee, and, therefore, the property in the mare was well laid in the husband as the owner, when the mare was stolen.

³⁸⁰ In *Owen v. State*, 6 Humph. 330, the horse escaped from the premises of its owner, and entered on the premises of a neighbor, who directed his servant to put the horse into his stable, but

this was done to prevent the destruction of his corn in the field, and upon this it was ruled that the taker-up of the horse might well be stated to be his owner in an indictment charging his servant with the theft of the animal.

In short, the turning point and test rule in all cases of this sort may be formulated into this question: Did the party alleged in the indictment to be the owner have such a special property or right of possession in the goods as would enable him to maintain an action for them if taken out of his custody? If this interrogatory be answered affirmatively, then prosecution will lie in the name of such alleged owner; otherwise not: *Commonwealth v. Morse*, 14 Mass. 217; *Ludden v. Leavitt*, 9 Mass. 104; 6 Am. Dec. 45; *Warren v. Leland*, 9 Mass. 265; *Dillenback v. Jerome*, 7 Cow. 294; 2 Bishop's Criminal Procedure, sec. 722.

Tested by the rule thus laid down, it must be obvious to even casual observation that Mrs. Sexauer had no such special ownership in the property taken as would admit of her prosecuting an action for it, were it taken, and this is shown by the evidence disclosing that she is but the wife of the real owner.

But, further, the indictment not only fails to allege ownership of any kind in her, but, on the contrary, it alleges it to be in her husband. Now, how robbery could be committed in the absence of the real or special owner is rather difficult to understand. In *State v. Davidson*, 38 Mo. 374, the property was laid in John Day as owner, and it was held that as the evidence showed that Day was not present when the "rifle gun" was taken, that therefore an instruction asked by ³⁸¹ defendant that he could not be convicted of robbery in the first degree should have been given.

Here the indictment shows that the money alleged to have been taken was not taken in the presence of the only one whom the indictment mentions as owner. This makes the indictment bad on its face and obnoxious to a motion in arrest, or sufficient to cause a reversal in this court without such motion, the error being apparent of record: *State v. Meyers*, 99 Mo. 107.

The judgment should be reversed and the cause remanded.

All concur.

ROBBERY—INDICTMENT—ALLEGATION OF FEAR.—An indictment for robbery is sufficient without averment of the value of the property taken. The putting in fear and taking the property constitute the gist of the crime, and are the only essential elements that need be alleged: *State v. Perry*, 86 Me. 427; 41 Am. St. Rep. 564. See the extended note to *State v. McCune*, 70 Am. Dec. 185.

ROBBERY—VIOLENCE.—To constitute robbery, there must be force or intimidation: *Crawford v. State*, 90 Ga. 701; 35 Am. St. Rep. 242. When the taking is accomplished by force or violence, the force or vio-

lence must precede the taking: Extended note to *State v. McCune*, 70 Am. Dec. 182.

ROBBERY—INDICTMENT—ALLEGATION OF OWNERSHIP.—In an indictment for robbery, the property may be laid as belonging either to the actual owner or to the person robbed: *Brooks v. People*, 49 N. Y. 436; 10 Am. Rep. 398. A person in actual possession of money has such ownership thereof as makes it robbery to take it from his person without his consent: *Stegar v. State*, 39 Ga. 588; 99 Am. Dec. 472, and note. See, also, the extended note to *State v. McCune*, 70 Am. Dec. 190.

LANKFORD v. GEBHART.

[130 MISSOURI, 621.]

ELECTIONS—AUSTRALIAN BALLOT LAW—IDENTIFICATION MARKS.—The fact that the name of a voter is placed upon his ballot after it is delivered to him does not invalidate it under the Australian ballot law, provided the name so written on the ballot could not be seen by anyone, and was not written there for the purpose of identifying it.

ELECTIONS—RESIDENCE OF VOTER.—A finding by the trial court that a person was a resident voter cannot be disturbed on appeal, if no declarations of law were asked or given, nor specific findings of fact made.

ELECTIONS—CHANGE OF RESIDENCE.—A voter who leaves the state for the purpose of securing a homestead elsewhere, with the intention of there remaining if successful, and if not, of returning, and who selects a homestead claim, but shortly thereafter abandons it, does not lose his residence as a voter in the state from which he removed, although he resided with his family for a few months in another state before returning to the former.

ELECTIONS—PREMATURE CLOSE OF POLLS.—Under a statute declaring that the election polls shall remain open until a certain hour, a ballot cast and accepted by the judges before that hour should be counted, although the polls were closed without authority before the ballot was cast, and although it was prepared secretly in a place other than one of the election booths.

ELECTIONS.—EVIDENCE IS ADMISSIBLE ON AN ELECTION CONTEST to show that a mutilated ballot was intact when voted.

ELECTIONS—IDENTIFICATION OF VOTER.—Parol evidence is not admissible to show that a ballot duly numbered was cast by a person other than the one whose name is recorded on the poll-books opposite the corresponding number, especially when the names are not idem sonans.

ELECTIONS—PLACE OF RESIDENCE.—A person in the United States railway mail service, whose established home and residence are with his father, can vote legally only in the township in which his father resides.

ELECTIONS—PLACE OF RESIDENCE.—A permanent member of a soldiers' home, who is not permitted to leave it without a license or furlough, has a residence at such home for the purpose of voting.

ELECTIONS—RESIDENCE OF VOTER.—One who purchases a farm, and takes possession of it with the intention of making it his permanent home, acquires a residence at the place where the farm is situated for the purpose of voting from the time he takes possession, although he does not bring his entire family there until a short time afterward.

ELECTIONS—RESIDENCE OF VOTER.—If a father removes from one state to another, while engaged in the civil service of the United States, taking his minor son with him, but retaining his residence for the purpose of voting in the state from which he removes, the residence of the son continues the same as that of the father, during the minority of the former, and also thereafter until he acquires one of his own.

ELECTIONS.—Statutes requiring that ballots on account of want of conformity to any particular of the law, shall not be counted, are mandatory.

ELECTIONS—BALLOTS—MARKS NOT INVALIDATING.—A ballot containing the word "yes," written under the name of one candidate, and the word "no" under the name of another candidate for the same office, is not invalid as to other candidates for other offices to which the words written do not apply.

ELECTIONS—IDENTITY OF VOTER—EVIDENCE.—If a ballot is numbered and recorded on the election poll-book without any name being written opposite thereto to designate the person who voted the ballot, parol evidence is not admissible to identify, nor to supply the name of, the voter.

ELECTIONS—NOTICE OF CONTEST.—The manner of the service of the writ directing the clerk of court to recount the ballots in an election contest, and of notice to the contestee when the recount is to be made, though irregular, is valid, if the clerk obeys the writ and the contestee is present at the recount.

Alexander & Richardson, J. F. Hicklin, and J. P. O. Givens, for the appellant.

Hamilton & Dudley, for the respondent.

⁶²⁸ **MACFARLANE, J.** This is an election contest over the office of sheriff of Daviess county. On a proper order, the ballots were opened, examined, and recounted by the clerk. Upon a hearing in the circuit court, it was found and adjudged that contestant and contestee each received at said election eighteen hundred and twenty-two votes. Both parties appealed. For convenience, the two appeals will be considered together.

1. Contestant objected to the legality of nine votes counted for contestee, for the reason that each of the ballots had written on the back thereof the name of the voter who cast the same. It did not appear by whom the names, or any of them, were written.

⁶²⁹ The statute was designed to preserve the secrecy of the ballot, and the legislature had the undoubted right to prescribe the form to be used, and to prohibit any marks, devices, or writing thereon by which the ballot of one person could be distinguished from that of another. These statutes are said to be either mandatory or directory. If the former, a substantial variance from the prescribed requirements will invalidate the vote.

The decisions of this court have been uniform and consistent in holding that a statute which declares that a ballot should not be counted which is cast in disregard and violation of certain

prescribed forms is mandatory: *State v. Cook*, 41 Mo. 593; *West v. Ross*, 53 Mo. 350; *Ledbetter v. Hall*, 62 Mo. 422; *State v. Frazier*, 98 Mo. 426; *Bowers v. Smith*, 111 Mo. 45; 3? *Ann. St. Rep.* 491.

Contestant insists that the requirements of section 4671 of the Revised Statutes of 1889, and of sections 8 and 9 of the act of 1891 (Acts 1891, p. 135), were violated by writing on the back of the prospective ballots the name of the voter thereof; that the requirements of these sections are mandatory, and such votes should not be counted.

Section 4671 of the Revised Statutes of 1889 provides that the ballot voted "shall not bear upon it any device whatever, nor shall there be any writing or printing thereon, except the names of persons, and the designations of the office to be filled, leaving a margin on either side of the printed matter for substituting names. . . . Any ballot not conforming to the provisions of this chapter shall be considered fraudulent, and the same shall not be counted."

Section 8 of the act of 1891 (page 135), after requiring that the judges of election should deliver to the voter a ballot, makes this provision: "Before delivering any ballot to the elector, the two judges of election ⁶³⁰ having charge of the ballots shall write their names or initials upon the back of the ballot with ink or indelible pencil, and no other writing shall be on the back of the ballot, except the number of the ballot."

Section 9 provides that, after preparing the ballot, "the elector shall fold the same so that the face of the ballot will be concealed and the initials of the judge may be seen. He shall then vote forthwith and before leaving the polling place."

But it will be observed that the act of 1891 is amendatory of the general election law, of which section 4671 is a part. The latter section is found in the law before the Australian system of voting was adopted. A comparison of that section with the said sections 8 and 9 will show that the requirements are wholly inconsistent and irreconcilable. The amendatory law by section 13 expressly repeals all acts or parts of acts inconsistent with it. We must, therefore, hold that section 4671 was repealed by the later act of 1891.

Under the election law as in force, the ballots must be officially printed and furnished the voter by the officers conducting the election. The voter is left no choice in selecting or making his ballot. It is true section 8 of the act of 1891 requires that two of the judges of election shall write their names or initials

on the back of the ballot furnished the voter, and that no other writing shall be on the back of the ballot, except the number of the ballot; but it will be observed that this prohibition refers to the time the ballot is delivered to the voter, and not to the time at which it is voted.

Even though the statute was intended, as doubtless it was, to require that the ballot, when delivered by the voter to the judges, should have no other writing on the back, except the names or initials of the judges, and the number of the ballot, it should not be regarded as mandatory. There are no negative or other words ⁶³¹ making it mandatory in form, as was the case with the statute it repealed. That statute, with its construction, was before the legislature, and the omission to give the repealing law a mandatory form is very significant of a contrary intention.

Nor can we see that the mere writing of the name upon the ballot, though done by the voter himself, was such violation of the intended secrecy of elections as should render it void. It did not appear that the ballot was so folded that the name written on it could be seen by anyone, or that the name was written for the purpose of identifying the vote. The name on the back of the ballot gave no greater opportunity for identifying it than the number on the poll list afforded.

The statute, we think, should only be considered as giving direction to the officers of the election in respect to the discharge of their duties, and not as mandatory upon the voter. If the name was so written on the ballot that it could be seen, the judges should have refused to receive it, and required the voter to prepare another. As it was accepted by the judges, and there was no evidence of intentional violation of the law on the part of the voter, the vote was properly counted.

2. Contestant challenges the legality of the votes of Orva Cook and John Persinger, counted for contestee, on the ground that they had changed their residence to another state, and had not resided in this state after their return to it for one year before the election. There was some conflict in the evidence as to whether these persons ever changed their residence from this state. No declarations of law were asked or given, or specific findings of fact made by the court. In such case, this court will not interfere with the conclusions reached by the trial court: *Gumm v. Hubbard*, 97 Mo. 321; 10 Am. St. Rep. 312.

⁶³² 3. The vote of Seth Sullivan was counted for contestee. Contestant insists that this vote should have been rejected, for the reason that it appeared conclusively from the evidence that the

voter had not been a resident of this state for one year before the election.

The evidence shows that Sullivan left this state for Oklahoma in August, 1893, and was there at the opening of that territory to settlers. He took his family with him. At the opening of the territory, he selected a claim, went upon it, and plowed the land for a few days. He went to the land-office to file his homestead claim, and found his rights contested, and then abandoned them. He went from there to Kansas, where he rented a house and remained until December 20, 1893, when he started back to Missouri, where he arrived in January, 1894. He never moved his family onto the claim selected, nor into the territory, and testified that when he went to Oklahoma it was his intention, if he was successful in securing a homestead, to remain, and, if not, to return to Missouri.

Contestant insists that selecting a claim on government land for a homestead was conclusive of an intention to make that his home and residence.

We do not think a mere selection of a claim, without securing the approval of the government, and making the necessary declaration, would have the effect of concluding him on the question of residence. It was held by the supreme court of California that leaving one's residence merely for the purpose of complying with the homestead law would not cause a loss of residence: *Preston v. Culbertson*, 58 Cal. 198. In Illinois, it was held by the supreme court that leaving one's residence with an intention to remain away if suited, but to return if not suited, will not cause one to lose his residence if he returns before election: *Beardstown v. ⁶³³ Virginia*, 81 Ill. 541; *Smith v. People*, 44 Ill. 16. See, also, 6 Am. & Eng. Ency. of Law, 279, notes. So this court has held that "physical stay or residence in any particular place will not, of itself, constitute a domicile. The physical act of staying must be accompanied with the mental determination of making a home or domicile in the place where the party stays or abides": *State v. Dayton*, 77 Mo. 682, and cases cited. We think the question of intention in this case must control, and the conclusion reached by the court must conclude us from further inquiry.

4. In one precinct, a voter was permitted to cast his vote after the polls had been formally closed. The evidence showed that the polls were closed before 6 o'clock in the evening, and indeed that the contested vote was cast before that hour. But it shows further that the polls had not only been closed, but that the

booths had been removed, and the judges and clerks were engaged in counting the vote.

It was held in *Gumm v. Hubbard*, 97 Mo. 321; 10 Am. St. Rep. 312, that the polls, when closed, are closed to the judges as well as to other persons. But the fair presumption is, that the polls in that case were not closed until the time of the day fixed by law for closing them.

The statute requires that the polls "shall continue open until 6 o'clock in the evening, unless the sun shall set after 6, when the polls shall be kept open until sunset." The requirement seems to be very positive that the polls shall be kept open until the hour named. The statute provides for no formal closing of the polls. The duties of the election officers continue at least until the hour named. The rights of voters should not be prejudiced by premature suspension of their duties by the judges and clerks. The law nowhere authorizes a constable by public proclamation, as was ⁶³⁴ done in this case, to close the polls, or put an end to the voting.

The fact that the voter prepared his ballot in a place other than one of the booths should not invalidate his vote. It did not appear that the ballot was not secretly prepared. Moreover, it was accepted by the judges, and we ought to presume that they did their duty in that respect. This vote was properly counted.

5. It appeared on examination of the ballots that the caption had been torn off one of them which was counted for contestee. It was shown by evidence that said ballot was intact when voted. Contestant objected to this evidence.

Effect should be given to the will of the electors, and it is now generally agreed that the circumstances surrounding the election may be given in evidence on an election contest to explain ambiguities in the ballot: *Gumm v. Hubbard*, 97 Mo. 321; 10 Am. St. Rep. 312. With the same purpose in view, no reason can be seen why this evidence was not properly admissible. If the ballot was legal when voted, it should be counted. To exclude proof of its legality would virtually be a denial of the right to count a legal ballot. The evidence was admissible.

6. The name of Frank Vance appeared upon the poll-books as one of the voters. No man of that name lived in the election precinct. Frank Zentz was a qualified voter of the precinct and voted thereat, but his name does not appear upon the poll-books. The court admitted parol evidence for the purpose of proving that the ballot was cast by Zentz. The proof having been made

to the satisfaction of the court, the vote was counted for contestee.

The constitution provides that "every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the voter ⁶³⁵ who presents the ballot." It further provides that, "in all cases of contested elections, the ballot cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law": Const., art. 8, sec. 3. The statute requires the judges to number the ballots, and the clerks of election "to enter the names of the voters and the number of the ballots, in the order in which they were received on the poll-books." The question is, whether parol evidence is admissible for the purpose of showing that a ballot, duly numbered, was cast by a person other than the one whose name is recorded on the poll-books opposite the corresponding number.

The names Vance and Zentz are not idem sonans, and cannot therefore be taken as the same. It is claimed that an elector, who is qualified, and who has himself complied with all the requirements of the law, should not be disfranchised on account of the failure of the election officers to perform their duties. There can be no doubt that a hardship would be done the individual voter in denying him a voice in the election through no fault of his own. But, at the same time, the state has the undoubted right to regulate the manner of conducting elections, to prescribe what shall be done by the voter and the officers, and to make the validity of the vote dependent upon due compliance therewith: *West v. Ross*, 53 Mo. 350. The constitution and the statute were designed to secure the purity of elections, and, in those requirements which are mandatory, individual rights must give way to the public good, which we assume the law was intended to promote.

If the statute stood alone, it could be given the liberal construction claimed for it, but a positive requirement of the constitution cannot be treated as a mere direction. As is said: "Constitutions do not ⁶⁸ usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must be regarded in the light of limitations upon the power to be exercised": *Cooley's Constitutional Limitations*, 93.

The constitution speaks in unmistakable terms. It declares the will of the people of the state. It cannot be regarded merely

as giving directions to the officers of elections in respect to their duty. It must be taken as mandatory. The requirement that in cases of contested elections the ballots cast may be compared with the list of voters excludes any other means of identifying the person who cast the ballot. An expression of one mode of proof is an exclusion of all others.

It is very clear that the constitution was intended, not only to provide the means for detecting illegal votes and frauds in elections, but also, which is equally as important, to prevent frauds and perjuries in cases of contests. The ballots are all alike, and prima facie make a valid vote. Whether they should be counted depends upon the qualification of the voter. The voter is required to be identified by his number on the poll-book, which must correspond with the number of the ballot. In case one voted who was not a qualified voter, there could be no definite identification of the ballot he cast, if he or witnesses were permitted to contradict the evidence the poll-books afford. The law was intended to identify, not only the voter, but also the ballot. The ballot is what counts, and what ballots shall be excluded when a fraudulent voter is found is the question of vital importance. The constitution was intended to prevent frauds and perjuries in identifying the ballots, and to prevent the rejection of legal, and the counting of illegal, votes. We regard the constitution as mandatory, and, when it so speaks, the ⁶³⁷ courts have no discretion. This vote should have been rejected.

This concludes the errors assigned by contestant. It thus appears one vote was improperly counted for contestee.

7. It is admitted by contestant that four votes counted for him also had the name of the voter written thereon. For the reason given in paragraph 1, these votes were properly counted.

8. The vote of C. G. Buckingham, who voted for contestee, was rejected by the court, and of this ruling contestee complains.

This voter was in the railway mail service of the United States, and voted at Pattonsburg, Daviess county. Previous to going into this service, his residence was with his father in Washington township, Daviess county. Buckingham testified that he had no established home, except that of his father, but he had lived at Pattonsburg, boarding at the hotel, from October 25th to the day of the election. Had been in the mail service since May 24, 1894, most of the time running into St. Louis. From October 25th, his run was between Pattonsburg and

Brunswick, his stopping place being at Pattonsburg, Benton township.

We think this vote was properly rejected by the court. The constitution provides that, "for the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service, either civil or military, of this state, or of the United States": Const., art. 8, sec. 7. The statute provides that each voter shall vote only in the township in which he resides: Rev. Stats. 1889, sec. 4670. This voter, according to his own evidence, recognized his father's home in Washington township as his residence. This residence was not ^{ess} changed by his employment in the civil service of the United States. His voting place, unless he had adopted another, was in Benton township, the residence of his father, and his vote cast in another township, though in the same county, was properly rejected. He was not a qualified voter in such township.

9. The vote of Jerry Snyder, who voted for contestee, was rejected. Of this contestee complains.

The evidence showed that Snyder had lived in Daviess county for many years, but, at the date of the election, was a member of the soldiers' home at Leavenworth, Kansas. It did not appear how long he had been a member of the home. Snyder testified that he was a "permanent" member of the home, and was admitted free, but testified further that he had no intention of changing his residence from Daviess county in this state, and that he had been home on furlough for four months preceding the election.

The statute makes no special provision for such a case. The legality of the vote depended upon the residence of the voter. That was a question of intention. The testimony of Snyder that he had no intention of changing his residence when he became a member of the home or afterward may be taken as a mere conclusion of the witness. A contrary intent may be gathered from all the circumstances. The evidence that he was a permanent member of the home, and that he was not permitted to leave it without a license, or "furlough," from the manager, would tend very strongly to prove a change of residence. Under the evidence, the court may well have inferred that a permanent residence was adopted in the state of Kansas, and, in the absence of any declaration of law, we must presume that it so found.

10. Benjamin Porterfield formerly lived in Livingston county. On the twenty-fifth day of August, ^{ess} 1894, he bought and

obtained possession of a farm in Daviess county. At that time, he moved part of his household goods and farming implements to his farm, and commenced work on it. He took two of his sons with him. The rest of the family, consisting of wife and three children, were not moved to the farm until September 10th, which was only fifty-eight days before the election. He testified that, when he went upon the farm and commenced work, he intended it as his permanent residence. Porterfield voted for contestant, and his vote was counted.

Contestee insists that the residence of this voter was not acquired in Daviess county until his entire family was moved there. This claim is made upon authority of *State v. Dayton*, 77 Mo. 678. But this material distinction will be noted between that case and this one. In that case, the evidence shows that the voter, Dayton, did not go to, or remain at, work in Kansas City with the mental determination of making it his home. He intended to make it his residence on the condition that he could make suitable terms with his employers. In this case, the mental determination was accompanied with the physical act of staying upon the farm. The fact that a part of his family and a part of his goods were not moved for a few days should not defeat the physical act and mental intention. The vote was properly counted.

11. Carlos B. Tomlin voted for contestant, and the vote was counted by the court. The father of the voter received employment as clerk in the general land-office at Washington, D. C., in which he is still engaged. The son, when sixteen years of age, removed with his father to Washington, where he continued to live. When he voted he was twenty-two years of age. The residence of the father was not changed by reason of living in Washington city while engaged in the civil ⁶⁴⁰ service of the United States. The residence of the son continued the same as that of the father during the minority of the former, and until he acquired one of his own. He testified that he had never intended to change his residence, though he continued to live in Washington after he had attained his majority. The question was one of intention, and the finding of the court will not be disturbed.

12. One ballot voted for contestee contained the word "yes" written under the name of one candidate for prosecuting attorney and the word "no" written under the name of the other candidate for the same office. This ballot was rejected by the court.

It may be that under the mandatory requirements of section 4671 of the Revised Statutes of 1889, that ballot should not have been counted, because of writing the words "yes" and "no" therein. When the statute requires that a ballot, on account of want of conformity to any particular provision of the law, shall not be counted, it is mandatory. As was said in *Gumm v. Hubbard*, 97 Mo. 321, 10 Am. St. Rep. 312, section 5493 (the same as section 4671 of the Revised Statutes of 1889) furnishes an absolute rule of evidence. It makes the ballot fraudulent without regard to intent, when it has thereon any writing or printing other than that specified. But, as we have seen, this section was repealed by the act of 1891, and no such prohibition is now contained in the statute.

The words written do not apply to the office of sheriff, which alone is in contest here. We can see no reason for rejecting the entire ballot for the reason that the vote for prosecuting attorney may be left in doubt: *Atkeson v. Lay*, 115 Mo. 538. We are of the opinion that this vote should have been counted for contestee.

13. One ballot of Colfax township was numbered 6 and the number was so recorded on the poll-book, but no name was written opposite thereto to ⁶⁴¹ designate the person who presented the ballot. Nor was any name recorded upon the poll-book by which the identity of the voter could be determined. The court permitted the introduction of parol evidence for the purpose of ascertaining the person who cast the ballot. The proof being thus made, the vote was counted for contestant. Contestee assigns this action of the court as error.

In a former paragraph, we considered the admissibility of such evidence for the purpose of identifying one whose name was improperly recorded on the poll-list. We held it inadmissible even for that purpose. It follows from what is there said that this ballot was also improperly counted. If the name of a voter on the poll-list cannot be identified, one cannot be supplied.

14. Objection was made by contestee to counting the vote of James Gilling, who voted for contestant. The objection was on the ground that the voter did not reside in the county. There was some conflict in the evidence, but it tended to prove his residence, and the finding of the court must stand.

15. Objection was made that the writ directing the clerk to recount the ballots was served by an elisor instead of a sheriff, and that the notice to contestee that the clerk would, on the day named, open and recount the ballots, was not served as a

writ of summons is required by law to be served. It appears that the clerk obeyed the commands of the writ without objection to the manner of service, and that contestee was present at the opening of the ballot-boxes and witnessed the recount. The objects for which the service of the writ and notice were designed were fully accomplished, and the manner of the service becomes a matter of no importance.

⁶⁴² The result of the election, therefore, is that contestee received eighteen hundred and twenty-one votes, and contestant received eighteen hundred and twenty votes. Contestee was therefore elected by a majority of one vote.

Judgment reversed with directions to enter judgment for contestee.

Sherwood and Gantt, JJ., concur; Brace, C J., concurs in all but paragraph 6; Burgess in all but 1, 4, and 7; Barclay, J., dissents; Robinson, J., absent.

ELECTIONS—AUSTRALIAN BALLOT LAW—IDENTIFYING MARKS ON BALLOTS.—This subject is fully discussed in the monographic note to *Taylor v. Bleakley*, 49 Am. St. Rep. 243-249.

ELECTIONS.—BALLOTS, when their integrity is satisfactorily established, are the best evidence in an election contest of how the electors voted; *Tebbe v. Smith*, 108 Cal. 101; 49 Am. St. Rep. 68, and note.

ELECTIONS—RESIDENCE.—The residence of a voter is the place in which his habitation is fixed without any present intention of removing therefrom; *Berry v. Wilcox*, 44 Neb. 82; 48 Am. St. Rep. 706, and extended note on what and where is residence, and how the same may be lost or changed.

ELECTIONS—RESIDENCE OF INMATES OF SOLDIERS' HOMES.—If a soldier abandons his former residence, and becomes an inmate of a soldiers' home, with an intention to make that his future place of residence, and remains with such intention, he thereby gains a residence where the home is situated; *Stewart v. Kyser*, 105 Cal. 459, cited in the extended note to *Berry v. Wilcox*, 48 Am. St. Rep. 717.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

PENNSYLVANIA R. R. Co. v. MIDDLETON.

[87 NEW JERSEY LAW, 154.]

NEGLIGENCE.—ON A MOTION TO NONSUIT, in order to withdraw the case from the jury, the contributory negligence must appear as a conclusion of fact, or by necessary inference from the evidence adduced by the plaintiff. If the action is one for causing the death of a human being, it must appear that he, by some act or omission on his part, contributed to the accident which resulted in his death.

NEITHER NEGLIGENCE NOR CONTRIBUTORY NEGLIGENCE IS PRESUMED from proof of an accident on the track of a railway, resulting in personal injuries.

NEGLIGENCE, CONTRIBUTORY NOT PRESUMED.—If a person driving a team is killed at a railway crossing, and the evidence shows that the locomotive by which he was injured was not attached to a regular train, and that its bell was not rung when approaching the crossing, and there is no evidence as to what precautions, if any, were adopted by the decedent for his safety, the trial court cannot presume that he was guilty of contributory negligence, and grant a nonsuit, but must submit the question to the jury.

NEGLIGENCE—EVIDENCE.—IN AN ACTION TO RECOVER FOR THE DEATH of a person at a railway crossing, caused by the collision of the team he was driving, with a locomotive, the defendant has no right to demand positive evidence that the decedent did stop, look, and listen, but the jury must be left to determine from all the circumstances, in the absence of direct evidence, whether the death was the result of contributory negligence or not.

Samuel H. Gray, for the plaintiff.

John J. Crandall and Timothy J. Middleton, for the defendant in error.

155 LIPPINCOTT, J. This is an action by the plaintiff, as administrator of Elmer V. Hunt, deceased, against the defendant, to recover damages for the benefit of the widow and the next of kin, by reason of the death arising from the alleged negligence of the defendant.

At the close of the evidence on the part of the plaintiff, a mo-

tion for a nonsuit was made by the defendant, on the ground that the case of the plaintiff showed that the decedent was guilty of contributory negligence, and therefore could not recover. This motion the trial justice refused, and upon this refusal error has been assigned.

Therefore, the question is, whether the trial justice erred in not granting a nonsuit.

The deceased was killed at a place known as Main's railroad ¹⁵⁶ crossing of a public road called the New Albany road, near a station called Lenola, some distance west of Moorestown, in the county of Burlington, on the twelfth day of September, 1893, about 4 o'clock in the morning. He was at this time returning from Philadelphia to his home, a short distance east of the crossing, with a two-horse team drawing a truck wagon and shelving thereon, with which he had taken earlier in the day or night a load of truck to market, and whilst he was crossing the railroad of the defendant company, on his return from market, an engine, with a tender attached, collided with the wagon, and he was killed. The horses were not killed, but the wagon was destroyed, and he was found dead beside the track, about one hundred and thirty feet easterly of the crossing. The morning was quite dark. Some of the witnesses for the plaintiff speak of it as a very dark morning. There were no witnesses who saw the accident, except the engineer at the very moment. The crossing of the railroad tracks by the public road is not at right angles, but diagonally. Mr. Crider, a witness who was at the time living on the New Albany road, about two hundred and fifty yards from the railroad crossing, was lying awake in his bed and heard the rumbling of the wagon going past his home toward the railroad crossing. He also heard the engine approaching, and, from where he was in bed, saw the headlight of the locomotive flash upon the windows of his bedroom, and then he heard the crash of the collision. He then aroused some members of his family and went to the crossing, and found Hunt dead at the spot to which reference has been made. The engine and tender had come from Camden, and were going to Long Branch for duty that day, to take a train from Long Branch to Trenton, and were, at the time, running at the high rate of speed of about from forty to fifty miles per hour. The deceased, with his team, was traveling in the same (an easterly) direction, along this road, to his home. The evidence on the part of the plaintiff shows that the public road along which the decedent was driving commences, about thirty feet away from the track, to descend at

the rate of about three or ¹⁵⁷ four feet in fifty, and at this point the track is somewhere between three and six feet below the surface of the surrounding land. The station of Lenola was a short distance, in a westerly direction, from the crossing. At this station there were signal lights, and at other places, in a westerly direction, for some distance, there were one or more switch lights, which could be seen in approaching the crossing by the public road, and seen from the crossing, and lights were about eight or nine feet above the surface of the track. It was in evidence, also, that along the track, on the side thereof nearest the public road, there were several telegraph poles, about twenty to twenty-five feet from the middle of the track. On the same side of the track, in a westerly direction, there were several trees, five in number, which have branches so low as to be within three or four feet of the ground. There is some evidence, also, that from the scene of the accident a view of the track cannot be had for more than about forty feet in a westerly direction, from which this train was approaching the crossing, but the angle of the track, close at hand, which causes this situation, is not such that it alone would obscure the view of the track by anyone approaching the crossing on the road. This seems to be the general situation at the place of this occurrence.

The evidence for the plaintiff is, that the whistle of the engine was not blown nor its bell rung at any time before the engine approached the crossing or whilst it was so approaching. Mr. Crider testifies to this fact positively and directly. Other witnesses living close to the crossing also testify that the whistle was not blown nor the bell rung. On motion to nonsuit, there was not, as there could not be, any attempt to deny the existence of the negligent default of the engineer and other servants of the defendant company in giving these statutory warnings. Whether such warnings were given or not, the evidence on the part of the plaintiff was quite conclusive as to this neglect, and the motion to nonsuit was made, not because there did not exist affirmative negligence of the servants of the defendant in running the engine over ¹⁵⁸ the crossing, presumably causing the collision, but on the ground that the defendant was guilty of negligence contributing to his injury and death, and the only complaint which now can be urged against the determination of the trial justice is, that there was error in law in not withdrawing the case from the jury.

Whilst this question requires some examination of the circumstances of the occurrence, yet a discussion of the conclusions

and inferences which ought to have been drawn or rejected involves a controversy which renders it evident that it should not be determined by the trial court. It only requires that attention be confined to a consideration of a few of the leading facts and circumstances to ascertain whether the case as presented by the plaintiff was not of the nature which, in the law, was within the exclusive province of the jury to determine.

On a motion to nonsuit, in order to withdraw the case from the jury, the contributory negligence must appear clearly, as a conclusion of fact or by necessary exclusive inference, from the evidence which is adduced by the plaintiff.

It must appear in the proof of the plaintiff that the decedent, by some act of omission or commission on his part, contributed to the collision which resulted in his death: *Palys v. Erie Ry. Co.*, 30 N. J. Eq. 604; *Pennsylvania R. R. Co. v. Righter*, 42 N. J. L. 180. This principle has been reiterated, in one form or another, in all our adjudications. The proof of the occurrence of the accident is not sufficient of itself to establish the negligence of the defendant. It does not give rise to the presumption of negligence: *Bahr v. Lombard*, 53 N. J. L. 233. It was not disputed, on the motion to nonsuit, that the testimony of the plaintiff disclosed circumstances, such as the absence of the required statutory signals of warning, from which the negligence of the defendant might be concluded or inferred, and, therefore, it was required to be submitted to the jury, unless the contributory negligence of the decedent was clearly discoverable or inferable from the other facts and circumstances of the case. In the ¹⁵⁹ consideration of these other facts and circumstances adduced in the evidence of the plaintiff, the trial justice could apply no unfavorable presumption against the decedent. The mere proof of the accident raised no presumption of contributory negligence on his part. From the mere accident there could arise no conclusion or inference of the want of ordinary care or caution in approaching and going over this crossing, but, from the accident and its attendant circumstances, taken together, there must have appeared sufficient evidence for the trial court to declare that negligent conduct on his part, or want of ordinary care, clearly appeared, and without this conclusion, thus arrived at, there existed no legal power to exclude the jury from the consideration of whether contributory negligence existed or not.

There was no witness who could at all detail the conduct of the decedent, because no one saw the occurrence. This want of proof can give rise to no presumption against him as to the char-

acter of his conduct. He was bound to his legal duty, which was to exercise reasonable care, and to exercise ordinary caution and circumspection, under all the circumstances, in approaching and going across. This legal duty required of him the reasonable and ordinary use of all his senses, and all his physical powers reasonably exerted to avoid danger. He was bound to look and listen, before he attempted to cross, and whatever danger he could have discovered by looking and listening he incurred the peril of if he proceeded. These were legal obligations on his part, the neglect of which, if injury arose to him, left him without remedy. The courts of this state have not as yet proceeded so far as to declare that there exists a legal obligation to stop absolutely before entering upon a railroad crossing of this character. Whether any such obligation will be ever established is a question which need not, in view of the circumstances of this case, be discussed. Upon the evidence of the plaintiff, it would have been very difficult for the trial justice to have declared, in order to grant the motion to nonsuit, that the decedent did not stop, look, and listen, for, under the circumstances, ¹⁶⁰ all these things may have happened, and the observation to be gained by such conduct may have been obtained, and yet the accident still have happened. The defendant, on this question of contributory negligence, on a motion to nonsuit, had no right to demand positive evidence from the plaintiff that the decedent did stop, look, or listen, for if that were true, in cases where death results, the beneficiaries of the decedent would, in a great many instances, be entirely remediless, whatever the circumstances proven may have been. The determination of these elements of care and caution depends upon the circumstances of each case, and belongs to the jury, unless the trial court finds that they are such that but one result is deducible.

Returning again to some consideration of the facts. The decedent was required to exercise ordinary care under all the circumstances to avoid danger—to avoid collision and resulting injury. This requires the exercise of judgment, and whether he exercised good judgment depends upon the circumstances which confronted him, and by which he was surrounded. The decedent with his team and wagon approached and went on the crossing upon a walk. The reflection arises that his wagon could not have been making much noise in its movement, and thereby affording much greater opportunity for him to hear the approaching train; but, on the other hand, it might well be said that the engine and tender would make but little noise, as a matter of

warning. He had his team to watch, and the engine was running at a great rate of speed. In going toward the track, and just before reaching the crossing, he was bound to encounter a descent of about three feet in thirty, which might create some difficulty in managing his team, so as to be in absolute control of it. In the direction from which the train was approaching the signal lights of the station and the switch lights were placed alongside or on the tracks, placed at about the same height as the locomotive headlight, and which could, according to the evidence, be readily mistaken for the signal or switch lights; along the tracks and close by the track were a number of telegraph ¹⁶¹ poles and five trees, which, by the evidence, to some extent at least obscured the view of an approaching train, at a distance away on the public road of from twenty-five to fifty feet. He was driving in nearly the same direction that the train was approaching, with the train behind him, and, as the wind was blowing in an opposite direction, no sound of the approaching train may ever have reached him, and the train coming in that direction, it very readily and naturally might be that he would not perceive the headlight at all. That he was awake before and at the time of the accident may be indicated from the fact that a part of a cigar yet warm was picked up at the place of the accident, and under the evidence it can be concluded that the decedent was smoking it when the engine collided with the wagon, which was struck in the middle portion thereof. The night, according to the evidence of all the witnesses, at the hour of the accident, was very dark, and, as no whistle was blown or bell rung, as we are bound to believe upon the evidence, it may be a grave question of fact whether he could otherwise be notified of an approaching train. In the darkness of the night, his view would be worth but little to him, save as he might see the headlight, which he may not have been able to distinguish from the signal or switch lights, and therefore, instead of aiding him, they may have confused and embarrassed him. Besides, it is to be remembered that this was not a regular train with a schedule of time, and the decedent cannot, as a matter of fact, be held to have expected an approaching train at this hour of the night. He lived close at hand to this crossing, and presumably it may be said that he was aware of the time trains regularly reached this crossing, but this was an engine and tender on a special errand, without schedule time, and not to be expected by anyone.

Upon these facts, was it for the trial court to determine or

infer that the accident was one to which his own want of ordinary care contributed? It may be that he exercised none of the precautions required of him; it may be that he omitted ¹⁶² some precaution required of him, and the omission contributed to the result; it may be, as a logical deduction from these facts and circumstances, that he stopped, looked, and listened, and exercised all the care and caution required in the performance of his legal duty.

Now, upon these facts and circumstances, I think it is apparent that it would extend the power of the trial court beyond the line defined by the law to have required it to order a nonsuit. The case is not one without grave difficulty and considerable doubt upon the question whether the decedent was in culpable default contributing to his death, but, if this difficulty and doubt exist, then so much stronger the reason that the court should not trench upon the province of the jury to solve the question of fact in controversy.

Under the cases, if the mind of the trial justice was in some state of doubt upon the question whether the decedent exercised that degree of care which his legal duty exacted, then it was a matter within the exclusive power of the jury to determine—*Pennsylvania R. R. Co. v. Matthews*, 36 N. J. L. 531; *Delaware etc. R. R. Co. v. Shelton*, 55 N. J. L. 342.

The important question in this case arose on the motion to nonsuit, and it was determined by the trial justice upon the proper application of the principles of law established by the adjudications of this court.

I have examined the requests of the defendant, to the trial court, to charge the jury, in connection with the charge as delivered to the jury, upon which error has been assigned, and I can discover no error in the refusal to charge as requested.

Besides, the discussion of the assignment of error on the refusal to nonsuit has practically covered the questions raised by the requests to charge.

The instructions of the trial justice to the jury, upon the whole case, seem to be in entire conformity with the law applicable to the facts.

¹⁶³ I shall therefore vote to affirm the judgment of the supreme court.

RAILROADS—ACCIDENT AT CROSSING—PRESUMPTION OF NEGLIGENCE.—An accident from a collision between a railroad train and a private vehicle at a crossing, by which a person on the vehicle is injured, is not evidence from which an inference of negligence on the part of the railroad company can be drawn: *Extended note to Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 494.

RAILROAD CROSSING—INJURY AT—PRESUMPTION OF CONTRIBUTORY NEGLIGENCE.—It will be presumed that a person injured in attempting to cross a railroad track did not look before crossing, if it appears that, had he done so, he would have seen the approaching train, in season to have avoided it: *Wilcox v. Rome etc. R. R. Co.*, 39 N. Y. 358; 100 Am. Dec. 440, and note. In the absence of evidence to the contrary, a person who has been killed by a train at a railway crossing will be presumed to have observed the precautions the law requires, and the burden of proof is on the railway company to show that he has not: *Pennsylvania R. R. Co. v. Weber*, 76 Pa. St. 157; 18 Am. Rep. 407; *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note. It devolves upon the railroad company, in an action against it for negligence, to show want of proper care by the injured person, where his negligence is not disclosed by his own evidence, and the company is shown to have been in default: *O'Connor v. Missouri Pac. Ry. Co.*, 94 Mo. 150; 4 Am. St. Rep. 364, and note. When a person crossing a railway track is injured by collision with the train, the fault is *prima facie* his own, and he must show affirmatively that his fault or negligence did not contribute to the injury before he is entitled to recover therefor: *Cincinnati etc. Ry. Co. v. Howard*, 124 Ind. 280; 19 Am. St. Rep. 96, and note; *Indiana etc. Ry. Co. v. Greene*, 106 Ind. 279; 55 Am. Rep. 736, and note.

CONTRIBUTORY NEGLIGENCE — QUESTION OF — WHEN SHOULD BE SUBMITTED TO THE JURY.—The proof of contributory negligence must be clear and decisive, not leaving room for impartial and unbiased minds to arrive at any other conclusion, in order to warrant any absolute direction to the jury on that ground: *Valin v. Milwaukee etc. R. R. Co.*, 82 Wis. 1; 33 Am. St. Rep. 17, and note. Only in rare cases is the court justified in withdrawing the question of contributory negligence from the jury: *McQuillan v. Seattle*, 10 Wash. 464; 45 Am. St. Rep. 799, and note. Proof of contributory negligence must be clear and decisive to warrant a nonsuit on that ground: *Thoresen v. La Crosse etc. Ry. Co.*, 87 Wis. 597; 41 Am. St. Rep. 64, and note.

NORD DEUTSCHER LLOYD STEAMSHIP CO. v. INGEBREGSTEN.

[97 NEW JERSEY LAW, 400.]

A MASTER'S DUTY TO HIS SERVANT requires the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business in which the servant is employed, and in keeping such machinery and appliances in repair, including the duty of making inspection and test at proper intervals.

IF A MASTER DELEGATES TO AN AGENT THE DUTY OR AUTHORITY of furnishing proper appliances and machinery for a business in which the servant is engaged, or of keeping such machinery and appliances in repair, and of making proper tests and inspection thereof, he is answerable to his servants and employes for injuries received by them from the negligence of the agent to whom these duties have been delegated.

MASTER AND SERVANT, FELLOW-SERVANTS, WHO ARE NOT.—If one servant is injured through the negligence of another in failing to discover defects in machinery or appliances, and the latter is not engaged in using the apparatus in a common employment with the servant injured, then the former in his duty represents the master, who is chargeable with his defaults and answerable for injuries suffered by the other servant therefrom. The chief justice dissents.

NEGLIGENCE, CONTRIBUTORY.—AN EMPLOYE IS ENTITLED TO ASSUME that his employer has exercised due care in furnishing proper appliances and in keeping them in a safe condition, and is not chargeable with contributory negligence for so assuming.

Samuel A. Besson, for the plaintiff in error.

Robert L. Lawrence, for the defendant in error.

⁴⁰⁰ **DIXON, J.** In an action by an administratrix to recover damages resulting from the death of her intestate, it appeared that the deceased was a stevedore in the employ of the defendant, and was killed while unloading one of the defendant's steamships at the dock in Hoboken. The circumstances of his death were as follows: The ship's cargo, consisting of bags of rice weighing about two hundred and fifty pounds each, was hoisted out of the hold by means of a wire rope fifteen-sixteenths of an inch in diameter, called a "hanger," suspended from one of the ship's masts, and having its lower end held over the hatch by another wire rope called an "outhaul"; the lower end of the hanger was formed into a loop by being bent around an iron thimble and spliced upon itself with ⁴⁰¹ hemp lashing for a foot or two above the thimble; the thimble was shaped like a horse's collar inverted, except that the upper ends were not quite closed; into this thimble were hooked the lower end of the outhaul, and also the upper end of the vertical hoisting apparatus, at the lower end of which was a sling to hold the bags of rice; the work of the deceased was to place the bags in the sling and fasten the sling to the apparatus for hoisting; as several slings were in use, he would frequently be engaged in filling one sling beneath the hatchway while another was ascending; and while he was thus occupied, the hanger broke at the open end of the thimble, and the bags fell upon him, inflicting injuries from which he soon died.

At the close of the plaintiff's case, the defendant moved for a nonsuit, on the ground that the testimony did not indicate any negligence of the defendant, and did establish contributory negligence by the deceased, which motion was denied and an exception sealed.

The plaintiff's evidence tended to prove that the hanger, if in good order, would sustain a weight of about fifteen tons, and had on it when it broke less than one ton; that it had been in use two or three times a week for about seven years; that before the accident it was rusty, and at the point of fracture had been abraded by the ends of the thimble; that those defects were discoverable on removing the lashing by which the splice was

made, and that the apparatus was supplied by the defendant and kept in charge of Gerhart Schau, its storekeeper, whose duty it was to look after all the gear used at the dock and see that it was in good order.

Upon this evidence, we think it became a fair question for the jury whether the accident had not happened because of a defect in the hanger which reasonable inspection would have discovered, and reasonable prudence have remedied. Supposing the jury might decide that question in favor of the plaintiff, the question of law arises whether the defendant had performed its duty as employer, by delegating to its storekeeper, Schau, the duty of inspection and repair.

⁴⁰² The master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing suitable machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals: *Union Pac. Ry. Co. v. Daniels*, 152 U. S. 684. So far the authorities are at one. Almost as unanimous are they in the proposition that, if the master selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible for the fault: *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 642, and cases there cited; *Baily v. Rome etc. R. R. Co.*, 139 N. Y. 302; *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416; 40 Am. St. Rep. 616; *Toy v. United States Cartridge Co.*, 159 Mass. 313.

Discrepancies, however, have arisen in the application of the latter rule, because of another rule firmly established, that the master is not responsible to his servant for the negligence of a fellow-servant engaged in a common employment. In determining whether an employé, through whose negligence defects in the machinery have failed of discovery or repair, is a representative of the master in the discharge of the master's duty to the servant, or is a fellow-servant of the latter engaged in a common employment, many incongruous decisions have been rendered.

On this topic a rational distinction would seem to be, that when the employé's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow-servant, and the master is not responsible to his fellow-servant for his fault, but that if the master has cast a duty of inspection or repair upon an employé who is not engaged in

using the apparatus in a common employment with his fellow-servant, then that employé in that duty represents the master, and the master is chargeable with his default. This distinction is noticeable in *McAndrews v. Burns*, ⁴⁰³ 39 N. J. L. 117; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467; 36 Am. Rep. 535; *Collyer v. Pennsylvania R. R. Co.*, 49 N. J. L. 59; *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160; *Moynihan v. Hills Co.*, 146 Mass. 586; 4 Am. St. Rep. 348; *Daley v. Boston etc. R. R. Co.*, 147 Mass. 101, and many other cases.

Applying this principle to the case in hand, it is manifest that Schau, the storekeeper, who was charged with the duty of seeing that the apparatus was in good condition before it was delivered to the stevedores for use, but was not himself to be engaged in using it, was in that service the representative of the defendant, and was not serving in a common employment with the deceased. As the evidence tended to show that he had not carefully performed this duty, and that the accident had thence resulted, the plaintiff could not be nonsuited for want of proof of negligence chargeable to the defendant.

That the case did not present such indubitable proof of negligence on the part of the deceased as to justify a nonsuit, is, I think, too clear for discussion. The nonsuit was rightly refused.

The other exceptions relate to the charge and to the defendant's request to charge. These requests were, that the court charge the jury that, if the accident was caused by want of sufficient examination of the hanger on the part of Schau, the plaintiff could not recover, and that the defendant's duty was discharged if proper appliances were procured and furnished by it, and it exercised due care in the employment of a fit person to take charge of the examination and repair of the same.

These requests rest upon the assumption that, in discharging his duty to examine and repair the hoisting apparatus, Schau was engaged in a common employment with the deceased. For reasons already stated, they should have been refused. But they were substantially complied with by the trial judge. He, however, further charged that it was the duty of the defendant to exercise reasonable care in the inspection of the machinery and to keep it reasonably safe and ⁴⁰⁴ secure, and a neglect of this duty, if an injury occurred, would be actionable negligence. The meaning of these portions of the charge, taken together, seems to be that while the defendant would not be responsible for negligent inspection by Schau, yet if reasonable inspection had not been made by any person, and through want of it

the accident had occurred, the defendant would be responsible. Remembering that the master's duty required reasonable inspection to be made by someone, this charge was not injurious to the defendant.

The last exception is against so much of the charge as instructed the jury that, in deciding whether the deceased was guilty of contributory negligence, they should consider him as entitled to assume that his employer had exercised due care in furnishing proper appliances and in keeping them safe. In this there was no error: *Chicago etc. Ry. Co. v. Branyan*, 10 Ind. App. 570.

Counsel for the defendant, in argument, laid stress upon the fact that the trial judge frequently referred in his charge to the master's duty of using proper care to employ competent coservants, although there was no evidence that the defendant had failed in that duty. What was said by the judge on this point was not intrinsically erroneous, and seems to have been induced by the request of the defendant's counsel at the trial. It was not then excepted to, nor was any request made for instructions to the jury that there was no evidence of a breach of that duty. Under these circumstances, the defendant has no substantial grounds of complaint.

The judgment should be affirmed.

MASTER AND SERVANT—MASTER'S DUTY AS TO MACHINERY.—An employer owes a duty to his employes to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in order: *Elledge v. National City etc. Ry. Co.*, 100 Cal. 282; 38 Am. St. Rep. 290, and note; *Meador v. Lake Shore etc. Ry. Co.*, 133 Ind. 290; 46 Am. St. Rep. 384. A master is bound to exercise reasonable care and diligence in providing and keeping in repair safe tools and machinery for a servant's use: *Monmouth Min. etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187, and note.

MASTER AND SERVANT—DELEGATION OF DUTY AS TO MACHINERY.—Knowledge of a vice-principal that machinery under his control is dangerously defective is the knowledge of the principal: *Mattise v. Consumers' Ice Co.*, 46 La. Ann. 1535; 49 Am. St. Rep. 356. A master cannot delegate to a servant the duty of seeing that machinery with which other servants must work is reasonably safe so as to relieve himself from liability for the negligence of the servant to whom such duty is delegated: *Monmouth Min. etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187, and note with the cases collected; *Norton v. Volske*, 158 Ill. 402; 49 Am. St. Rep. 167.

MASTER AND SERVANT.—A servant has the right to assume that appliances furnished him are safe: *Carter v. Oliver Oil Co.*, 34 S. C. 211; 27 Am. St. Rep. 815, and note; *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777, and note; *Monmouth Min. etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187.

NEWARK v. BONNELL.

[57 NEW JERSEY LAW, 424.]

PUBLIC WORKS—PROPOSALS CALLING FOR PATENTED OR PROPRIETARY ARTICLES.—The fact that an article is patented, does not necessarily prevent any person but the patentee from contracting to supply it. An award of public work may therefore be sustained, though the notice to bidders called for the furnishing of such an article, and the right was reserved of rejecting any and all proposals, though the law requires the contract to be let to the lowest bidder.

Sherrerd Depue, for the City of Newark.

Joseph Coult, for the Barber Asphalt Company.

425 GARRISON, J. On the sixth day of August, 1892, the board of street and water commissioners of the city of Newark advertised for sealed proposals for the paving of certain streets. The specifications of the material to be furnished therefor, in each instance, called for the employment of genuine "Trinidad Lake" asphaltum. The board, in inviting these bids, expressly reserved "the right to accept or reject any or all proposals for the above work as they might deem for the interest of the city."

Proposals were received from two bidders, the Barber Asphalt Paving Company and the New Jersey Asphalt Company, the bid of the latter being the lower. After an investigation that occupied more than six months, the board determined that it was not for the best interest of the city to accept the proposal of the New Jersey Asphalt Company. The contracts with the Barber Asphalt Paving Company (now the subject of controversy) were thereupon awarded and executed. The examination of the board, which was directed almost wholly to the bona fides of the two competitors in regard to the employment of the material specified, is detailed in five hundred printed pages of testimony, with respect to which it is sufficient to say that it fails to suggest a doubt as to the honest exercise by the board of the discretion they had reserved to themselves.

The only question of law raised by the reasons on file is, that the material called "Trinidad Lake" asphaltum is a proprietary article and a monopoly, in which there can be no competition. In point of fact, the latter statement is not sustained by the proofs. Upon the facts proved, the legal proposition is, that a municipality may not contract for the material **426** it deems most suitable for its purpose if it be patented or the subject of exclusive ownership or control, for that is what the contention comes to. Such a proposition cannot be said to be sustained by any necessary, or even by any legitimate, implication to be drawn

from the legislative prescription that "all contracts shall be awarded to the lowest bidder," especially when modified by the proviso, "unless it shall appear that the interests of the city or of the property owners will not be advanced thereby." The correct rule, as I conceive it, is stated by Chief Justice Cooley, in *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185, in these words: "The fact that an article is patented does not necessarily prevent any person but the patentee from contracting to supply it." The obvious reasoning being that others may contract to do so, taking the risk of obtaining the material or the patentee's license to use it. The primary objects of care in the legislative provision for competition are the public and private interests committed to municipal agencies, not the convenience of contractors or the protection of their profits. Upon this point, the case of *In re Dugro*, 50 N. Y. 513, appears to me to be a satisfactory authority. The case of *Kean v. Elizabeth*, 35 N. J. L. 351, is not in point, and does not decide the proposition stated in its syllabus. All that is decided by that case is, that the petition of property owners did not represent one-half of the running feet along the line of the proposed improvement. The view expressed by Mr. Justice Souder upon the legal doctrine was not regarded by him as dispositive of the case, which turned, as he deemed, and rightly so, upon the application to the facts of a pertinent supplement directly in point. Moreover, that case concerned not the employment of a proprietary material, but the exclusive local right to put down a patented pavement, which raises a somewhat different question, with respect to which no opinion is now expressed. There is in the present case nothing to show that the proposals were not invited in good faith, nor that the specification of material was not, in point of fact, for the best interests of the city. In such a state of affairs, the city is not legally debarred ⁴²⁷ from contracting for what it wants, merely because the desired material is the subject of private ownership or the product of exclusive manufacture.

The judgment of the supreme court should be reversed.

PATENTS—CONTRACTS TO SUPPLY PATENTED ARTICLES.
A city is not prohibited from contracting to lay Nicholson pavement by its charter, which provides that no contracts shall be made by the city, except with the lowest bidder after advertisement of proposals, although the right to lay it is patented and owned by a single firm, which was the only bidder: *Hobart v. Detroit*, 17 Mich. 246; 97 Am. Dec. 185, and note with the cases collected.

GERLI v. POIDEBARD SILK MANUFACTURING CO.

[57 NEW JERSEY LAW, 432.]

A PARTNERSHIP CHOSE IN ACTION MAY BE ASSIGNED
by any member of the firm.

STATUTE OF FRAUDS.—A MEMORANDUM ORDER FOR GOODS in which are stated all the terms of the proposed contract of purchase, signed by the buyer, or his general manager, and the written acceptance of the order signed by the seller and accepted by the buyer, constitutes a sufficient memorandum to satisfy the statute of frauds.

UPON A SALE OF GOODS DELIVERABLE IN INSTALLMENTS there is no right of rescission by the purchaser for a failure to deliver one of the installments, unless the seller, by his conduct, indicates his intention to abandon the contract, or a desire no longer to be bound by its terms. Hence, under a contract to sell thirty bales of silk, to be delivered in specified installments, at times designated, the failure or inability of the seller to deliver the first installment at the time agreed upon does not release the purchaser from the whole contract. He remains under obligation to receive the other installments when tendered to him, if the usefulness to him of any installment did not depend on prompt delivery of the prior installments, and full indemnity for the failure to deliver the first installment could be secured by action based thereon.

SALE.—THE REFUSAL OF A PURCHASER TO RECEIVE GOODS PURCHASED at a time when they were agreed to be delivered to him does not entitle the seller to recover damages, if it was impossible for him on his part to have made the delivery at the time stipulated.

Charles L. Carrick and Charles E. Hughes, for the plaintiff in error.

Collins & Corbin, for the defendant in error.

433 DIXON, J. On March 28, 1893, C. & E. Gerli and Fratelli & Co. entered into a contract to sell and deliver in New York, to the Poidebard Silk Manufacturing Company, thirty bales of extra Piva new silk, deliverable, ten bales July 20th to 25th, ten bales August 15th, and ten bales September 1st to 10th, each installment to be paid for sixty days after delivery, at five dollars and ninety cents per pound. In consequence of the lateness of the new crop, it was impossible for the sellers to make delivery of the first ten bales within the time specified, and on July 27th the buyer extended the time for such delivery until August 1st. On that date, the impossibility still continuing, the buyer notified the sellers that it canceled the contract because of the default, and would decline to receive any of the merchandise ordered. On August 15th, the new crop of silk had not yet arrived in New York, but it arrived before September 10th. Under these circumstances, one of the members of the selling firm assigned the firm's rights in the contract to Paul Gerli, the plaintiff, and thereupon he brought this suit against the buyer to recover damages arising from the refusal to accept

the installments of August 15th and September 1st to 10th. At the trial, the justice denied the right to damages for the installment of August 15th, and directed a recovery of the damages as to the installment of September 1st to 10th. On exceptions taken at the trial, each party has assigned error.

The errors assigned by the purchaser will first be considered:

1. That the claim for damages was assignable, so as to authorize the assignee to sue thereon in his own name, is clear on the words of the supplement to the Practice Act approved March 4, 1890: Pamphlet Laws, p. 24. It was "a chose in action arising on contract." Such a chose in action belonging to a partnership may be transferred by a single member of the firm: Story on Partnership, sec. 101.

⁴²⁴ 2. The contract was fully proved within the statute of frauds. Evidence introduced on behalf of the defendant showed that its general manager had written and signed a memorandum of the order given for the goods, in which were stated all the terms of the proposed contract, and that thereupon the agent of the sellers had sent to the buyer a written acceptance of the order duly signed. Such proof was sufficient: Brown on the Statute of Frauds, sec. 346.

3. The other exception pressed by the defendant below is that the trial justice denied the right of the buyer to rescind the contract on the nondelivery of the first installment of silk.

The general rule on this subject was thus laid down by this court in *Blackburn v. Reilly*, 47 N. J. L. 290; 54 Am. Rep. 159: "In contracts for the sale of goods, to be executed by a series of deliveries and payments, defaults of either party, with reference to one or more of the stipulated acts, will not ordinarily discharge the other party from his obligation, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms."

In the case cited, this rule was enforced against the buyer. In *Trotter v. Heckscher*, 40 N. J. Eq. 612, this court, and in *Otis v. Adams*, 56 N. J. L. 38, the supreme court, enforced it against the seller.

That the conduct of the vendors in the present case did not evince an intention to abandon the contract or not to be bound by its terms appears beyond dispute. They failed to deliver the July installment because it was impossible to do so, offered to deliver other silk which they considered equally valuable, expressed their willingness to come to an equitable arrangement for their default, and, on the first intimation of a purpose on the

part of the vendee to rescind the contract, they protested against the right of rescission, and insisted that they should be permitted to make the subsequent deliveries. They showed a design the very opposite of repudiation.

Nor do we find anything in this contract or the circumstances of the parties from which it can reasonably be inferred ⁴³⁵ that the parties intended the delivery of each installment of silk to be a condition precedent to the continuing obligation of the contract. So far as appears, the usefulness to the buyer of any installment did not at all depend upon the prompt delivery of prior installments, and full indemnity for every default could be secured by action based thereon. So that, under the rule before declared, it would seem that the attempt to rescind was illegal.

The defendant, however, insists that the rule is not applicable to the present case, because the seller's fault consisted in failing to do the first thing required to be done in performance of the contract, and *Norrington v. Wright*, 115 U. S. 188, is cited as an authority for this distinction.

On principle, I do not see that, for such a purpose, the first act to be done stands upon a different footing from subsequent acts. A default in that does not make it more certain than do other defaults that the party aggrieved cannot get exactly what he contracted for; for that default, as well as for others, he may be compensated by suit, and by that default, as readily as by others, he may obtain an unconscionable advantage if he is entitled to rescind or retain the bargain as self-interest may dictate. As evidence of repudiation or abandonment, nonperformance of the first thing required to be done may be more persuasive than if the promisor had partially carried out his contract, but, as a basis on which a right of rescission is to be supported, it cannot, merely because it is first in order of time, have any greater importance than later defaults.

In *Norrington v. Wright*, 115 U. S. 188, the plaintiff had contracted to ship from Europe to the defendant, in Philadelphia, one thousand tons of rails in each of the months of February, March, April, May, and June. In February, he had shipped four hundred tons which the defendant had received and paid for, not knowing that less than the required quantity had been shipped. In March, the plaintiff had shipped eight hundred and eighty-five tons, and the defendant, on learning of these deficiencies, declared the contract terminated. The court held that he was justified in doing so.

⁴³⁶ I am not sure that I perceive definitely the principle on

which this decision was rested. But the case seems now to be cited for the following paragraph in the opinion of the court: "The seller is bound to deliver the quantity stipulated, and has no right . . . to compel the buyer to accept a less quantity; . . . and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once."

I cannot but think that there is here some confusion of thought. If a contract of sale requires the delivery of all the goods at once, and the seller tenders only part at the time specified, certainly the buyer may refuse to accept the part, but it is scarcely accurate to say his refusal is based upon a rescission of the contract. He has simply refused to do what he never agreed to do. But if the goods are to be delivered in installments at different times, and the seller tenders one installment on the day specified, then if the buyer refuses to accept it, plainly his refusal must rest upon a different foundation. He had agreed to accept such a tender, and his refusal can be justified only on the idea that he has become released from that agreement—that is to say, with reference to the point we are now considering, it must appear that his agreement to accept the installment tendered was dependent on the due performance by the seller of another promise which he had failed to perform. We are thus brought to the real question in all bargains of this nature, whether, on the proper construction of the contract, the performance of any particular stipulation by one party is a condition precedent to the continuance of obligation upon the other party, and, logically, this must be the question as well with regard to the first stipulation as the subsequent ones.

On this question, this court adopted the general rule, that when the seller has agreed to deliver the goods sold in installments, and the buyer has agreed to pay the price in installments ⁴³⁷ which are proportioned to, and payable on, the delivery of each installment of goods, then default by either party with reference to any one installment will not ordinarily entitle the other party to abrogate the contract. We were led to the adoption of this rule because it seemed to be supported by the greater strength of judicial authority and to be most likely to promote justice. We see no sufficient reason for abandoning it.

The rule governs the case in hand and maintains the right of the plaintiff to recover damages for the defendant's refusal to

accept the third installment of silk. Therefore, as against the defendant, the judgment is not erroneous.

The plaintiff below assigns error upon the exclusion of his claim for damages, because of the refusal to accept the installment deliverable August 15th.

In this there was no substantial error. Conceding that the defendant's repudiation of the whole contract before August 15th absolved the sellers from the duty of tendering an installment on that date, and gave them an immediate right of action against the defendant for a breach of contract, nevertheless, when it appeared, as it did on the trial, that by no possibility could the sellers have made tender of the silk due August 15th, because the silk did not arrive in New York until a later day, it became evident that as to that installment the sellers suffered no loss by the breach.

There are other assignments of error in the record, but, as counsel did not notice them in argument, we assume that they are all involved in the matters above decided or are waived.

The judgment should be affirmed.

From the opinion of the majority of the court, Van Syckle, J., dissented. He maintained: 1. That when goods are contracted to be delivered at a specified time, the purchaser is under no obligation to accept them some other time: *Behn v. Burgess*, 3 Best. & S. 757; *Bowes v. Shand*, 2 App. Cas. 455; *Lowber v. Bangs*, 2 Wall. 728; *Jones v. United States*, 96 U. S. 24; *Davidson v. Von Lingen*, 113 U. S. 40; and 2. That though the goods were deliverable in installments of ten bales each, the contract was for thirty bales, and was not severable, nor could it be justly implied therefrom that, if delivery was not made of some of the installments, the purchaser would accept damages for the failure to deliver, and remain liable to receive and pay for the remaining installments: *Hoare v. Remrine*, 5 Hurl. & N. 19; *Houch v. Muller*, L. R. 7 Q. B. 92; *Norrington v. Wright*, 115 U. S. 188; *Cleveland etc. Mills v. Rhodes*, 121 U. S. 255. We entertain no doubt that the dissenting opinion is well supported by authorities, and sustained by reason. The consequences of the prevailing opinion were thus described by the dissenting judge: "Under the rule on which the judgment below is based, if there is a contract for twelve successive monthly deliveries, the vendor may refuse to make eleven of the deliveries as the due days arrive, and still hold the vendee to the acceptance of the twelfth delivery. Such a doctrine will be startling to the business community. It needs no discussion to show that, in those pursuits where supplies are essential to the employment of labor, no business enterprise can be conducted with safety or success under such a rule. A contract for goods in installments is thereby perverted into an agreement to engage in a series of lawsuits, if the vendor selects, for such damages as the purchaser may be able to recover, as a substitute for what he expressly bargains for, and during all this period the purchaser cannot safely secure his needed supplies elsewhere, because he cannot know until the due days arrive

whether the vendor will make further default. The injustice of such an exposition of the law is even more conspicuous when we consider that in many cases the purchaser will be compelled to seek redress in the courts of another state or in those of a foreign country."

It therefore follows that if, in a contract between two parties, one of them makes a default in something he is required to do, he is not in a position to compel performance by his adversary, and the latter, because of the default, may treat the contract as at an end. Thus, if a vendor, or a person who has contracted to do work, is to be paid in installments, or otherwise, at designated times before all the goods sold or all the work is done, and, upon money becoming due, default is made in its payment, he may refuse to proceed any further on his part, and cannot be compelled to do so, or be made answerable in damages on a subsequent tender or payment to him of the sum or sums respecting which the default was made: *Durnel v. Howard*, 30 Me. 258; *Reybold v. Voorhees*, 30 Pa. St. 116; *King Philip Mills v. Slater*, 12 R. I. 82; 34 Am. Dec. 603; *Stephenson v. Cady*, 117 Mass. 6; *Cleveland etc. Mills v. Rhodes*, 121 U. S. 255.

PARTNERSHIP—POWER OF PARTNER TO TRANSFER PAPER OF FIRM.—All the partners are liable on a note indorsed in the firm name, though transferred by one partner for his individual benefit, if it is sued upon by an indorsee, who shows that he acquired it before maturity and for value: *Bank v. Gilliland*, 23 Wend. 311; 35 Am. Dec. 566; where one partner makes his own note to his own order, and indorses it individually, and in the firm name, to an innocent purchaser, appropriating the proceeds to his own use, the firm will be liable thereon to the holder: *Redlon v. Churchill*, 73 Me. 146; 40 Am. Rep. 345, and note. See, also, the note to *Davies v. Atkinson*, 7 Am. St. Rep. 378.

SALES—STATUTE OF FRAUDS—MEMORANDUM.—A memorandum of sale written by the vendor in his book, and signed by him, and by the purchaser's agent in his own name, is a valid contract: *Wiener v. Whipple*, 53 Wis. 298; 40 Am. Rep. 775. Signing by the vendors of a memorandum of a contract for the sale of goods is a sufficient compliance with the statute of frauds: *Russell v. Nicoll*, 3 Wend. 112; 20 Am. Dec. 670, and note. An agreement to deliver cotton, signed by the defendant alone, is a sufficient memorandum of the contract to take the case out of the statute of frauds: *Douglass v. Spears*, 2 Nott & McC. 207; 10 Am. Dec. 588, and note. A memorandum of a contract for the sale of goods was written by the broker employed to make the purchase with a lead-pencil in his book in the presence of the vendor, and the names of the vendor and vendee, and the terms were stated in the body of the memorandum, but was not subscribed by the parties. This was held sufficient within the statute of frauds: *Merritt v. Clason*, 12 Johns. 102; 7 Am. Dec. 286, and note; but see *Bailey v. Ogden*, 3 Johns. 399; 3 Am. Dec. 509.

SALES—SUCCESSIVE DELIVERIES—BREACH.—On a contract for the sale of goods by successive deliveries and payments, a default in respect to one or more will not discharge the other party, unless it is evident that the defaulting party intends no longer to fulfill: *Blackburn v. Reilly*, 47 N. J. L. 290; 54 Am. Rep. 159, and note.

MIDDLETON v. GRIFFITH.

[37 NEW JERSEY LAW, 442.]

NEGOTIABLE INSTRUMENT. — AN INDORSEMENT IN BLANK of a negotiable instrument by the payee does not necessarily establish that he has ceased to be an owner, if it remains in his possession. Hence, he may recover thereon against the maker by producing it at the trial, and proving that it is still his property.

NEGOTIABLE INSTRUMENTS. — THE INDORSEMENT OF A NOTE BY A PAYEE does not become effectual until he delivers the note to a third person.

NEGOTIABLE INSTRUMENTS. — THE POSSESSION OF A NEGOTIABLE INSTRUMENT by a payee is prima facie evidence of title in him, whether his name is indorsed thereon or not.

NEGOTIABLE INSTRUMENTS. — INDORSEMENT upon a negotiable instrument may be stricken out by the original payee upon his regaining possession in a bona fide manner, and he may recover upon such instrument as if it had never been indorsed. Especially is this true when the indorsement was for collection.

A PROMISSORY NOTE CANNOT BE CONVERTED BY PAROL EVIDENCE from a special into a conditional contract.

PAROL EVIDENCE is not admissible to prove a contemporaneous agreement which varies or alters the terms of a promissory note, unless it be respecting the mode of payment, and the evidence further shows that such agreement has been executed, and the note thereby transferred. Such evidence is admissible, because it establishes payment, and does not vary the terms of the note.

PRACTICE. — AN OFFER OF EVIDENCE tending to defeat a recovery should be of facts, clear and distinct in their character, and not of doubtful or uncertain import; and if, from the offer, it does not necessarily appear that the facts offered to be proved would constitute a defense, the trial court is justified in refusing to receive the evidence.

John J. Crandall and Timothy J. Middleton, for the plaintiff in error.

C. V. D. Joline, for the defendant in error.

442 LIPPINCOTT, J. This is an action on a promissory note given by the defendant below, who is here the plaintiff in **443** error, to the plaintiff below, the defendant in error in this court, for the sum of three hundred and seventy-five dollars, dated April 22, 1889, payable in three months from the date. The note was first indorsed by Richard Griffith, the plaintiff; then by "The Provident Life and Trust Company of Philadelphia, May 9th, 1889"; then "for collection, remittance to Central National Bank, Philadelphia, Pa., Theo. Kitchen, cashier." At the time of trial, the last two indorsements were erased. The plea was general issue, and a specification of defenses under the general issue was demanded and served.

In 1889, the defendant secured a policy of life insurance in the Provident Life and Trust Company of Philadelphia, on his own life, for ten thousand dollars. The yearly premium was five

hundred and twenty-two dollars. A note was given for this premium, and when it became due part was paid and a new note given. When this second note became due, another part was paid and the note in suit was given. This last note was for three hundred and seventy-five dollars, payable to Griffith, who appears to have been the agent through whom the insurance had been obtained. The other notes had also been given to him. The policy of insurance is still in the possession of the defendant and retained by him.

On the trial below, a verdict was directed in favor of the plaintiff against the defendant for the sum of four hundred and eighty-five dollars, being the amount of the note with interest thereon from the maturity thereof.

At the trial, the note was proved and offered in evidence with the last two indorsements erased. The name of the plaintiff as first indorser was not erased. The defendant objected to the admission of the note with the name of the plaintiff indorsed thereon, and now claims, in his first assignment of error, that it should not have been admitted in evidence, for the reason that the plaintiff, by legal import, was not the owner of the note and had no right of action thereon.

It will be noticed that the indorsements subsequent to that of the payee had been erased; the promissory note was produced by the plaintiff, and he, during the progress of the cause, testified that he was the owner of the note. Now, it ⁴⁴⁴ may be observed that to the formal admission of this paper in evidence there could be no objection. The contention made by this assignment of error is, that there could be no recovery, because the indorsement of the plaintiff was not erased from the note, because the indorsement in law imported a contract which conclusively demonstrated that the note was owned by someone else who had the right of action on the note.

This contention does not appear to be founded upon either reason or authority. There is no reason why evidence is not admissible to show that one who has a promissory note in his possession and produces it, is the holder of it and to trace his title to it. Such evidence is held to be competent by numerous adjudicated cases, and it is not evidence which varies the contract implied in the law between the indorser and indorsee: 2 Daniel on Negotiable Instruments, 4th ed., secs. 1181 a, 1198. The indorsement of a promissory note by the payee is an order upon the maker of the note to pay the indorsee (*Heylyn v. Adamson*, 2 Burr. 669, 676; *Garrettsie v. Van Ness*, 2 N. J. L.

21, 25; 2 Am. Dec. 333); and the indorser becomes liable upon the custom of merchants, or commercial law, and not upon any implied covenant or promise contained in the indorsement distinct from that raised by such custom. The right of the indorsee to recur back to the payee or other indorser, in case of failure of the maker to pay on demand and notice, is purely of mercantile origin: *Garrettsie v. Van Ness*, 1 Penn. 21, 2 Am. Dec. 333. A promissory note only takes effect from delivery: *Powell v. Waters*, 8 Cow. 670. So a note may be indorsed by the payee, yet if not delivered to someone as indorsee or holder, the title remains in the payee who still is its holder, and no contract whatever from such indorsement is created or implied, unless there be a delivery of the note: *Fine v. High Bridge M. E. Church*, 44 N. J. L. 148; *Denton v. Peters*, L. R. 5 Q. B. 475; *Muller v. Pondir*, 55 N. Y. 325; 14 Am. Rep. 259. If the note is still in the payee's possession, his blank indorsement is no evidence of a transfer by him: *Williams v. Smith*, 21 Mo. 419; *Beeson v. Lippman*, 52 Ala. 276; *Best v. Nokomis Nat. Bank*, 76 Ill. 608. And if it has ⁴⁴⁵ been transferred by him by blank indorsement, upon regaining possession in a bona fide manner of the note he may strike out all subsequent indorsements and his own also and sue upon it. The payee's possession of a bill or note is prima facie evidence of title in him, whether his own indorsement be erased or not. He need not show, in order to maintain his action, any retransfer of the instrument to himself, and he can at the trial strike out his own or any subsequent blank indorsements. He can strike out his own indorsement at the trial, or at bar, on a motion for a new trial. The general rule of law is, and I think without an exceptional ruling to the contrary so far as I can discover, that the holder of a bill or note is, prima facie, its owner, and that a delivery of a note is necessary to its transfer either by indorsement or otherwise, and that the fact that his blank indorsement is thereon, standing alone, is no evidence that he has transferred the note, or that he is not the owner of it, or that anyone else is the owner of it. This rule is entirely applicable to all blank indorsements or indorsements for collection, the only character of indorsements which were upon the note in question: 2 *Randolph on Commercial Paper*, sec. 717, and cases cited; 2 *Daniel on Negotiable Instruments*, secs. 1181 a, 1198, 1200, and cases cited.

The holder's own blank indorsement, left uncanceled on the note, will not, in general, prevent his recovery, but, from his possession, it will be presumed that the paper was not delivered

under the indorsement, or that, if it was so delivered, it was afterward taken up by him: 3 Randolph on Commercial Paper, secs. 1645, 1646, and cases cited; Locke v. Leonard Silk Co., 37 Mich. 479; Reading v. Beardsley, 41 Mich. 123.

The practice in this state, universally established, has been for the holder, being either payee or other indorser, to strike out all subsequent blank indorsements, or indorsements for collection, and then sue upon the note. I do not think the practice has been universal to strike out his own indorsement. I think it has generally been done, but in many cases, if not quite generally, not until the time of trial. There is no reason manifest why his own blank indorsement should be ⁴⁴⁶ stricken out. Every subsequent indorsement being stricken out, and the note being in his possession and produced at the trial, it would seem as if no reason could exist for the mere mechanical act of striking out his own name; and, of course, the note having matured, there could exist no holder after that who, in the face of the judgment thereon, could maintain a recovery upon the note. There is no reason for a contrary rule, and I think it is established by authority that the fact that the blank indorsement of a holder of a promissory note, still remaining thereon, does not impair his title to it or defeat his action to recover the amount due: 2 Randolph on Commercial Paper, sec. 717; 3 Randolph on Commercial Paper, secs. 1645, 1646; 1 Daniel on Negotiable Instruments, sec. 694; 2 Daniel on Negotiable Instruments, sec. 1196; Abbott v. Joy, 47 Me. 177; Dollfus v. Frosch, 1 Denio, 367; Chaffee v. Taylor, 3 Allen, 598; Royce v. Nye, 52 Vt. 372; Evans v. Gordon, 8 Port. 142; Humphreyville v. Culver, 73 Ill. 485; Block v. Strickland, 3 Ont. 217; Callow v. Lawrence, 3 Maule & S. 95; Dugan v. United States, 3 Wheat. 172; 2 Am. & Eng. Ency. of Law, 383.

There is an entire want of reference to authorities, upon this assignment of error, in the briefs of counsel, but the case of Bright v. Hand, 16 N. J. L. 273, has suggested itself as indicating that an indorser, as payee, could not maintain an action, unless the note had been reassigned to him. The case as an authority is entirely unavailable. It can be concluded from the case that the note was, at the time the suit was brought, in the hands of a third party. The case is very meagerly reported as to facts, and cannot, in any sense, be applicable to establish a principle so much at variance with the nature and qualities of commercial paper transferable by indorsement, delivery by the

holder, or by delivery only, as where the paper is taken up by the payee or some prior indorser, of some subsequent holder.

In the case of *Dugan v. United States*, 3 Wheat. 172, it was held that "if a person who indorses a bill to another, whether for value or for the purpose of collection, comes again to the possession thereof, he is to be regarded, unless the contrary appears in evidence, as the ⁴⁴⁷ bona fide holder and owner of such bill, and is entitled to recover thereon, notwithstanding there may be on it one or more indorsements in full, without producing any receipt or indorsement back to him, from either such indorsees, whose names he may strike from the bill or not, as he thinks proper."

The first assignment of error is, therefore, not sustained.

The second and only other assignment of error is, that the trial judge refused to admit the evidence of a certain agreement between the maker and payee of the note. This alleged agreement was in the shape of an offer of evidence and overruled by the trial justice.

The note in question was given for a premium on a policy of life insurance upon the life of the maker of the note. The policy was delivered by the payee to the maker of the note, and had ever since been retained by him and not delivered or surrendered up to the company or to the payee of the note. This fully appeared in the evidence of the plaintiff.

The offer, on the part of the defendant, was made to show "that it was agreed between the defendant, the maker of the note, and the plaintiff as payee, at the time of the making of the note, that the defendant, the insured, should have the option, to be exercised at any time during his life, or the continuance of the policy, of paying a reduced rate of insurance called a 'carrying rate,' by surrendering the policy to the payee of the note, and that upon the defendant exercising such option, which he did under the agreement, there would, upon an accounting rendered of payments already made, remain nothing due on said note, inasmuch as more money has been paid by the defendant to the plaintiff personally than would meet the conditions of one hundred and seventy-five dollars per year, which was then agreed to be the carrying rate aforesaid."

Parol testimony is admissible to establish between the parties a contemporaneous agreement, as to the mode of payment which has been executed in satisfaction of a promissory note. Such an executed agreement then becomes payment of ⁴⁴⁸ the note. And such an agreement does not alter or vary the contract.

The general rule applicable to promissory notes is, that evidence is not admissible to vary the contract between the parties, and this is true whether the evidence be of a contemporaneous agreement or of any other character. The only rule under which the evidence of a contemporaneous agreement is admissible is, that it must be such an agreement that when executed it works a performance or satisfaction of the contract and extinguishes its obligation.

There is no fraud charged, and parol evidence was not admissible tending to vary the import of this note. It cannot be converted by parol evidence from an absolute into a conditional contract: *Meyer v. Beardsley*, 30 N. J. L. 236; *Chaddock v. Van Ness*, 35 N. J. L. 517; 10 Am. Rep. 256; *Wright v. Remington*, 41 N. J. L. 48. Evidence of a parol contemporaneous agreement that the note should not be paid, in whole or in part, is not admissible: *Remington v. Wright*, 43 N. J. L. 451; *Johnson v. Ramsay*, 43 N. J. L. 279; 39 Am. Rep. 580; *Anthony v. Fritts*, 45 N. J. L. 1; *Hendrickson v. Hutchinson*, 29 N. J. L. 180; *Wharton on Evidence*, sec. 1058; *Byles on Bills*, par. 500; *Stiles v. Vandewater*, 48 N. J. L. 67; *Buchanan v. Adams*, 49 N. J. L. 636; 60 Am. Rep. 666. These cases all illustrate this rule of law, and, therefore, a contemporaneous agreement which varies or alters the terms and import of a promissory note, by adjudication in this court, is inadmissible, and cannot defeat a recovery.

But evidence is admissible to show a want or failure of consideration, illegality of the transaction on which the note is based, or fraud and mistake.

It was also held in *Chaddock v. Van Ness*, 35 N. J. L. 517, in this court, that parol evidence of a contemporaneous agreement between the parties as to the mode of payment, which has been executed in satisfaction of the debt, is admissible in an action by the payee against the maker.

In *Buchanan v. Adams*, 49 N. J. L. 636, 60 Am. Rep. 666, in this court, the testimony objected to was to the effect that contemporaneously with the giving of the note it was agreed with the defendant ⁴⁴⁹ that lumber would be taken in payment of it, and that the note would not be negotiated. This testimony, supplemented by proof that such agreement was executed, on the part of the defendant, by the delivery of lumber to pay the note, was admitted for the purpose of showing that the lumber was, in fact, received by the payee, the plaintiff, in payment of the note, and not for the purpose of varying the terms of the written contract to pay.

The principle upon which such evidence is admissible in an action by the payee is, that it goes to establish the fact of payment or satisfaction: *Oliver v. Phelps*, 21 N. J. L. 597, 603.

If this offer of evidence in this case was to establish a contemporaneous agreement as to its mode or manner of payment between the plaintiff and defendant, and which had been executed in satisfaction of the note or the debt secured thereby, then it was admissible to defeat the action, but, in order to be admissible, the offer must tend to show this result.

The offer must be adjudged by its terms, and it is clear that the agreement, if one was made at the time, had never been executed. The agreement remained of an executory character at the time the action was commenced. The policy of life insurance had not been surrendered to the payee; all of the terms of the agreement remained unexecuted. No attempt or offer was made to show that the note was without consideration, or that its consideration had failed. The offer was to show satisfaction by a contemporaneous agreement, and in no sense did the offer include such a result. The note had remained in the hands of the payee or his indorsees, and the policy of life insurance was retained by the maker. The position of the parties remained precisely as at the execution of the instrument, and the offer of evidence to defeat the action was not of any fact tending to show any want or failure of consideration of the note sued on, nor any illegality of the transaction upon which the note was founded, nor of fraud or mistake in its inception.

The offer was intended to show an executed agreement which worked a satisfaction or payment of the note, but the ⁴⁵⁰ offer was entirely devoid of any fact tending to establish that result. The terms of the agreement were not set out in the offer with any degree of certainty whatever. In the offer, the term "carrying rate" is used, but there was no offer to show the facts upon which the court could determine the meaning of the term. The note had admittedly been given for the premium to be paid on a policy of life insurance, which, according to the terms of the agreement, so far as they were revealed in the offer, was to have been surrendered to the plaintiff, but the offer itself and the evidence in the case show that it had not been surrendered to the plaintiff, nor had the note been demanded as satisfied. The policy was still retained by the defendant, and no attempt had been made to surrender it to the plaintiff in satisfaction and payment of the note, or for any other purpose. The note itself was founded upon a good consideration, and the contempora-

neous agreement must have been of such a character as satisfied the obligation of the note, and that, in order to work the payment or satisfaction and defeat recovery thereof, it must have been executed. A mere agreement that a note founded on a good and valuable consideration shall never be enforced, or that it shall not stand for what it imports on its face, can have no valid effect whatever against the enforcement of the obligation of the note.

The agreement set forth in the offer is not of the character of contemporaneous agreements which will work a satisfaction of a note when executed. It is an agreement in relation to the future conduct of the parties, to which they may or may not conform; and whether it shall be performed or not depended upon whether both parties could agree. It was a contract of an executory character, and it never emerged into an executed one; and whether or not it was ever to be an executed agreement depended entirely upon the future conduct of the parties. As the offer stands, it is just what the trial court denominated it—an attempt to vary and alter the terms and import of the promissory note upon which the suit was brought.

⁴⁵¹ An offer of evidence tending to defeat recovery should be of facts clear and distinct in their character, and not of doubtful or uncertain import. For instance, an offer to give the acts and declarations of an assignor in evidence against his assignee should be so framed as to show that they were made before the transfer. If the offer leaves it in doubt whether the declarations were made before or after the transfer, it must be excluded: *Abbott's Trial Evidence*, 13, tit. "Civil Actions"; *Vrooman v. King*, 36 N. Y. 477.

The offer of the agreement was intended to show satisfaction of the note. That was the only purpose in law it could have. Now, the offer of evidence frequently occurs in the progress of a cause, and with a statement for the purpose for which it is offered, and it is always subject to an objection for irrelevancy or immateriality. This method has the sanction of usage, and may be now regarded as a well-regulated formula for obtaining a hearing upon the subject matter of the offer and the purpose for which the evidence is offered: *Van Buren v. Wells*, 19 Wend. 203. The trial court is bound to ascertain, as certainly as possible, if objection be made, that the evidence offered is material and relevant before it is received, and counsel must not leave it in an indefinite or doubtful shape, but are bound to inform the court of the facts expected

to be proved, and how they are relevant, so that the court may act understandingly in relation to the admission of the evidence: 3 *Wait's Law and Practice*, 5th ed., 474. And the offer must be so full and specific that its exclusion would be erroneous in any point of view; and, whenever its competency or materiality depends upon the facts, they must be stated, and the offers must also be made to prove them, or it is not error to sustain the objection. It rests with the party making the offer to so state the facts that there shall be no doubt what is intended to be proved, for if the party so chooses, he need not make any offer of evidence at all, but rely upon the evidence to be obtained from the witnesses as called: *Carnes v. Platt*, 4 Jones & S. 361; *Keller v. New York Cent. R. R. Co.*, 2 Abb. App. Dec. 480; *McGrath* ⁴⁵² *v. Bell*, 1 Jones & S. 195; 2 *Rumsey's Practice*, 297; *Bayliss v. Cockcroft*, 81 N. Y. 363.

The offer of the evidence in this case did not conform to established principles of law, as to relevancy and purpose, and therefore no error is found in its exclusion by the trial justice.

The judgment will be affirmed, with costs.

NEGOTIABLE INSTRUMENTS—INDORSEMENT IN BLANK—DELIVERY.—A note indorsed in blank is transferable by delivery, and, so long as the indorsement continues in blank, it makes the bill or note in effect payable to bearer: *Sterling v. Bender*, 7 Ark. 201; 44 Am. Dec. 539, and note; *Mitchell v. Fuller*, 15 Pa. St. 268; 53 Am. Dec. 594, and note.

NEGOTIABLE INSTRUMENTS—DELIVERY.—The delivery of a note is essential to its validity: *Foy v. Blackstone*, 31 Ill. 538; 83 Am. Dec. 246, and note; *Purviance v. Jones*, 120 Ind. 162; 16 Am. St. Rep. 319, and note.

NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSERS.—One who obtains possession of a bill or note after indorsing it is restored to his original position, and cannot, nor can a purchaser from him with notice of the facts, hold immediate indorsers liable who could look to him again: *Adrian v. McCaskill*, 103 N. C. 181; 14 Am. St. Rep. 789, and note.

NEGOTIABLE INSTRUMENTS—PAROL EVIDENCE OF CONTEMPORANEOUS CONTRACT.—Parol evidence of an oral agreement made at the time of making a promissory note cannot be permitted to vary or contradict the terms of the written contract: *Shaw v. Shaw*, 50 Me. 94; 79 Am. Dec. 605, and note; *Dennis v. Jackson*, 57 Minn. 286; 47 Am. St. Rep. 603, and note. Parol proof of a contemporaneous parol agreement is admissible to explain or qualify a blank indorsement of a promissory note in an action between the parties thereto: *Holmes v. First Nat. Bank*, 38 Neb. 326; 41 Am. St. Rep. 733, and note. See particularly the note to *Kulenkamp v. Groff*, 15 Am. St. Rep. 287.

POTTER v. BERRY.

[58 NEW JERSEY EQUITY, 151.]

GIFT OF THE USE OF LAND, EQUITABLE AID OF.—If a father, after devising land to his daughter, and placing her and her husband in possession, and stating that he wished them to have the use of it during his life, becomes insane, they having remained in possession, and made improvements, a court of equity will not permit his guardian to revoke the license, and dispossess them of the property. The court will, in these matters, do what it is reasonable to suppose the lunatic would do if he retained his capacity to act.

LUNATIC, CARRYING OUT INTENTIONS OF.—If, after devising land to his daughter, the deviser puts her and her husband in possession of it, expressing a desire that they shall retain such possession during his life, and he then becomes insane, and a guardian is appointed for him, a court of equity will not permit such guardian to dispossess the daughter, but will carry out what it believes would have been done by the lunatic had he continued of sound mind.

Alan H. Strong, for the appellants.

Ephraim Outter, for the respondent.

¹⁵³ **BEASLEY, C. J.** This case was decided in the court of chancery on the ground of its purely legal aspect. It was found that the defendants were in the occupation of the lands in question as the licensees of the lunatic, and that the licensor having become of unsound mind, and his guardian having notified them that such license was revoked, they were ordered by the decree to remove from the premises in question and to account for the profits.

Looking at the affair in this aspect, it is difficult to see how a court of equity could take cognizance of the case, for, in such a situation, an action of ejectment would appear to be the appropriate remedy. But, as a cross-bill has been incorporated in the answer, presenting for the consideration of the court of chancery ¹⁵⁴ certain equities that enter into and modify the strict legal status of the transaction, it has appeared to this court to be the proper course to retain the case so as to give due force to such conscionable characteristics.

The equities referred to are those inseparable from the fact that the lunatic, who is represented by the respondent on this appeal, had expressed during his sanity, in an unquestionable form, his purpose that the appellants should remain in the possession of the premises in dispute during his own life. This property, by his will, he had devised to his daughter, and, in turning it over to her husband, he said, according to the testimony of the latter, "if I ever needed it, I need it now; he intended it for his daughter, and he wanted her to be benefited

while he was alive." For several years before the father in law's lunacy, the appellants continued in the occupation of the premises, spending considerable money in putting them in a productive condition. The son in law and the daughter who were thus provided for had a large family and were in somewhat straitened circumstances, and the father who thus established them was possessed of an estate that fully warranted his generosity. The question, therefore, arises whether, the father having lost his mind, this benefaction of his toward his own child is to be frustrated and revoked by his guardian. No case has been observed in which a court of equity has permitted such a cruel dispossession. The cases strongly enforce the opposite doctrine. The general rule on this subject is, that the court will do that, in these matters, which it is reasonable to believe the lunatic himself would do if he had the capacity to act. The decisions are numerous and all to this effect. The following are illustrative cases: *Ex parte Whitbread*, 2 Meriv. 102; *In re Willoughby*, 11 Paige, 257; *In re Heeney*, 2 Barb. Ch. 326; *Campbell v. Mackay*, 1 Mylne & C. 624.

The result is, that the appellants should not, under present circumstances, be disturbed in the possession and use of the property in question, and a decree should be entered to that effect.

Consequently, let the decree appealed from be reversed, and a decree entered in accordance with the foregoing view, with costs to be paid out of the estate.

INSANE PERSONS.—INTENTIONS of an alleged lunatic when his sanity was unquestionable are competent evidence for the consideration of the jury in a case wherein his will or deed is sought to be avoided on account of his want of capacity to execute it: *Rice v. Rice*, 127 Pa. St. 181; 14 Am. St. Rep. 831. A contract or liability assumed by a person while of sound mind may be enforced against him when he is of unsound mind: *King v. Robinson*, 33 Me. 114; 54 Am. Dec. 614, and note.

FEDER v. VAN WINKLE.

(88 NEW JERSEY EQUITY, 570.)

FIXTURES.—AS BETWEEN A MORTGAGEE OF REAL PROPERTY and the receiver of the mortgagor, the former is entitled to chattels which were annexed to the real estate, or to something appurtenant thereto, if they were applied to the use or purpose to which that part of the realty to which they were annexed was appropriate, and they were annexed with an intention to make a permanent accession to the realty.

FIXTURES.—A STEAM ENGINE set upon a brick foundation laid in the earth without any attachment to the building is a fixture.

FIXTURES.—TO THE ANNEXATION TO REAL PROPERTY which is essential to convert chattels into fixtures it is not indispensable that they be fastened or bolted to the building or soil; this is only one method of annexation.

FIXTURES, TESTS OF.—The fact that chattels may be removed and sold for other uses, or that they were not made with special adaptation to the building in which they are placed, is not conclusive of the question whether they have become fixtures; but such and the like facts are circumstances proper to be considered in deciding the question.

FIXTURES.—AN INTENTION at the time of annexing chattels to realty that it shall be perpetual is not essential, but there must be an intention to incorporate the chattels with the real estate for a use to which the real estate is appropriate, and there must be the presence of such facts and circumstances as do not tend to repel the inference that it is intended to be a temporary annexation.

FIXTURES, INSTANCES OF.—HEAVY MACHINES weighing from one to three tons fastened by bolts to large timbers laid in the earth, and other machines of less weight bolted to timbers, and adapted and intended for use in carrying on the business of manufacturing bridge iron, are fixtures, and pass by a real estate mortgage in which they are described. It is not material that such machines might have been removed and utilized elsewhere, if they were intended to be used in the business, and such use would have been continued had the business remained prosperous.

John W. Griggs, for Feder.

Eugene Stevenson, for the receiver.

371 VAN SYCKEL, J. The controversy in this case is between the appellant, who has a real estate mortgage, and John A. Van Winkle, receiver of the Riverside Bridge and Iron Works, an insolvent corporation, and relates to certain machinery which was used in its business of manufacturing structural and bridge iron. The said company had been engaged for fourteen or fifteen years in carrying on its business prior to its insolvency.

It occupied a tract of about two acres of land, on which the buildings in which the business was carried on were erected.

The buildings were: 1. The main shop sixty by one hundred and sixty feet. It was a mere shed, having no floor except the natural earth; 2. The office building; 3. The blacksmith shop, which also had no floor; 4. The storehouse; 5. The

foundry, which had no floor; 6. The machine shop, which was part of the main shop and had a wooden floor; 7. The templet shop on the second floor over a part of the main shop; 8. The engineroom, from which power was supplied to the different machines.

All the buildings were frame, and were practically joined together as one inclosure, the pipes, shafting, and other appliances running from one into the other. The appellant held a ³⁷² mortgage, given May 15, 1889, which covered the real estate by its description, and also contained the following clause: "Also all steam engines, boilers, shafting, belting, pulleys, hoisting apparatus, and all other machinery whatsoever, with all connections, fixtures, and appurtenances thereto belonging upon said premises or in the buildings erected thereon, or any of them." This mortgage was duly recorded as a real estate mortgage on the day it bears date.

In order to establish the claim of the mortgagee to the machinery as against the receiver, it must appear: 1. That the chattels were actually annexed to the real estate or something appurtenant thereto; 2. That they were applied to the use or purpose to which that part of the realty with which they were connected was appropriated; 3. That they were annexed with the intention to make a permanent accession to the freehold.

This case must be adjudged by the law as propounded in the following cases in this court: *Blancke v. Rogers*, 26 N. J. Eq. 563; *Penn etc. Ins. Co. v. Semple*, 38 N. J. Eq. 575; *Speiden v. Parker*, 46 N. J. Eq. 292. The difficulty arises in applying the rule; each case must be determined according to its particular facts and circumstances.

The chattels must, to constitute them fixtures, be actually annexed to the real estate or something appurtenant thereto. They need not necessarily be attached to the building; that is one way of annexing them to the soil, but not the only way. A steam engine set upon a brick foundation laid in the earth, without any attachment to the building, is unquestionably a fixture. In *Speiden v. Parker*, 46 N. J. Eq. 292, a derrick set in the ground to hoist stone, and a track laid on ties in the ground on which cars were run, were held to be fixtures. So that to satisfy this test, it is not material whether the substructure is brick or wood, or whether the machinery is annexed to the building, or rests upon a foundation securely laid for it in the soil, and to which it is fastened.

³⁷³ Neither is the fact that the things in question may be re-

moved and sold for other uses, or that they were not made for special adaptation to the buildings in which they are placed, decisive of their character. Those qualities are mere circumstances to be considered, but the presence of them does not necessarily withdraw machinery from the real estate mortgage. A steam engine, to take on the qualities of a fixture, need not be made specially for the building in which it is planted. It may, like any other piece of mechanism, be removed and used with equal advantage in any other establishment for which it will furnish sufficient power.

The same observation will apply to other articles which, in the court below, were properly adjudged, in accordance with almost all cases on this subject, to be fixtures.

There must be actual annexation, with an intention to make a permanent accession to the freehold, but it is not necessary that there be an intention to make the annexation perpetual. A test so severe would be impracticable in its application.

The intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and there must be the presence of such facts and circumstances as do not lead to, but repel, the inference that it is intended to be a temporary annexation.

In *Blancke v. Rogers*, 26 N. J. Eq. 563, two machines were the subject of controversy—a “number one, four-sided, inside moulding machine” and a “number one clipper, planer, and matcher.”

The opinion says that no adjustment was made of them to fit, in anywise, to the place where they were put for use. They were placed in the building, upon the floor of a room, without support. One was not attached in any way to the soil or building; the other was partially bolted to the floor with screw-bolts. They were movable in the building, and were moved about at the convenience of the owner, and run from different parts of the shafting: *Blancke v. Rogers*, 26 N. J. Eq. 565, 568.

The learned justice who delivered the opinion of the court was clearly right in saying that, while such chattels may be so annexed to and incorporated into the realty as to become, ³⁷⁴ through the manner of annexation and the purpose of the owner, a part of the freehold, yet there was an absence in that case of evidence to show such annexation and intention.

In *Penn etc. Ins. Co. v. Semple*, 38 N. J. Eq. 575, the machines were fastened to the floor by small screws, to steady them,

and in their use some were moved from one place in the building to another.

This court said: "There was no evidence in any act of the owners, or in any circumstance growing out of the organization or manner of conducting the manufacturing establishment, showing a design on the part of the owners to make a permanent addition of the property in dispute to the realty."

The later case of *Speiden v. Parker*, 46 N. J. Eq. 292, was a controversy respecting the character of certain appliances used in connection with a stone quarry and dock in Essex county.

They consisted of three boilers, two engines, two hoisting gears, three derricks, and a steam-pump, with connecting pipes, valves, and pulleys, all located in or near the quarry, and a railroad track laid from the quarry to the dock on Passaic river, to transport stone, and two derricks at the dock, to transport the stone to boats.

The stationary machinery was fastened in the ground, and was used for the only purposes to which the real estate was put. Upon these facts, this court rested its conclusion that these appliances were attached to the freehold with the intention of making them part thereof. The opinion of this court was unanimous, and was concurred in by Mr. Justice Knapp, who delivered the opinion of the court in the two cases last cited.

Not one of the implements involved appeared to have been specially adapted to the place in which it was used—some were set in the earth—and all could have been removed and applied to the prosecution of a like business elsewhere.

The decision must rest upon the facts that the appliances were actually annexed; that they were adapted to, and used in, the business for which the realty was held by the owner; that a common purpose was to be promoted by attaching the chattels to the freehold; that the just inference was, that the annexation was intended to continue so long as the business was prosecuted ³⁷⁵ on those premises, and that the enterprise was intended to be permanent in the sense in which that term is used in business transactions—permanent as contradistinguished from temporary.

It will be necessary, therefore, to look at the controlling facts of this case before us to determine whether there was an absence of intention to incorporate the machinery with the real estate, as in *Blancke v. Rogers*, 26 N. J. Eq. 563, or the presence of such intention, as in *Speiden v. Parker*, 46 N. J. Eq. 292.

The following is a brief statement of the machines included in the petition of appeal, and the manner of their annexation:

Numbers 1, 2, 4, 5, 8, 10, 12, 13, 20, 21, 25, 26, and 52 are heavy machines, most of them weighing from two thousand pounds to six thousand pounds. They rest upon large timbers laid in the earth to their full depth, and they are fastened to them by bolts running down through the timbers.

Numbers 49, 50, and 51, in addition to the heavy timbers to which they are fastened at the base, are also fastened down into a subfoundation of concrete, and for them the building was adapted by cutting holes, and running pipes from the boilers in the boiler-house, one hundred feet away.

Numbers 15, 16, 17, and 30 are fastened to columns of the shop by bolts, and other fastenings in some cases.

Numbers 5, 14, and 46 are fastened by iron or wooden rods, or both, let down from the beams or rafters above.

Numbers 28, 29, 40, 41, 42, and 45 are fastened to the floor by lag screws, which are heavy bolts with a screw. The lightest in weight is four hundred pounds, and the heaviest is eight thousand pounds.

Numbers 1 and 2 have power applied by a belt coming through a hole in the roof.

Numbers 45 and 46 were adapted for use by the adjustment of timbers and braces in the building, and the cutting of holes through the floor for running the belt.

In view of these facts, I am of the opinion that these chattels did not retain the character of personalty, as in *Blanke v. Rogers*, 26 N. J. Eq. 563, but were transmuted into realty, and passed to the mortgagee as in *Speiden v. Parker*, 46 N. J. Eq. 292. In no respect was that case stronger for ³⁷⁶ the mortgagee than is this. If all the tests necessary to constitute the chattels fixtures were satisfied in that case, they surely are in this case.

The various appliances were actually annexed to the freehold. They were fitted for, and applied to, the use to which the real estate was appropriated, all being designed for and necessary to the prosecution of a common purpose. Thus the machinery and land became unified and incorporated together as a whole.

The business had been carried on for fourteen years, and, save for business disaster, might, and probably would, have been prosecuted indefinitely. The machinery employed, the mode of its annexation and manner of its use, in connection with the realty as an entirety, indicated not a temporary but a permanent accession.

The fact that the machines might be removed and utilized

elsewhere will not, under the circumstances of this case, serve to sever them in legal contemplation from the freehold.

The decrees below should be reversed as to all the articles above specified, and a decree rendered in accordance with the views herein expressed.

FIXTURES—TEST OF.—One of the tests of whether personal property retains its character or becomes a fixture is the use to which it is put. If it is placed on realty to improve it and make it more valuable, it is generally deemed a fixture. If it is placed there for a use that does not enhance the value of the realty, it generally retains its character of personal property: *Winslow v. Bromich*, 54 Kan. 300; 45 Am. St. Rep. 285, and note. Whether a chattel becomes a fixture depends upon the character of the act by which it is put in its place, the uses to which it is put, the policy of the law connected with its purpose, and the intention of those concerned: *Atchison etc. R. R. Co. v. Morgan*, 42 Kan. 23; 16 Am. St. Rep. 471, and note; *Johnson v. Wiseman*, 4 Met. 357; 83 Am. Dec. 475, and note.

FIXTURES—INTENTION.—One of the requisites to convert a chattel into a part of the realty is the intention of the party making the annexation to make a permanent accession to the freehold: *Wood v. Hally Mfg. Co.*, 100 Ala. 326; 46 Am. St. Rep. 56; *Fitfield v. Farmers Nat. Bank*, 148 Ill. 163; 39 Am. St. Rep. 166, and note; *Roseville etc. Min. Co. v. Iowa Gulch Min. Co.*, 15 Col. 29; 22 Am. St. Rep. 373.

FIXTURES.—PHYSICAL ANNEXATION TO THE REALTY is not alone sufficient to change the character of personal property from a chattel to a fixture: *Atchison etc. R. R. Co. v. Morgan*, 42 Kan. 23; 16 Am. St. Rep. 471. See also *Peck v. Batchelder*, 40 Vt. 233; 94 Am. Dec. 392.

FIXTURES—STEAM ENGINE.—An engine with its boilers and attachments placed upon, and securely attached to, public land by the locator and occupier of a mining claim thereon, for the purpose of operating such claim, constitutes a part of the realty: *Roseville etc. Min. Co. v. Iowa Gulch Min. Co.*, 15 Col. 29; 22 Am. St. Rep. 373, and note. A steam engine and boilers which furnish the motive power to marble works, and which are attached to the realty by brickwork, granite, masonry, and bolts, are fixtures, and will be regarded as part of the freehold: *Sweetzer v. Jones*, 35 Vt. 317; 82 Am. Dec. 639; *Richardson v. Copeland*, 6 Gray, 536; 66 Am. Dec. 424, and note.

BARCOCK v. STANDISH.

[58 NEW JERSEY EQUITY, 376.]

CHANCERY PRACTICE—PROOF REQUIRED IN SUPPORT OF ANSWER.—If to a suit to charge the defendant's property with the payment of a sum of money, he pleads a previous suit for the same purpose, resulting in a decree in his favor, the plea must be supported by evidence, for though an answer under oath is called for, it is not evidence of a new matter set up as a defense.

RES JUDICATA—PARTIES.—If one made a defendant to a bill in chancery is afterward dismissed, a decree rendered after such dismissal is not binding upon him, because by such dismissal he ceased to be a party to the suit.

RES JUDICATA—ESTOPPEL.—A WITNESS who is a party to a judgment or decree is not estopped in a suit between other parties from

testifying to facts which he is estopped by such judgment or decree from denying as between himself and his adversaries.

A PAYMENT OF PARTNERSHIP MONEYS to satisfy the personal debt of one partner, if made to a person having no notice of the source whence they came, does not entitle the partnership, or any member of it, to recover the moneys so paid, or any part thereof. It will be otherwise if the payment was received with such notice.

Cortlandt Parker, for Standish.

Frank Bergen, for Babcock.

³⁷⁷ MAGIE, J. The decree appealed from charged upon lands of Caroline M. Babcock the sum of \$921.50, with interest from January 10, 1889, in favor of William P. Standish, and directed that, unless that sum with costs should be paid within a stated time, said lands should be sold to raise what was thus charged thereon.

Caroline M. Babcock, who was one of the defendants below, appeals from the decree, on the ground that it was erroneous to charge her lands with any part of that sum. William P. Standish, who was complainant below, appeals from the decree, and contends that it was erroneous in not charging on said lands a larger sum. These appeals have been argued together. To make intelligible the conclusions I have reached upon the case presented, a brief statement of the pleadings, showing the issues between the parties, is necessary.

The bill was filed by Standish against Caroline M. Babcock and Frederick A., her husband. It charged that Frederick A. Babcock, Joseph W. Moyer, and Standish, in 1884, entered into a written agreement of partnership in the business of purchasing and selling coal lands in Schuylkill county, Pennsylvania; that, under that agreement, lands were purchased and sold at a profit, and the proceeds of the sale were received by Frederick A. Babcock; that in 1890, Standish filed a bill in our court of chancery ³⁷⁸ against Babcock and Moyer for an accounting and settlement of the partnership affairs, and it was thereon decreed, on October 10, 1892, that Babcock was indebted to Standish in \$4,941.73, said sum being Standish's share of said profits; that said profits arose from the purchase and sale of lands in said county, which were bought in 1884, and sold to one Frisbie on January 8, 1889, for \$15,000, which sum was then paid to said Babcock; that on January 10, 1889, said Babcock, out of said sum so received, paid off a mortgage which then encumbered lands of his wife amounting to \$3,500 of principal and the interest then due thereon.

The bill also charged that the decree remained unsatisfied,

and that Frederick A. Babcock had property which could not be reached by execution, and there was a prayer for discovery against him.

As to Caroline M. Babcock, the prayer was, that the sum paid by her husband in satisfaction of the mortgage on her lands should be made a charge and lien on said lands in favor of Standish, and that they might be sold to raise and pay him that amount. The bill did not call for answers without oath.

Caroline M. Babcock, by her answer, denied knowledge, or information justifying belief, whether the agreement of partnership set out in the bill was ever entered into, or whether, under it, lands were purchased and sold at a profit, or whether the proceeds of any such sale were collected and received by her husband. She admitted that Standish had filed a bill in the court of chancery, against Moyer and her husband, for an account and settlement of the affairs of the alleged partnership, but averred that it was also filed against her and one Edward M. Babcock, and, after having been duly tried, had been dismissed upon the merits as to her. She admitted, on information and belief, that such a decree as was set out in the bill had been made in that cause. She denied knowledge or information in respect to the purchase of land and the subsequent sale to Frisbie, or the receipt by her husband of \$15,000 as the proceeds of that sale, and she left complainant to make proof thereof. She admitted that the mortgage ³⁷⁹ on her lands had been paid off, but denied that it was paid by her husband, averring that, being under foreclosure, it was paid by her son, Edward M. Babcock.

By the answer, she further averred that the previous bill of Standish had charged that her husband had applied part of the money received by him from the sale to Frisbie to the satisfaction of the mortgage on her lands, and had prayed relief by charging as a lien upon her said lands the amount so paid, and by selling said lands to discharge such lien. She averred that by her answer to that bill an issue was presented upon those charges, which was duly tried, and a decree made thereon that the bill should be dismissed as against her, with costs. She thereupon claimed that the matter thus established by that decree was conclusively established as against Standish, and prayed to have the same benefit of this defense as if she had pleaded the decree in bar.

To this answer was appended an affidavit containing the customary averments of affidavits to answers, and the further averments that the proceedings and decree in the former suit were

correctly set forth in the answer, and that a copy of the decree annexed to the answer was true and correct.

There was no affidavit or certificate of counsel such as is required to be annexed to a plea or demurrer: Revision, sec. 27, p. 109. But the complainant below filed a general replication, and the cause went to hearing upon those pleadings.

The evident purpose was to interpose the defense of *res adjudicata*. If the answer in that respect stood for a plea, the burden of proving its truth devolved upon the party pleading, for it is plainly an affirmative plea: 1 Daniell's Chancery Practice, 718; *Swayze v. Swayze*, 37 N. J. Eq. 180. If it is to be deemed a defense set up by answer, it must be sustained by proof. For if this answer was called for and put in under oath, it will not be evidence of new matter set up in defense. In either aspect, proof of the former suit, including the pleadings, which would show what issues were there tried or triable, and the decree thereon, was necessary to support the defense. The case before us discloses no proof whatever of this sort. The learned vice-chancellor who tried this ³⁸⁰ case indicates by his opinion that he conceived that he had before him the proceedings in the former cause, and that they showed that the dismissal therefrom of Caroline M. Babcock was ordered by the court *ex mero motu*, and without considering the issue presented by her answer, because she was not a proper party. If the record disclosed such a dismissal, it would probably fail to establish the truth of the plea or answer. If the record did not disclose the ground of dismissal, extrinsic evidence could make it clear: *Russell v. Place*, 94 U. S. 606. But here we have not the record of the former cause, and in its absence there is nothing to support the defense of *res adjudicata*.

Although this defense was not made out by proof, it is also true that the proof which appears to have been made in this cause was insufficient to justify a decree in favor of Standish. By his bill, he asserted that, in equity, the lands of Caroline M. Babcock should be recharged with the burden from which they had been gratuitously relieved by her husband's use of partnership funds for that purpose, and made to satisfy Standish for his share as one of the partners. Under the answer, he was required to prove the partnership, the resulting profit, and particularly that the \$15,000 received by Frederick A. Babcock were the result of the sale of partnership property. Without such proof, the equity here asserted was not established.

But the case before us is barren of proof upon these points. While the decree in the former cause was not put in evidence,

yet, as Caroline M. Babcock had set it out in her answer, and appended a copy thereto, Standish had a right to rely upon it as evidence against her, if it possessed evidential force in that regard. But it was not competent proof against her of the facts essential to his case. For although she was originally made party to that suit, she was dismissed therefrom. She was not bound by the decree, and its adjudications on the essential facts do not estop her from contesting them and requiring other proof. If she was a proper party in that cause, Standish could have appealed from the order dismissing her therefrom, and by its reversal would have bound her by the decree. But, after dismissal, the decree ³⁸¹ was as ineffective against her as if she had not been originally a party to the suit.

As the decree is thus unavailable as proof, the case is left without proof on these essential points. Indeed, the only evidence upon the subject is that of Frederick A. Babcock, who, when called as a witness by Standish, repeatedly declared that the \$15,000 which he received from Frisbie were the proceeds of the sale of railroad bonds and stock, and not of the coal lands. While it is true that he is estopped from this defense by the decree in the former cause, yet he is admissible to testify in defense of his wife, who is not estopped thereby. The result is, that there is no evidence to support the decree appealed from.

But this result is by no means satisfactory. The learned vice-chancellor who advised the decree evidently deemed that he had before him evidence that raised the legal questions which he decided. Indeed, his opinion indicates that he believed that he had before him, not only the pleadings and decree, but also the evidence taken in the former cause, for he states facts that nowhere appear in proof of this cause.

If we assume, as he did, that it appeared that the \$15,000 paid by Frisbie to Frederick A. Babcock was the price of lands belonging to the partnership, a question is presented decisive of the case.

Although the charge of the bill was, that Frederick A. Babcock had paid off the mortgage on his wife's lands out of the \$15,000 received by him, the facts proven in this cause do not support this charge. The truth was, that shortly after the receipt of that sum Frederick A. Babcock paid \$6,000 of it to his son, Edward B. Babcock, and the latter, almost immediately, applied enough of that sum to discharge the mortgage on his mother's lands. It is suggested by Standish's counsel that these circumstances point to fraud, and justify the inference of collusion to invest the dis-

charge of the mortgage with an appearance of filial generosity, while, in reality, it was a scheme to divert partnership funds to an unlawful purpose. But the vice-chancellor failed to draw any such deduction from any evidence before him, ³³² and our review of the evidence before us convinces us that in so doing he was not in error. The evidence that the payment of \$6,000 to Edward was a payment upon a just debt honestly due is uncontradicted. The circumstances supposed to be suspicious are explainable by the near relationship of the parties, and will not justify an inference of fraud. There is ample corroboration of the ability of the son to make the advances to his father out of which arose the indebtedness upon which the \$6,000 were paid. It must be considered as established that the payment was made upon a debt honestly due.

We also think that the evidence before us plainly shows that the son received that payment without any knowledge that the money paid was or was claimed to be partnership funds. Nor is there anything discoverable in the evidence which shows that he was put upon inquiry on that subject. His evidence is uncontradicted that he supposed the money thus paid him was from the proceeds of the sale of some railroad bonds and stock made by his father.

The question, then, is whether Edward B. Babcock can retain money paid to him by his father upon an honest debt, and received by him without knowledge or notice that the money belonged to a partnership, of which his father was one.

The solution of this question is not affected by the subsequent application of part of this money by way of a gift to his mother. For if Edward had acquired a right thereto he could dispose of it at his pleasure.

The question was solved by the court below by the application of the well-settled doctrine of the law of partnership that each partner has a lien on partnership property for the payment of partnership debts, and upon the surplus after such payment for his share: 1 Lindley on Partnership, *352. It was considered that it followed from this doctrine that one partner might follow money belonging to the partnership into the hands of a creditor of an individual partner, who had received it in payment of his debt without knowing that it was partnership money, and might require such creditor to restore the money so received to the partnership, or at least to account for his share thereof. And ³³³ this decree, if made upon the facts deemed to have been before the vice-chancellor, can only be supported upon that proposition.

There can be no doubt that one partner cannot give away partnership property, or things procured by partnership money, and that the donee will be deemed to be a trustee for the partnership, and required to account for such gifts: *Shaler v. Trowbridge*, 28 N. J. Eq. 595; *Partridge v. Wells*, 30 N. J. Eq. 176; *Wells v. Partridge*, 31 N. J. Eq. 362. Nor can one partner give a partnership obligation in payment of his individual debt without the consent of the other partners, and it has been held in this state that the creditor who thus accepts partnership obligations from one partner has the burden cast on him to prove the consent of the other partners: *Mecutchen v. Kennady*, 27 N. J. L. 230; *Dob v. Halsey*, 16 Johns. 34; 8 Am. Dec. 293. Nor can a partner transfer or create a lien upon partnership property for the payment of his individual debt to a creditor who has knowledge that the property so transferred or pledged is partnership property: *Matlack v. James*, 13 N. J. Eq. 126; *Clements v. Jeesup*, 36 N. J. Eq. 569. And this doctrine will apply to partnership money paid by one partner to his individual creditor, if the latter knows that the money belongs to the partnership: *Piercy v. Fynney*, L. R. 12 Eq. Cas. 69; *Kendal v. Wood*, L. R. 6 Ex. 243; 17 Am. & Eng. Ency. of Law, 1250; *Davis v. Smith*, 27 Minn. 390; *Dob v. Halsey*, 16 Johns. 34; 8 Am. Dec. 293.

In the opinion delivered in the supreme court in *Mecutchen v. Kennady*, 27 N. J. L. 230, Chief Justice Green indicated his approval of the doctrine declared by the supreme court of the United States in *Rogers v. Batchelor*, 12 Pet. 221. That doctrine was, that a partner could not apply partnership property to the payment of his individual debt, so that the title of the partnership thereto would be divested, even if the individual creditor was ignorant that the property received by him belonged to the partnership. Mr. Justice Story, who delivered the opinion in that case, put the doctrine upon the ground that the true question was, whether the title to the property had passed from the partnership to the individual creditor. The reasoning is, that the implied agency of one partner to dispose of partnership property extends³⁸⁴ only to its disposition for partnership purposes, and not to its application to the purposes of one of the partners. An individual creditor receiving property upon his debt may, by inquiry, discover the title of his debtor who thus applies such property, and may in this mode be chargeable with the knowledge which would be acquired upon such inquiry.

But if this doctrine, supported by such authority, be admitted to be correct (as to which no opinion need be expressed), the

question remains whether it applies when a partner uses, not property, but money, of the partnership in the discharge of his individual debt.

In my judgment, there is a marked distinction between the two cases. This results, not from the old notion that money has no "earmark," but because money has the quality of currency, passing from hand to hand in all bona fide transactions without the necessity of inquiry on the part of him who receives it as to the title of the party who pays it. When property thus passes, the recipient may be put upon inquiry as to its title; when money thus passes, no inquiry is required. In the former case, the knowledge which inquiry would produce would charge the recipient; in the latter case, nothing but actual knowledge will charge him. It was forcibly said by Lord Justice Fry, in *Northern Counties etc. v. Whipp*, L. R. 26 Ch. Div. 482, that "the proposition that money obtained by fraud can be followed into the hands of persons who take it in satisfaction of a bona fide debt without notice is, in our judgment, devoid of support from principle or authority": *Perry on Trusts*, sec. 837; *Lewin on Trusts*, *892.

The result is, that if this case appeared before us as it seems to have appeared to the vice-chancellor, in my judgment his conclusion was erroneous, and the decree made thereon cannot be supported.

It has been deemed best to state this conclusion, as the contrary view expressed in the court below will tend to greatly limit dealings with persons who are copartners. If a creditor of any individual partner cannot retain money paid upon his debt, if the money so paid was in fact partnership money, ³⁸⁵ although not known to be so by the creditor receiving it, dealings with individual partners will be seriously affected.

For the reasons above set forth, the decree must be reversed, with costs.

WITNESSES—ESTOPPEL.—A witness not testifying on his own behalf is not estopped from telling the truth by admissions or statement which he might have made, and which, were his own interests involved might operate against him as estoppels: *Purdy v. Coar*, 109 N. Y. 448; 4 Am. St. Rep. 491.

PARTNERSHIP—RECEIVING PROPERTY OF, FOR PARTNER'S DEBT—NOTICE.—Where a creditor of one partner knowingly receives partnership property in payment of the debt, he thereby becomes a debtor to the partnership for the price, and cannot set off the partner's debt against such claim: *Dob v. Halsey*, 16 Johns. 34; 8 Am. Dec. 293, and note. Funds misappropriated by one partner to the payment of his individual debts may be recovered back, if needed for firm purposes and if paid to a creditor who had knowledge of the misappro-

priation at the time he received payment, and the misappropriation was without assent, express or implied, of the other members of the firm: *Davies v. Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373, and extended note 380. Where a partnership has so intrusted one partner with the partnership goods that he is enabled to deal with them apparently as his own, and to induce the public to believe them to be his, a sale by him of such goods, in payment of his private debt to one who has no notice or knowledge that they are partnership goods is invalid as against the partnership and its creditors: *Locke v. Lewis*, 124 Mass. 1; 28 Am. Rep. 631. The indorsement of a note in the firm name to secure a liability of an individual partner when the firm is insolvent, is not fraudulent as against firm creditors, providing that it is done for an honest purpose and with the consent of the members of the firm, and the indorsee did not know that the firm was insolvent: *Bernheimer v. Rindskopf*, 116 N. Y. 423; 15 Am. St. Rep. 414.

SEVERS v. DODSON.

[58 NEW JERSEY EQUITY, 633.]

A VOLUNTARY CONVEYANCE IS CONCLUSIVELY PRESUMED to be fraudulent as against debts existing when it was executed.

VOLUNTARY CONVEYANCE—CREDITORS WHO MAY ATTACK.—One who is an accommodation indorser of a note whose maker executes a voluntary conveyance, is not, before the dishonor of the note, a creditor in favor of whom such conveyance is presumed to be fraudulent and void.

Garret D. W. Vroom and William M. Lanning, for the appellants.

John H. Backes, for the respondents.

634 BEASLEY, C. J. This bill was filed by the respondents, as creditors at large, to set aside a conveyance made by their debtor to his granddaughter.

The grounds taken before the vice-chancellor, on the part of such complainants, was that the transfer of the property was in pursuance of a scheme to defraud and delay creditors, or, failing in that contention, it was insisted that the conveyance was, at all events, without consideration, and was, therefore, constructively fraudulent as against existing debts, to which class it was alleged the claim sought to be enforced belonged.

By way of answering these grounds, the defendants contended that there was no fraud; that the conveyance was not voluntary, and that if the transaction was a mere gift, nevertheless it was equitable and legal, inasmuch as it was not an arrangement hostile to creditors.

The vice-chancellor's consideration of the facts led him to the conclusions that the deed was voluntary, and that there was no

actual fraud in the affair, but that, as the debt in question was in existence at the time of the gift, such conveyance should be annulled in accordance with the rule established in the case of *Haston v. Castner*, 31 N. J. Eq. 703.

The result was a decree setting aside the conveyance and ordering the land to be sold, the proceeds to be applied to the payment of the debt due the complainants, the amount of which was ascertained by the court.

With respect to the facts that the conveyance was purely voluntary, and that it was not tainted with fraud, the opinion of this court is in all respects in accord with that of the vice-chancellor. This part of the case is deemed so plain as to render all ~~case~~ discussion of the subject utterly superfluous, but we think that the other essential fact, viz., that the complainants were creditors at the time of the transfer of the property, so far from being proved, was negatived by the evidence.

On this subject, the uncontested facts were these: The deed of gift was dated the third day of April, 1886, and at that time the donor, one James Taylor, was the accommodation indorser for one Davis, who was in debt to the complainants. From time to time these notes were renewed as they fell due, the old ones being regularly taken up and new ones substituted. None of this paper was dishonored before the making of the conveyance in question, the first of them being protested about a year after that event.

The inquiry therefore arises, whether this situation placed this case within the operation of the rule defined in *Haston v. Castner*, 31 N. J. Eq. 703, already cited. The doctrine propounded in that authority is this: That if a person be indebted to another at the time of a voluntary settlement made by him, such disposition is presumed to be fraudulent with respect to such debt, and no circumstances will suffice to repel the legal presumption of fraud.

This doctrine, after full consideration, was established by this court, and it is not intended, on this occasion, to modify it in any degree. It is true that the propriety of this principle has been much discussed and much doubted, both in England and in this country, and such investigation has exhibited great contrariety in judicial opinion, but, as the question is not deemed to be an open one in this state, it would be but to supererogate to review that line of authorities.

Accepting, then, as a datum, that the gift now in question is void as respects cotemporaneous creditors, the only interrogatory here apposite is, Did the complainants belong to such class?

This question, we think, must be answered in the negative. At

the time in question, they were not creditors of the donor. It is readily admitted that they were such in a sense that entitled them to the remedies provided in the act for the prevention of frauds and perjuries. They can, undoubtedly, set aside conveyances and transfers of property made to defeat their just ⁶³⁶ claims. But at present we are not called upon to construe the statute itself, our present function being to construe the rule of evidence that this court has superinduced upon the statute. This discrimination has not always been made, and the omission has confused the subject. The act invalidates certain transfers of property infected with fraud. The rule now being considered relates to the proof of such fraud, declaring that the cotemporaneousness of the gift and the debt establishes it for certain purposes and to a definite extent.

We have said the complainant's case does not fall within this evidential rule, the reason being that they were not creditors of the donor. The latter was an accommodation indorser of current notes, and the situation did not constitute him a debtor. His assumptions might not have ripened into debts; whether they would have that effect was altogether contingent. It is obvious that to bring this case within the principle in question it is necessary to amplify, very greatly, its scope, for its terms "existing debts" would have to be metamorphosed into "existing liabilities." Such a change would be so fundamental as to deprive the principle itself of all semblance of reason or expediency. When a man is in debt, especially if such debts be due, it is certainly not irrational to infer, if he give away his property, that the intention was to defeat such claims, but such deduction would seem to be most extravagant if, instead of a present indebtedness, he has incurred a mere liability as a warrantor of title, as a tortfeasor, or as surety on an administrator's bond. If such responsibilities as these latter, which may, in the long run, be transformed into debts, should have the effect of invalidating voluntary settlements of property, then such settlements would be the most uncertain of legal transactions. It is plain that by force of so absurd a principle all donations would, in a measure, be made contingent, and would many times remain so beyond the lives of the donor and donee.

The result, therefore, is that, in order to bring a case within the operation of the rule in question, there must be a present indebtedness, and not a mere probability of future indebtedness.

The question thus considered and disposed of has never heretofore ⁶³⁷ been presented to the courts of this state for decision.

There are, indeed, cases that approach it but do not embrace it. What are "existing debts" within the meaning of the statute of frauds has been several times sub judice, but what are existing debts within the rule of evidence above defined has never before been adjudged. It will be observed that it has been already stated that, with respect to the statute, most present liabilities are under its protection against conveyances that are actually fraudulent, but that it is only debts, in the strictest terms, to which the judicial rule that, with respect to them, a voluntary transfer of property shall be void whether such transfers be fraudulent or not, is applicable. It is the former of these principles that has alone been illustrated in our decisions. Thus, in *Cook v. Johnson*, 12 N. J. Eq. 52, 72 Am. Dec. 381, the plain case was presented of an indorser of a dishonored note being deemed a debtor after protest. *Phelps v. Morrison*, 24 N. J. Eq. 196, *Schmidt v. Opie*, 33 N. J. Eq. 138, and *Post v. Stiger*, 29 N. J. Eq. 554, are all cases in which fraud in fact existed, and were each decided on that basis. The judicial expressions used on these occasions are to be received as authority only to the extent that they regulate the class of facts to which they are applied. All that is decided is, that a contingent liability, as that of an accommodation indorser, will lay a ground for a proceeding under the statute to set aside any transfer of property made in fraud of the holder of the claim. None of them decide that a contingent liability will, per se, raise an irrefutable inference of fraud, so as to invalidate a conveyance made during the continuance of such a condition of affairs.

The case of *Dodson v. Taylor*, 53 N. J. L. 200, is not in any wise relevant to our present inquiry. The question, then, under advisement was, whether an accommodation indorser, before dishonor, was a debtor, within the meaning of the statute for the relief of creditors against "heirs and devisees." The case presented was plainly within the statute. In the case of *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. 282, it was declared that the act embraced within its policy even so uncertain a liability as inherited in a warranty of title to lands. It is true that in the ⁶³⁸ opinion read in *Dodson v. Taylor*, 53 N. J. L. 200, the view is expressed that by the mere act of indorsement a person becomes a present debtor. It is said: "But, from the time of the indorsement, he is bound for the payment of the debt, and a person so circumstanced is, in both common and legal parlance, a debtor."

It is not perceived how this doctrine is to be sustained. So far as is known, no person ever thought or styled himself, or was styled by others, a debtor by reason of his having become an ac-

accommodation indorser. If a merchant were called upon to make out a list of his debts, it is not believed that it would ever occur to him to put in such account the moneys called for in the paper that had been gratuitously indorsed by him. Under the law of this state, the debts of the citizen taxed can, to a certain extent, be deducted from his assessment, and certainly no one can doubt that if any person, for such a purpose, should include in his sworn statements the amounts secured by his accommodation indorsements, such taxpayer could be convicted of perjury. The hypothesis suggested would, in practice, be fraught with embarrassments. If, by the mere indorsement, the indorser becomes, *ipso facto*, a debtor of the holder of the note, then, by parity of reasoning, it follows that, from the same cause, the maker of the paper becomes the debtor of the indorser. And indeed it has, on several occasions in legal practice, been attempted to utilize this notion in the entry of judgment on bonds with warrants of attorney. Such was the cause essayed in the case of *Blackwell v. Rankin*, 7 N. J. Eq. 152, the facts being that the plaintiff had taken judgment on an affidavit showing that he was the indorser on certain notes of the defendant, and which situation, it was insisted, showed a present debt. This contention is thus met by the chancellor. He says: "It is an abuse of language to say that, because I indorse your note to-day, payable three months hence, to be used by you, you are indebted to me to-day for the amount of it, and that it is a debt due and owing to me to-day." This doctrine is pointedly approved by this court in *Clapp v. Ely*, 27 N. J. L. 592.

But it is to be remembered that, while the phraseology in ⁶³³ question is deemed to be open to this criticism, nevertheless, in the connection in which it was used, it probably embodies the legal rule that the relation which the holder and indorser of a promissory note bear to each other is that of potential debtor and creditor, which is all that is required by the statute giving relief to creditors against devisees or legatees. This construction was the result of a consideration of the lax language of the act as enlightened by its evident policy. It was a remedial measure, and was, therefore, to be liberally construed.

But the present case demands the application of a rule the most opposite of this. We are not now called upon to ascertain the meaning of statutory language in legislative policy, our entire province being to demarcate the rule of evidence promulgated by ourselves, that makes the existence of fraud in voluntary conveyances, under a certain condition, a mere inference of law, irre-

spective of the truth. The rule is one of the most rigorous character, having the operation of an estoppel, and is to be kept within the narrowest limits. It is, therefore, enough for this court to say that the contingent liability of an accommodation indorser, before dishonor, does not make him a debtor, so that the holder of the paper can invalidate a voluntary conveyance made by him, when there was no actual fraud in the transaction.

It is obvious that the case of the complainants, as exhibited in the proofs, will not stand the test of the foregoing exposition of the equitable rule in question; the decree, consequently, must be reversed and the bill dismissed.

Before leaving this case, it seems to me that there are certain matters which, although they appear to have escaped the attention of counsel, should not be passed in this court sub silentio. They are alluded to only for the purpose of "excluding the conclusion" that the present course of law has our sanction.

The general theory exemplified in the bill before us is, that a creditor, having neglected or refused to present his claim to the executor within the time limited by the court, can, at his will, proceed in equity and levy his debt out of any lands that his deceased debtor has honestly settled on any member of his ^{old} family, and this without regard to the condition of the assets of his debtor's estate. Plainly, such a rule would be productive of the most flagrant injustice. In the present case, why should this gift to the granddaughter be defeated, unless after the exhaustion of the other assets of the estate? The claim is of a right to pass by the primary assets and sequester this donation in their stead.

Again, the decree finds the estate of the donor is indebted to the complainants in the amount of several thousand dollars, and yet the personal representative of that estate is not a party to the suit.

Again, the complainants are creditors at large, and the bill is personal and not in behalf of themselves and other creditors similarly situated.

And, lastly, the decree orders the land in question to be sold for the payment of the complainants' debts.

Does the chancellor possess the power to direct a sale of these premises? Whence is such power derived?

The decree for the debt must be construed to be against the executors of the donor, although they are not present, and such decree does not bind the lands of the deceased. Authority is conferred by statute upon the orphans' court to order the lands of

a decedent sold under certain circumstances, to settle the claims of creditors, but no such jurisdiction is given to the chancellor.

Under such circumstances as are here disclosed, it is entirely unsettled what course is to be taken by the creditors. The subject is both important and difficult; it has not been noticed either by the vice-chancellor nor by counsel, and as this court is not at present called upon to consider it, we leave it as we found it, undecided.

In order to avoid misconception of my own personal views on the subject above discussed, I deem it best to make the remark that, in my opinion, the inquiry is open to this further consideration, whether or not the rule that a voluntary transfer of property, unattended with fraud, is invalid with respect to existing debts, is applicable, unless such debts be past due at the time of the impeached transaction.

FRAUDULENT CONVEYANCES—PRESUMPTION AS TO VOLUNTARY CONVEYANCES.—A legal presumption arises upon a voluntary conveyance by one at the time indebted that it is in fraud of creditors: *Hutchinson v. Kelly*, 1 Rob. (La.) 123; 39 Am. Dec. 250; *Briscoe v. Bronaugh*, 1 Tex. 326; 46 Am. Dec. 108; *Lowry v. Fisher*, 2 Bush, 70; 92 Am. Dec. 475. A voluntary conveyance is presumed to be fraudulent as against existing creditors: *Rudy v. Austin*, 56 Ark. 73, 35 Am. St. Rep. 85, and note. See, also, the extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 746, and the note to *Cook v. Johnson*, 72 Am. Dec. 384.

FRAUDULENT CONVEYANCES.—WHETHER AN INDORSER IS A CREDITOR, entitled to attack a voluntary transfer, see the extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 744.

McFARLAND v. STANTON MANUFACTURING Co.

[58 NEW JERSEY EQUITY, 642.]

PATENTS.—AN ASSIGNMENT OF ALL RIGHTS and formulas which the assignor has, or may have, to and about a specified article includes letters-patent granted or applied for, or which may thereafter be applied for, and is available in equity, which will compel assignments to be made of all rights acquired and all patents applied for or granted, or formulas made or perfected, after the execution of the original assignment. An assignment of all right and formulas which the assignor has or may have, and all improvement for or about an article known as "Naphtha Soap" is available in equity, and entitles the assignee to all improvements thereafter made by the assignor.

Buchanan & Bellstab, for the appellants.

Lowthorp & Oliphant, for the respondent.

649 **VAN SYCKEL, J.** The bill in this case was filed by the Stanton Manufacturing Company to compel McFarland to convey

to complainant company a patent granted to him as assignee of E. W. Stanton, the ⁶⁵⁰ complainant claiming it under an assignment prior to that to McFarland.

By an assignment in writing dated December 1, 1891, Stanton assigned to the said company "all rights and formulas which I had or may have pertaining to or about the combination or article known as 'Stanton's Naphtha Soap,' and the making, mixture, and combination thereof, and any and all parts thereof, including all letters patent of the United States now granted or applied for, for the same, or that may hereafter be applied for, including any and all improvements for or about the same, or pertaining to the art of 'naphtha soap making.'"

The company, soon after the date of this assignment, commenced the manufacture of soap under this formula.

On October 31, 1893, Stanton filed an application for an improvement in his patent, or for a patent for an additional discovery, and in May, 1893, a patent was granted to him, which he assigned to McFarland.

The assignment to the company was not recorded when McFarland took the assignment in 1893, but I think that the testimony of Woodruff and of Fels, and the testimony of McFarland himself, show that he had notice of the previous assignment to the company.

The conclusion of the vice-chancellor on this point is supported by the evidence. Conceding this, the case turns upon the question whether the company, under the contract before set forth, is entitled to an assignment of the patent held by McFarland.

It is common learning in the law that, to constitute a valid sale, the vendor must have a present property, either actual or potential, in the thing sold: *Looker v. Peckwell*, 38 N. J. L. 253.

The rule as to the equitable title to contingent interests and expectations, and to things not in esse, is different; the equitable title to things not in actual or potential existence, may pass by assignment, the equity in the assignee attaching to the contemplated thing the instant it comes into being.

This distinction between the rule at law and in equity has been clearly recognized in this state in respect to articles not patented: *Smithhurst v. Edmunds*, 14 N. J. Eq. 409.

⁶⁵¹ In the federal courts, the same doctrine has been applied to patented inventions. Where the owner of a patent assigns it to another, together with all future improvements which he may make on such patent, the equitable title to any improvements

thereafter made by the assignor vests in the assignee as soon as the improvement is in esse, capable of being identified.

This rule is broadly enunciated by Chief Justice Waite in *Littlefield v. Perry*, 21 Wall. 226, and by Mr. Justice Bradley in *Aspinwall Mfg. Co. v. Gill*, 32 Fed. Rep. 697.

The assignment of future improvements upon a machine, in connection with the assignment of the patent for such machine, is valid. A naked agreement to assign in gross a man's future labors as an inventor is not good. But where a man purchases a particular invention, secured by a patent which is open to indefinite improvement, he may stipulate for the sale of future improvements he may make upon it. The subsequent patent, to be within the terms of the contract, must be an improvement upon the original invention.

It appears in the case that the formula assigned to the complainant company was not patented, but that circumstance does not affect the result under the authority of *Smithhurst v. Edmunds*, 14 N. J. Eq. 409.

The burden of proof, in the first instance, is upon the complainant company to show that the patent claimed is an improvement upon the formula which it held by prior assignment. The term "improvement" cannot comprehend every future invention of every possible process for making naphtha soap, however different from, and independent of, the first formula.

No evidence was produced before the vice-chancellor to show what the formula held by complainant was, so that a comparison of it could be made with the subsequent patented process. The only fact before us to relieve the complainant of the burden cast upon him in this respect is the assignment of the patent by Stanton to McFarland on the twenty-fifth day of May, 1893. That assignment recites ⁶⁵² "that Stanton has invented certain new and useful improvements in the method of an apparatus for producing naphtha soap, for which he has applied for letters patent, and he thereby assigns and sets over to McFarland the patent to be issued under such application."

This recital and assignment are sufficient to shift the burden of proof from the complainant company to McFarland, to show that the patented process assigned to him is not an improvement on the formula held by complainant, within the legal acceptance of that word.

The patent was applied for by Stanton as an "improvement," and so contracted for and taken by McFarland.

The decree below should be affirmed, with costs.

PATENTS—ASSIGNMENT.—An assignment of a patent conveys the entire interest of the patentee, or an undivided part thereof, and must embrace the whole United States: Extended note to Commonwealth v. Edison Electric Light Co., 37 Am. St. Rep. 748.

FAIRCHILD v. FAIRCHILD.

[58 NEW JERSEY EQUITY, 678.]

A DECREE OF DIVORCE entered against a wife in a state in which she has never been, and without serving any process on her, or notifying her of the pendency of the proceedings against her, although her place of residence was known to the plaintiff, is without extraterritorial effect.

A DECREE OF DIVORCE GRANTED IN ANOTHER STATE by a court having jurisdiction of the parties is conclusive, and its effect cannot be avoided in this state upon any ground which it was necessary for the plaintiff to disprove to entitle him to the divorce, such, for instance, as that he had abandoned his wife without justifiable cause, and was not an actual resident of that state in good faith for the time required by its laws.

JURISDICTION, DIVESTING BY PROCEEDINGS IN ANOTHER STATE.—If during the pendency of a suit by a wife against her husband for maintenance, he commences suit against her in another state for divorce, in which she appears and answers, and he obtains a decree in his favor, it is conclusive against her when pleaded in the first suit. The pendency of the suit in this state could not deprive the court of the other state of its jurisdiction to entertain the suit therein for a divorce.

Leon Abbett, for the appellant.

Alfred Walling, Jr., for the respondent.

⁶⁷⁸ GUMMERE, J. This is an appeal from a decree of the court of chancery, on a bill for maintenance filed by the respondent against the appellant. The parties were married in the city of New York, on August 10, 1885, and a few days afterward the appellant left his wife and removed to the state of Colorado, and in December ⁶⁷⁹ of the same year went to Kansas, where he has ever since continued to reside. The respondent was, at the time of her marriage, and still is, a resident of this state.

On the 11th of March, 1887, the appellant obtained a decree of divorce from the respondent in the district court of Stafford county, in the state of Kansas. The respondent, however, was never within the jurisdiction of that court, nor was she served with process in the suit in which the decree was rendered, nor did she ever receive any notice of its pendency.

In April, 1887, this suit was begun in the court of chancery, by the respondent, for the purpose of compelling her husband to maintain her, and, incidentally, to have the decree of the Kansas court declared null and void.

In March, 1888, and while this suit was pending in the court of chancery, the appellant commenced another action against the respondent in the district court of Hodgeman county, Kansas, for a divorce from her, and an annulment of their marriage. To this second Kansas suit the respondent appeared and made defense, and on the fourth day of October, 1888, a final decree was entered in favor of the appellant, divorcing him from the respondent.

In November, 1893, the appellant applied to the court of chancery to open the decree pro confesso which had been entered against him in this suit, and for leave to file an answer setting up the decree of the district court of Hodgeman county as a bar to the complainant's right to a decree. His application was granted, and an answer was filed by him setting up the second Kansas decree.

On the final hearing of the cause, the court below found that the appellant had abandoned the respondent without justifiable cause; that he was not a bona fide resident of the state of Kansas, but that he went there solely for the purpose of instituting divorce proceedings against the respondent, and that neither the decree of divorce made by the district court of Stafford county nor that made by the district court of Hodgeman county was a bar to the suit, and granted the respondent the relief asked for.

So far as the decree of divorce which was granted by the Stafford county court is concerned, it is clear that it was without extraterritorial effect. The respondent was never within its jurisdiction, she was not served with process, nor was any notice of the pendency of the proceedings given to her, although her place of residence was known to the appellant. Under similar circumstances, a decree of divorce, pronounced by a circuit court of the state of Illinois, was refused recognition by this court in the case of *Doughty v. Doughty*, 28 N. J. Eq. 581.

The decree of the district court of Hodgeman county, however, stands on a different footing. That court had jurisdiction over the parties, the respondent having voluntarily appeared and made defense to the action brought against her there by the appellant. It also had jurisdiction, by virtue of the Kansas statute, which was offered in evidence, over the subject matter of the suit. Counsel for the respondent contended before us that the court was without jurisdiction over the subject matter of the litigation, because, at the time of its institution, the marriage relation no longer existed between the parties, so far as the state of Kansas was concerned, it having already been dissolved by the decree of

the Stafford county court. But this was a matter of defense which should have been set up in the second Kansas suit, and cannot be considered in this action. So, too, the question of the bona fides of appellant's residence in Kansas, which was passed upon by the court of chancery, was one for the exclusive consideration of the Kansas court. By the statute of that state, the plaintiff in an action of divorce is required to have been an actual resident, in good faith, of the state for one year next preceding the filing of his petition. It was, therefore, necessary for the Kansas court, before taking up the consideration of appellant's case upon the merits, to determine whether he had been an actual resident of the state, in good faith, for at least a year next preceding the commencement of his action, and that decision, unless procured by fraud, is conclusive, not only in Kansas, but in every other jurisdiction where the validity of the judgment comes in question: *Kinnier v. Kinnier*, 45 N. Y. 540; 6 Am. Rep. 132; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 147; *Nichols v. Nichols*, 25 N. J. Eq. 63.

⁶⁸¹ Can this judgment, rendered by a court which had jurisdiction over the parties and over the subject matter of the litigation, be ignored by the courts of this state, notwithstanding the prescription of the constitution of the United States, supplemented by the federal statute of 1790, that the judicial proceedings of each state shall have the same faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state where such proceedings are had? It seems to me not, for, while this constitutional provision and the federal statute referred to have been the subject of more or less diversity of judicial opinion, it is now entirely settled that the only grounds upon which the judgment of a court of general jurisdiction can be disregarded in another state are: 1. Where the adjudging tribunal had no jurisdiction over the person against whom judgment was pronounced, or over the subject matter of the litigation; and 2. Where the adjudication of the foreign tribunal has been obtained by fraud: *Moulin v. Trenton etc. Ins. Co.*, 24 N. J. L. 222; *Mackay v. Gordon*, 34 N. J. L. 286; *Jardine v. Reichert*, 39 N. J. L. 165; *Davis v. Headley*, 22 N. J. Eq. 121; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Doughty v. Doughty*, 27 N. J. Eq. 315; 28 N. J. Eq. 581; *Royal Arcanum v. Carley*, 52 N. J. Eq. 642.

Neither of these conditions exists in the judgment now under consideration. As has already been stated, the Kansas court had jurisdiction over both the subject matter of the suit and over

the parties to it; and, although it was insisted before us, by counsel for the respondent, that the decree of that court was the product of fraud, an examination of the testimony in the case fails to disclose any substantial ground for such a charge.

It was contended, both in the court below and in this court, that the fact that the present suit was pending in the court of chancery of this state at the time of the institution of the proceedings in the Hodgeman county court, deprived the foreign tribunal of jurisdiction. This contention is without force. The pendency of a suit between the same parties, and for the same cause of action, in this state, is no bar to a subsequent suit brought in a sister state. The remedy of the defendant is to ~~ess~~ apply to the court in which the subsequent suit is brought, to stay proceedings, or to refuse final judgment, until the suit here is determined; and the granting or refusal of such application is a matter of discretion in the court to which it is made: *Bowne v. Joy*, 9 Johns. 221; *Hatch v. Spofford*, 22 Conn. 485; 58 Am. Dec. 433; *Newell v. Newton*, 10 Pick. 470; *Stanton v. Embrey*, 93 U. S. 548; *Fulton v. Golden*, 25 N. J. Eq. 353; *Kerr v. Willetts*, 48 N. J. L. 78.

The result is, that the decree in the second Kansas suit was a complete bar to the action brought in the court of chancery of this state, and that, consequently, the decree brought by this appeal should be reversed, and the bill of complaint dismissed.

MARRIAGE AND DIVORCE.—A DECREE OF DIVORCE GRANTED IN A FOREIGN COUNTRY, in which defendant did not reside, in an action to which he did not appear, and in which process was not personally served upon him within such country is void: *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652. A decree of divorce obtained by a wife while residing in one state against her husband domiciled in another state, without personal service upon him, is a nullity in the latter state: *Harris v. Harris*, 115 N. C. 587; 44 Am. St. Rep. 471. A divorce entered in another state against a wife who, at her marriage and ever afterward, resided in this state, and who never appeared in the suit, is void against her in this state, though she was personally served with process, but outside of the territorial jurisdiction of the court granting the divorce: *Williams v. Williams*, 130 N. Y. 193; 27 Am. St. Rep. 517. A judgment of divorce granted in another state against a wife over whom the courts did not have jurisdiction, while it may dissolve the marriage relation, cannot affect her rights in the property of her husband situate in this state: *Doerr v. Forsythe*, 50 Ohio St. 726; 40 Am. St. Rep. 703, and note. This subject will be found fully discussed in the notes to the following cases: *In re James*, 37 Am. St. Rep. 66; *Loker v. Gerald*, 34 Am. St. Rep. 254; *Watkins v. Watkins*, 21 Am. St. Rep. 219; *Jones v. Jones*, 2 Am. St. Rep. 453; and the extended notes to *Hanover v. Turner*, 7 Am. Dec. 206-209, and *Tolen v. Tolen*, 21 Am. Dec. 747-752.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

MARSHALL v. SHERMAN.

[148 New York, 2.]

A CONSTITUTIONAL PROVISION IS NOT SELF-EXECUTING which declares that dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by such stockholders, and such other means as shall be provided by law. The liability of stockholders must, therefore, be ascertained by examining such state statutes as have been enacted by the legislature in discharging the duty imposed upon it by such constitutional provision.

THE STATUTORY LIABILITY OF STOCKHOLDERS IN A FOREIGN CORPORATION cannot, as a general rule, be enforced, except in the domicile of the corporation, where the law of that domicile is the one which creates the right and the remedies for its enforcement.

CORPORATIONS.—LIABILITY OF STOCKHOLDERS OF A CORPORATION CREATED IN ANOTHER STATE cannot be enforced in this when it is patent from the whole scope and structure of the statutes of the other state, upon the subject, that they were intended to be enforced only within its jurisdiction. If it appears that the whole scheme of such statutes cannot be given full effect in this state, its courts will not detach some particular provision from the original context, with a view to ascertaining whether it is enforceable beyond the local jurisdiction.

A STOCKHOLDER'S LIABILITY FOR THE DEBTS OF A CORPORATION cannot be said to arise upon contract when he has paid in the full amount of his subscription, and the liability sought to be enforced against him is one imposed by statute, dependent upon the insolvency of the corporation.

FOREIGN CORPORATIONS—CONFLICT OF LAWS.—A creditor of a foreign corporation seeking to enforce against its stockholders in the courts of this state a right secured by the statutes of the state in which the corporation has its domicile, is not entitled to here pursue a form of action different from that which a creditor of a domestic corporation might pursue against a domestic stockholder; and if such a suit must, if in favor of a creditor of a domestic corporation, be brought by or in behalf of all its creditors, and against all its stockholders, then part of the creditors of a foreign corporation will not be permitted to here maintain suit against part of its stockholders.

CONFLICT OF LAWS.—THE STATUTES OF ANOTHER STATE have, *ex proprio vigore*, no force or effect in this, and if enforced at all in its courts, such enforcement is dependent upon the adoption of the doctrine of comity. Each state must determine for itself whether it can enforce a foreign law without at the same time neglecting a duty which it owes to its own citizens, and if it cannot, such enforcement must be denied.

CONFLICT OF LAWS—FOREIGN CORPORATIONS.—The doctrine of comity does not compel the courts of one state to enforce the laws of another, creating a personal liability against the stockholders of a corporation organized and doing business in the latter state, when such liability is not founded upon contract, but is dependent upon the statute creating it and prescribing the remedy for its enforcement.

Chester B. McLaughlin, for the appellant.

Frank N. Hager, for the respondent.

¹⁵ O'BRIEN, J. This action was brought by a creditor of the Miltonvale State Bank, a corporation organized under the laws of Kansas for banking purposes, against the defendant, a stockholder, residing in this state.

The questions in the case arise upon the defendant's demurrer as to the sufficiency of the complaint and the necessary parties to the action. The complaint avers that the bank was incorporated under the laws of Kansas on or about the 8th of July, 1886; that it continued to transact a banking business in that state until the 12th of July, 1891, when proceedings were instituted against it in the district court of the county of that state where it was located, which resulted in the appointment of a receiver to wind up its affairs, and that it has not since that date transacted any business, and, before the commencement of this action, was dissolved, leaving debts unpaid; that since the seventh day of October, 1889, the defendant has been the owner of thirty shares of the capital stock of the bank, the par value of which is stated to be three thousand dollars; that at the time of the appointment of the receiver, the bank was indebted to the plaintiff, as a depositor, in the sum of one hundred and ninety-one dollars and eighty-four cents. It is then stated that the plaintiff is the owner, by assignment or transfer, of the claims of fifteen other depositors, to whom the bank was indebted at the time of the appointment of the receiver in various small sums, upon which, together with the claim held by the plaintiff in his own right, judgment was recovered in the courts of Kansas for the sum of eighty-two hundred and four dollars damages and nineteen dollars and fifteen cents costs, on the 5th of September, 1891; that the plaintiff caused execution to be issued upon this judgment ¹⁶ against the property of the bank, which was returned unsatisfied; that the corporation is insolvent, and that eight hundred and eighty

dollars and forty-one cents has since been paid to the plaintiff on this judgment by the receiver. Judgment against the defendant as a stockholder is demanded for the balance unpaid, with interest from the date of the rendition of the judgment. The complaint sets forth certain provisions of the constitution of the state of Kansas, and the statutes of that state which, it is claimed, impose a legal liability upon the defendant in the courts of this state for the payment of the money still due upon the judgment. The provision of the constitution of that state, which is the foundation of the alleged liability, reads as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholders, and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations nor corporations for religious and charitable purposes." The statutes for the enforcement of this liability enacted by that state, and set forth in the complaint, are embraced in two sections of the laws with respect to the liability of stockholders in corporations. They are as follows:

"Sec. 44. If any corporation created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and, if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of the dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively; and, if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, ¹⁷ deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company was dissolved."

The other enactment is section 32, and is set forth in the complaint as follows: "Execution against stockholders' action.—That if any execution shall have been issued against the property or effects of a corporation, except a railway, or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the

amount of stock by him or her owned together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and, upon such motion, such court may order execution to issue accordingly, or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The defendant demurred to the complaint upon the grounds, among others: 1. That it appears upon its face that there is a defect of parties defendant, in that all the stockholders of the bank were not made defendants; and 2. That the complaint does not state facts sufficient to constitute a cause of action.

The complaint contains no allegation as to the meaning or effect of these statutes, or of the provision of the constitution quoted under the adjudications of the courts of Kansas, nor any allegation that any judgment has been obtained against the defendant in the courts of that state upon his liability as a stockholder, under these provisions of the local law. We are, therefore, obliged to construe them ourselves, with the aid of such rules and upon such principles as the courts of this state apply in the construction of such enactments here.

A right of action against the stockholders of a corporation does not exist at common law, and ordinarily exists only by virtue of some statutory enactment. In this case, the right of ¹⁸ action is founded upon the constitution and statutes of another state. We think it quite clear that the provision of the constitution referred to is not self-executing, and of itself creates no liability whatever. The language used plainly contemplates that legislation was necessary in order to make it effectual. It was intended simply to confer authority upon the legislature of that state to legislate upon the subject, and perhaps it imposed upon that body the duty of securing the debts of corporations by imposing upon the stockholders an individual liability, and by such other means as, in its discretion, it should deem proper, always limiting such power and discretion by the provision that each stockholder should be made liable to an amount equal to the stock held by him. The legislature did enact such statutes and it is these enactments, and not the constitution itself, which is sought to be enforced in this action: *Groves v. Slaughter*, 15 Pet. 449; *Morley v. Thayer*, 3 Fed. Rep. 737; *May v. Black*, 77 Wis. 101; *Fugz v. Spaunhorst*, 67 Mo. 256; *French v. Teschemaker*, 24 Cal. 518. The question is thus presented whether a right of action unknown

to the common law, and existing only by force of the statutes of another state, can be enforced in the courts of this state, or outside of the local jurisdiction where the corporation is domiciled. The defendant's relation to the corporation is governed by the laws of the state of its creation, and the general rule is, that the statutory liability of stockholders in foreign corporations cannot be enforced except at the domicile of the corporation when the law of the domicile provides the remedy. In *Erickson v. Nesmith*, 4 Allen, 233, the court said: "There seems to be no practicable mode of dealing with such corporations and its members, when seeking to charge the latter upon the statute liability, but to proceed in the manner prescribed by the statute creating such liability, and in the local jurisdiction where the corporation was established and carries on its business, and by whose local statutes alone the responsibility exists." We think that when the statutes set forth in the complaint are carefully read, it is apparent from their language that they provide for a special ¹⁰ and peculiar remedy against the stockholders of a corporation created under the laws of that state. From their whole structure and scope it is apparent that they were intended to operate and be enforced only within that jurisdiction. It is quite clear that, as to some of their provisions, at least, it would be impossible to enforce them in this state, and they should be construed as enactments in *pari materia*, and as a whole. If it appears that they cannot as a whole scheme be given full effect in this state, we ought not to detach some particular provision from the general context, with a view of ascertaining whether that is or is not enforceable beyond the local jurisdiction. But, without reference to the special and peculiar provisions of these statutes, we think that the general current of authority is to the effect that such enactments are to be enforced only within the jurisdiction of the sovereignty where they exist. Some of the authorities will be referred to hereafter.

The judgment of the learned court below seems to have proceeded principally upon the ground that the liability of the defendant as a stockholder of the insolvent bank in another state is primary and contractual. It is quite doubtful, at least, whether any such relation exists between the stockholders of the corporation and its creditors after the capital stock has been paid in and the organization of the corporation completed, so as to give it legal capacity to make contracts and incur obligations for itself. The statutes of this state, as construed by judicial decisions, seem to recognize that relation only in cases of liability before the cap

ital stock is paid in. Up to that time, the liability of stockholders has been likened to that of partners engaged in a joint enterprise, which, however, disappears upon the perfection of the corporate organization. We have had occasion recently to examine that question in the case of *First Nat. Bank of Auburn v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, and we adhere to the views there expressed with reference to this question, as well as other questions there decided, and which seem to be involved in this case. It is true that the liability sought to be enforced in that case ²⁰ differed in its nature from that involved in the case at bar, since it was not an action to enforce a stockholder's liability, but that of trustees for disregard of an express statute. The liability in that case was penal in its nature. Here it is not, and yet it cannot be said that it arises upon contract in the general sense, as it would not exist but for the terms of the statute. The voluntary purchase of the stock by defendant would not of itself create any liability: *Jessup v. Carnegie*, 80 N. Y. 441; 36 Am. Rep. 643. The complaint does not disclose any other contractual relations between the plaintiff and the defendant. The debt which the plaintiff is seeking to enforce is not the debt of the defendant, but that of the bank. The only liability that in law is imposed upon the defendant to pay this debt, or any part of it, is created by the statutes of the state where the corporation is domiciled. The principle adopted, generally, by the more recent cases in this state, is that such liability is not strictly based upon contract, but is created by statute. It is not primary, but secondary, and conditional upon the failure of the corporation itself which owes the debt to pay it. A liability is imposed by statute upon the defendant to pay the corporate debts to a limited extent, under certain circumstances and upon certain conditions. It is not a general liability, but special, and conditioned upon the failure of the corporation itself to pay. This peculiar liability has been held by our courts to place the stockholders of the corporation in the relation of sureties or guarantors of the corporate debts, and the obligation is limited, in the first place, by the defendant's holdings in the corporation, and, in the second place, by the deficiency existing after the application of all the property of the corporation to the payment of its debts. It does not appear from the statements of the complaint that the corporate property which passed into the hands of the receiver has yet been marshaled or appropriated for the benefit of creditors. It does appear that a part of it has, but as to how much, if any, still remains in the hands of the receiver applicable to the discharge of

the obligations held by creditors the complaint is silent. True, there is the allegation that the corporation ²¹ is insolvent, and has not sufficient property to discharge its debts. But, until all the property of the corporation in the hands of the receiver has been appropriated to that purpose it cannot be known what the deficiency is which the stockholders are required to make up. If the defendant should pay the plaintiff's debt in this action, for aught that appears someone may still be entitled to a dividend from the receiver on account of it, and, until it has been definitely ascertained by some proceeding, legal or equitable, either in the courts of the state where the corporation was domiciled or here, what the deficiency is, it is impossible to say with any degree of accuracy how much the defendant ought to pay. The relations of the defendant as a stockholder of the corporation are fixed and governed by the laws of the state in which the corporation is domiciled and under which it was created. If those laws created a liability against the defendant upon certain conditions and under certain circumstances, they also provided a special and peculiar remedy; and the general trend of authority is to the effect that the remedy thus provided must be followed, and the proceedings for its enforcement must be within the local jurisdiction and by the judicial department of the sovereignty which enacted the law and created the corporation; and this would be so whether the liability is penal in its nature or arises from the implied obligation of defendant by the purchase of stock.

But if, under any circumstances, the action could be maintained in this jurisdiction, it must be in such a form and by such modes of procedure as like liabilities created under our own statutes are enforced against our own citizens.

There is no reason why the plaintiff should be permitted to enforce his debt in this jurisdiction against a citizen of this state in a form of action different from that which a creditor of a domestic corporation may prosecute against a domestic stockholder. It is quite well established that, in a case like this, an action at law by a single creditor against a single stockholder for the recovery of a specific sum of money cannot be maintained in our courts under our statutes declaring the liability ²² of stockholders. In such cases, the liability must be enforced in equity in a suit brought by, or in behalf of, all the creditors against all the stockholders, wherein the amount of the liability and all the equities can be ascertained and adjusted. The stockholders of this Kansas bank are not equitably liable for any

greater sum than may be necessary to discharge the debts after the corporate property has been applied. All of them that are solvent should contribute in proportion to the amount of their holdings of stock. We are not informed by the complaint how many stockholders there are, or even the amount of the capital stock. Nor are we informed whether any of the stockholders are insolvent. It is quite evident, therefore, that the equitable proportion of the corporate debts which this defendant should pay cannot be ascertained or determined in this action. The liability of the stockholders is a fund to which all the creditors are entitled to resort after the corporate property has been applied upon the debts. If this action can be maintained, it is quite apparent that one creditor may collect his debt in full and another creditor may not be paid anything, except what he is able to collect from the corporation. The statutes upon which this action is based provide, among other things, that when judgment is obtained against a stockholder, and it is satisfied by collection or payment, he may, in turn, maintain an action against all the other stockholders, who are such at the time of dissolution for the recovery of the portion of the debt for which they were liable, and, if any stockholder thus sued shall not have property enough to satisfy his portion of the claim, the deficiency shall be divided equally among the remaining stockholders and collected accordingly. It is quite apparent that the purpose of the law cannot be carried out, except by a proceeding in equity for an accounting, to which all the stockholders are made parties. If the plaintiff can maintain this action and collect his debt from the defendant, how can the defendant proceed against his fellow stockholders to reimburse himself for that part of the debt which they should have paid? It would be manifestly unjust and unfair to ²³ compel him to pay this claim and turn him over to another action, perhaps in another state, or in many states, in order to obtain the contribution which the law evidently contemplates. All these questions should be settled in one proceeding, or in one action, and that at the domicile of the corporation. The statute contemplates that each stockholder shall pay his just proportion of any sum that may be required to discharge the outstanding obligations of the corporation. The form of the action should be one, therefore, adapted to the protection of all. A suit at law by one creditor to recover for himself alone is entirely inconsistent with any idea of contribution. The liability is not to any individual creditor, but for contribution to the fund out of which all creditors are to be paid alike. Hence, the appropriate remedy is by suit in equity to enforce the contribution, and not by one cred-

itor alone to appropriate to his own use that which belongs to others equally with himself: *First Nat. Bank of Auburn v. Dillingham*, 147 N. Y. 603; 49 Am. St. Rep. 692; *Terry v. Little*, 101 U. S. 216; *Hornor v. Henning*, 93 U. S. 228. It is impossible to conceal from ourselves that such is the scope and real purpose of the action, and hence we are asked to enforce a remedy under a foreign law where it is perfectly apparent that complete justice cannot be done, and where it is plain that an equitable result can be accomplished only by the courts of the jurisdiction where the corporation was created.

The case has thus far been considered with reference to the discovery of some practical method of applying in this jurisdiction the peculiar local remedy for the enforcement of the statutory liability created by the law of the domicile. There is still another aspect of the question which deserves attention, and it must be viewed in the light of notorious facts which, though not appearing in the record, are matters of current history and common knowledge to which we cannot shut our eyes. Within recent years, numerous business enterprises have been promoted in some of the western states, the money for the prosecution of which has been to a large extent borrowed here, either in the form of direct loans upon ²⁴ some kind of security, or by inducing many of our citizens to purchase stock in corporations organized for the purpose under local laws. Much of these investments, amounting to a vast sum in the aggregate, has been lost. This result is, in some degree, to be attributed to financial depression and the consequent derangement of business, but in a much greater degree to the gross mismanagement and dishonesty of the managers and promoters. The funds thus procured have been used largely in furtherance of local and private interests, and in disregard of every prudent safeguard for the protection of the investors, and sometimes in defiance of every principle of common honesty. In some cases, when the managers well knew they were hopelessly involved, they continued to transact business, borrowing recklessly and pledging the assets in their possession or under their control. When the crash came, these assets were sold by the pledgees, and, of course, sacrificed in many cases, leaving large deficiencies, which honest and prudent management could have converted into a surplus. A careful investigation of some of the disastrous failures of loan, investment, trust, land, and mortgage companies, as well as banks and other corporations, will reveal this condition of things. It will not be difficult for speculators to purchase large claims against these defunct corporations at

a very low price, if they can be readily enforced here against stockholders who have made and lost investments in the stock.

These considerations are not, of course, pertinent in a case where a party is seeking to enforce a clear legal right, whatever may have been the circumstances of its origin, but they serve to stimulate a careful inquiry as to the principles and reasons upon which the courts of this state are required to aid in the enforcement of claims of this character.

In the case at bar, the plaintiff's right of action has no other legal or moral basis than the fiat of a legislature of another state. It is a principle of universal application, recognized in all civilized states, that the statutes of one state have, *ex proprio vigore*, no force or effect in another. The ²⁵ enforcement in our courts of some positive law or regulation of another state depends upon our own express or tacit consent. The consent is given only by virtue of the adoption of the doctrine of comity as part of our municipal law. That doctrine has many limitations and qualifications, and, generally, each sovereignty has the right to determine for itself its true scope and extent. The courts of this state are open to all suitors to enforce rights of action, transitory in their nature, recognized by the common law or founded in natural justice, and when no law of the forum or any principle of public policy interferences. There is, however, a large class of foreign laws and statutes which, under the doctrine of comity, have no force in this jurisdiction. It belongs exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without, at the same time, neglecting the duty that it owes to its own citizens or subjects. It has been held, and is a principle universally recognized, that the revenue laws of one country have no force in another. The exemption laws and laws relating to married women, as well as the local statute of frauds and statutes authorizing distress and sale for nonpayment of rent, are not recognized in another jurisdiction under the principles of comity: *Morgan v. Neville*, 74 Pa. St. 52; *Waldron v. Ritchings*, 3 Daly, 288; *Siegel v. Robinson*, 56 Pa. St. 19; 93 Am. Dec. 775; *Kelly v. Davenport*, 1 Browne (Pa.), 231; *Ross v. Wigg*, 34 Hun, 192; *Ludlow v. Van Rensselaer*, 1 John. 95; *Skinner v. Tinker*, 84 Barb. 333. It is well understood also that the statutes of one state giving a right of action to recover a penalty have no force in another: *Huntington v. Attrill*, 146 U. S. 657. So, also, rights of action arising under foreign bankrupt, insolvent, or assignment laws, are not recognized here when prejudicial to the interests of our own citizens: *Warner v. Jaffray*, 96 N. Y. 248; 48 Am. Rep. 616;

In *re Waite*, 99 N. Y. 433; *Barth v. Beckus*, 140 N. Y. 230; 37 Am. St. Rep. 545; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; 34 Am. St. Rep. 448. There is another class of cases where the right to enforce the foreign statute is conditioned upon the existence of a law substantially similar here: *Wooden v. Western New York etc.* ²⁰ R. R. Co. 126 N. Y. 10; 22 Am. St. Rep. 803. Statutes giving a right of action for negligence resulting in death belong to that class: *Whitford v. Panama R. R. Co.*, 23 N. Y. 465. There are many other classes of foreign statutes affecting public and private interests which courts have uniformly held can have no extraterritorial force or effect. From the general trend of judicial decisions in this country, and the consensus of authority on the question, it may be safely asserted that rights of action, such as are set forth in the complaint in this action, are not enforceable in another jurisdiction upon any obligations of comity. It has been held that an action by a New York creditor of a corporation organized under the manufacturing act of this state, against a New Jersey trustee in the courts of that state, for neglect to file the annual report, could not be maintained. The opinions of the several members of the court in that case contain a clear and interesting discussion of the law applicable to the question: *Derrickson v. Smith*, 27 N. J. L. 166. The courts of Massachusetts have uniformly refused to entertain actions of this character, upon the ground either that to enforce the foreign law would be injurious to its own citizens or that complete justice could not be administered in its courts under its special and peculiar provisions: *Erickson v. Nesmith*, 4 Allen, 233; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349; *Post v. Toledo etc. R. R. Co.*, 144 Mass. 341; 59 Am. Rep. 86; *Bank of North America v. Rindge*, 154 Mass. 203; 26 Am. St. Rep. 240. The arguments of the court in these cases upon which the conclusion was based deserve the highest respect, and it is worthy of notice that in the case last cited the statute sought to be enforced was the identical one now under consideration in the case at bar.

The highest court of Illinois has also refused to enforce this same statute and provision of the Kansas constitution, on the ground that the remedy was special and must be pursued in the state where the corporation exists: *Fowler v. Lamson*, 146 Ill. 472; 37 Am. St. Rep. 163. In another case (*Young v. Farwell*, 139 Ill. 326), it held that it could not enforce by action at law a statute of Oregon for the collection of unpaid subscriptions, ²⁷ for the reason that a complete settlement of the controversy re-

quired a bill in equity where all the parties interested were before the court, so that complete justice could be meted out to all, and all conflicting rights and equities finally adjusted: *Patterson v. Lynde*, 112 Ill. 196; 106 U. S. 519. By the constitution and laws of Michigan, stockholders of corporations of that state are individually liable for certain debts to be enforced by action of assumpsit, and the highest court of Wisconsin has held that the remedy was exclusive; that the corporation itself was a necessary party, and that the liability could be enforced only in the courts of Michigan: *May v. Black*, 77 Wis. 101. It has been also held, after exhaustive consideration, that a creditor of an Ohio corporation could not enforce the statutory liability of a stockholder in the courts of West Virginia: *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184. There are numerous other decisions in the state and federal courts that hold, in effect, either that such a liability cannot be enforced at all beyond the local jurisdiction, or that such an action must be in equity after all remedies against the corporation have been exhausted, and that, too, in the state where the stockholder is sought to be charged, or at least the bill must show upon its face, by proper allegations, that such a proceeding was impossible, and that all the corporate assets have been applied to the payment of the claims of creditors: *Terry v. Little*, 101 U. S. 216; *National Tube Works Co. v. Ballou*, 146 U. S. 517; *Pollard v. Bailey*, 20 Wall. 520; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Peck v. Miller*, 39 Mich. 594; *Barrick v. Gifford*, 47 Ohio St. 181; 21 Am. St. Rep. 798; *Allen v. Walsh*, 25 Minn. 543; *Smith v. Huckabee*, 53 Ala. 191. The decisions of our own courts are also to the effect that special remedies provided by foreign laws to enforce the liability of stockholders in foreign corporations must be applied by the courts of the state in the local jurisdiction and where the corporation is domiciled: *Lowry v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97; 60 Am. Rep. 429; *Barnes v. Wheaton*, 80 Hun, 8. The statutes in these cases were, it is true, different in some ²⁸ respects from that now under consideration, but, when these cases are read with some of our more recent decisions as to the mode of enforcing the liability of stockholders in our own corporations, it becomes at once apparent that they apply to the statute in question: *First Nat. Bank v. Dillingham*, 147 N. Y. 603; 49 Am. St. Rep. 692.

The objection to this action does not rest upon the principle that the plaintiff is seeking to enforce a statute for the recovery of a penalty, since the liability is not penal in any international

sense, but arises upon the statute as an implied obligation which the defendant assumed when he purchased his stock: *Cochran v. Wiechers*, 119 N. Y. 399; *Flash v. Connecticut*, 109 U. S. 371; *Richmond v. Irons*, 121 U. S. 27. The case involves questions which open a broad field for investigation. It would take much time and labor to explore it thoroughly. It would, perhaps, be impossible, to state the principle upon which the decision should rest without apparently coming in conflict with some of the numerous cases on the subject at some point. The great weight of authority, as will be seen, is against the right to maintain such an action. Sometimes the decision is put upon one ground and sometimes upon another, but it is to be noticed that the party seeking to enforce such a statute in a foreign jurisdiction has been quite uniformly defeated. The statute in question, while creating a certain liability on the part of a stockholder to a creditor of a corporation, at the same time gives to the former certain rights as against his fellow stockholders for contribution. It should be administered in such a way as to secure the rights of all in the same action. This is the interpretation which we have given to our own statutes enacted for a similar purpose. It is clear that this cannot be done in this action, since the theory of the plaintiff is, that the defendant is liable in successive actions at law by creditors, suing separately, until he has paid a sum equal to his stock, and then he must resort to some other jurisdiction for contribution. This would be most unjust and oppressive, and it is safe to say that no well-considered case can be found that sanctions such a principle. ²⁹ While this is not an action for a penalty, yet we think that it belongs to a class of cases in which there is no obligation, under any well-recognized principle of the law of comity, to enforce a claim founded upon such a statute. Moreover, the right asserted and the remedy provided are of such nature that they cannot be given any practical effect here without injustice to our own citizens. We are virtually asked to ignore our own rules of construction and methods of procedure in order to compel the defendant to pay to foreign creditors a sum equal to his holdings of stock, without any power to inquire into the necessity for it by an accounting, or to secure to him any recourse against others equally liable. When the courts of this state are asked to administer the statutes of Kansas, and we can see that the case is surrounded by such complications, and the circumstances are such, that it cannot be done without injustice to our own citizens, or that it will be impossible to do full and complete

justice to all the parties in interest, it is reasonable and just to decline to administer them at all.

The judgment of the general and special terms should be reversed, with costs in all courts, and the demurrer sustained, with leave to the plaintiff to amend the complaint on payment of costs.

All concur.

Judgment accordingly.

CONSTITUTIONS—SELF-EXECUTING PROVISIONS.—A provision of a state constitution must be regarded as self-executing, if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action: *Willis v. Mabon*, 48 Minn. 140; 31 Am. St. Rep. 626.

CORPORATIONS—FOREIGN—JURISDICTION OVER.—If a foreign corporation is allowed to do business and maintain suits in this state, justice requires that we should here enforce its liabilities existing in favor of our citizens: *Guilford v. Western Union Tel. Co.*, 59 Minn. 332; 50 Am. St. Rep. 407.

CORPORATIONS—FOREIGN—ENFORCING LIABILITY OF STOCKHOLDERS.—A stockholder in a corporation organized under the laws of another state contracts with reference to all the laws of that state which affect its organization or enter into its constitution: *First Nat. Bank v. Gustin etc. Min. Co.*, 42 Minn. 327; 18 Am. St. Rep. 510. The creditor of a corporation which was established in New York under the statute of that state, which provides that stockholders and officers shall be personally liable as a penalty in certain contingencies, cannot maintain his action in Massachusetts to enforce his claim personally against a stockholder or officer of the corporation: *Halsey v. McLean*, 12 Allen, 439; 90 Am. Dec. 157. See, also, *First Nat. Bank v. Price*, 33 Md. 487; 3 Am. Rep. 204.

STATUTES—EXTRATERRITORIAL OPERATION OF.—The laws of a state can have no force *proprio vigore* outside of that state: *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194, and note. See, also, the cases collected in the note to *Forepaugh v. Delaware etc. R. R. Co.*, 15 Am. St. Rep. 679.

SPRINGFIELD FIRE AND MARINE INSURANCE Co. v. KEESVILLE.

[148 NEW YORK, 46.]

MUNICIPAL CORPORATIONS.—DISTINCTION BETWEEN THE PUBLIC AND THE PRIVATE POWERS CONFERRED upon municipal corporations is generally clear enough. If the power has relation to public purposes and is for the public good, it is classed as governmental. When it relates to the accomplishment of private corporate purposes in which the public is concerned but indirectly, it is private in its nature; and a municipality in respect to its exercise is regarded as a legal individual. With respect to the exercise of its governmental powers, a municipality is exempt from liability in an action by a private person. It is otherwise with the exercise of powers of a private and nongovernmental character.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE MANAGEMENT OF WATERWORKS.—A municipality in assuming the duty of providing and maintaining a system of waterworks to furnish water for private and domestic purposes, and also for public purposes, such as extinguishing fires, acts for the benefit of the public, and, therefore, in its governmental capacity, though it receives compensation for the water furnished its citizens and property holders. It therefore is not answerable in an action to recover compensation for damages alleged to have been suffered from the loss of plaintiff's property by fire through the inadequacy of the water supply, attributable to the negligence or mismanagement of the municipal authorities having charge of the waterworks.

A MUNICIPAL CORPORATION DOES NOT SUSTAIN IMPLIED CONTRACTUAL RELATIONS to the public within its boundaries with respect to the construction of public waterworks, so as to be responsible for a failure to exercise reasonable care and diligence in the management of such works.

MUNICIPAL CORPORATIONS—WATERWORKS.—The fact that water rents are paid by the inhabitants of a municipality does not show that in the maintenance of its system of waterworks it act in a private capacity, and is therefore answerable for negligence in their management.

Action against the defendant, a municipal corporation, to recover damages alleged to have been suffered by the destruction of certain property by fire through the inadequacy of the supply of water. The defendant, it was alleged, was organized under certain provisions of the laws of New York; and the plaintiff, a corporation, was engaged in the business of fire insurance. The defendant was authorized to maintain, and did maintain, a system of waterworks and a fire department and the appliances thereof, all of which were maintained by taxes levied upon taxable inhabitants, including the plaintiff, and by water rents paid by the inhabitants for the use of water. The plaintiff insured certain property for a less premium than it would have insured property outside the water limits and fire protection maintained by the defendant. The plaintiff, it was claimed, at the time of the fire, "had wrongfully and negligently allowed and caused its said waterworks, pumps, pipes, and fire appliances to become and be out of repair, broken, weakened, stopped with mud and other foreign objects, and unfit for use, to such an extent that water could not be put or thrown upon said dwelling-house to extinguish the fire therein; that when the hose was laid and opened, and ready to throw upon the fire in said house, said fire was very slight, and had done very little damage; that if said fire appliances and waterworks had been in proper working order, said fire would and could have been extinguished without damaging said house to exceed three hundred dollars; that at the time of said fire, and for several years previous thereto, the defendant, under and in pursuance of the powers granted it by the laws of the state of

New York, had assumed to maintain waterworks and fire appliances and a fire department, for the purpose, among other things, of protecting the property of the inhabitants of defendant against loss by fire, of all of which plaintiff and its assignor had notice, and, in reliance thereon, said assignor paid taxes to defendant to maintain the same, and plaintiff paid taxes to defendant for said purpose, and insured property at reduced rates as aforesaid; that plaintiff's aforesaid loss of four thousand four hundred and fifty dollars was, to the extent of at least four thousand one hundred and fifty dollars, caused solely by the negligence and wrongful and unlawful acts of the defendant in failing to keep its waterworks and fire appliances in proper working order, and in failing to employ competent men to manage and care for the same." The plaintiff also alleged the assignment to it by the property owner of all claims for damages against the defendant by reason of the fire. A demurrer interposed to the complaint was sustained by the special term, but, upon appeal, the general term reversed the decision of the special term, and overruled the defendant's demurrer, and thereupon an appeal was taken from the general term to the court of appeals.

Chester B. McLaughlin, for the appellant.

A. W. Boynton, for the respondent.

⁵¹ GRAY, J. The learned justice who spoke for the general term, in a very elaborate and interesting opinion, proceeded, very correctly, as I think, upon the assumption that the negligence charged against the defendant in the complaint related entirely to its waterworks system. In the view which we take of the matter, it is of comparatively little consequence whether the plaintiff bases its right of action upon negligence with respect to the fire department as such or to the water department as such. But the fair reading of the complaint undoubtedly warrants the assumption of the learned justice at general term.

If I correctly apprehend the reasoning, which led the general term to the conclusion that there was a municipal liability upon an admission of the facts set forth in the complaint, it rests in the main upon two theories. In the first place, it is held that by the voluntary assumption on the part of the defendant of the power conferred by statute to construct and maintain waterworks, it became responsible for the proper exercise of such power, and that such responsibility is necessarily demanded in the interest of an efficient public service, and the inhabitants, who have contributed to the maintenance of such a public work, have a right

to hold the defendant to the exercise of reasonable care and diligence and to a liability for a failure to do so. In the next place, it is held, while not deeming that the defendant had engaged in a private corporate business, conducted for its own benefit and not for the general public, nevertheless, that the defendant having agreed to erect and take charge of the public work and enterprise for the public within its boundaries, if there is a failure to exercise reasonable care and diligence in maintaining it, there has been a breach of an implied contract, for which, if injury results, an action will lie. Holding these ⁵³ views, the learned general term felt compelled, because of the admission by the defendant, through its demurrer, of the allegations of wrongful and neglectful conduct in relation to the maintenance of its waterworks, to hold that the plaintiff made out a good cause of action.

The proposition that such a liability rests upon a municipal corporation, as is asserted here, is somewhat startling, and I think the learned general term justices have misapprehended the nature of the responsibility which devolved upon the defendant in connection with its maintenance of a waterworks system, as well as the character of the power which it was authorized to exercise in relation thereto. I might remark, in the same spirit of criticism which was assumed by the learned justice at general term, that while the efficiency of the public service would be promoted by holding municipal corporations to the exercise of reasonable care and diligence in the performance of municipal duties, and to a liability for injury resulting from a failure in such exercise, the application of that doctrine to such a case as this might, and probably would, be highly disastrous to municipal governments. A little reflection will show that a multitude of actions would be encouraged, by fire insurance companies, as by individuals, and that cases have arisen, and may still arise, where an extensive conflagration might bankrupt the municipality, if it could be rendered liable for the damages or losses sustained.

The distinction between the public and private powers conferred upon municipal corporations, although the line of demarcation at times may be difficult to ascertain, is generally clear enough. It has been frequently the subject of judicial discussion, and, among the numerous cases, it is sufficient to refer to *Bailey v. Mayor*, 3 Hill, 531; 38 Am. Dec. 669, *Lloyd v. Mayor*, 5 N. Y. 369, 55 Am. Dec. 347, and *Maxmilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468. The opinion in *Darlington v. Mayor*, 31 N. Y. 164, 88 Am. Dec. 248, is also instructive upon the subject. When we

find that the power conferred has relation to public purposes and is for the public good, it is to be classified as governmental in ⁵³ its nature, and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature, and the municipal corporation, in respect to its exercise, is regarded as a legal individual. In the former case, the corporation is exempt from all liability, whether for nonuser or misuser; while in the latter case, it may be held to that degree of responsibility which would attach to an ordinary private corporation. Then, the investiture of municipal corporations by the legislature with administrative powers may be of two kinds. It may confer powers and enjoin their performance upon the corporation as a duty; or it may create new powers to be exercised as governmental adjuncts, and make their assumption optional with the corporation. Where a duty specifically enjoined upon the corporation as such has been wholly neglected by its agents, and an injury to an individual arises in consequence of the neglect, the corporation will be held responsible: *Mayor v. Furze*, 3 Hill, 612, 619. So in *McCarthy v. Syracuse*, 46 N. Y. 194, it was held that where a duty of a ministerial character is imposed by law upon the corporation, a negligent omission to perform that duty creates a liability for damages sustained. Such responsibility, however, would not attach to the corporation, where it has voluntarily assumed powers, authorized by the legislature under some general provision respecting municipalities throughout the state and permissive in their nature; and at this point I touch one of the theories upon which the general term decision seems to rest. In such a case—and I speak, of course, of legislative acts which are general in their nature and scope—the assumption by the municipal corporation is of a further function of self, or local, government and such a power is discretionary in its exercise, and carries with it no consequent liability for nonuser or misuser. In the legislature reside the power and force of government, confided to it by the people under constitutional restrictions. In the creation of municipal ⁵⁴ corporations subordinate commonwealths are made, upon which certain limited and prescribed political powers are conferred, and which enjoy the benefits of local self-government: *People v. Detroit*, 28 Mich. 228; 15 Am. Rep. 202. When, in addition to those general powers which are prescribed upon the creation of a municipal corporation, general statutes permit the assumption of further powers as a means of benefiting the portion of the public in the particular locality,

they invest the corporation availing itself of the permission with just so much more governmental power. Just as the general powers deposited with the various municipalities are exercised by them in a quasi sovereign capacity, so would any added powers designed for the general public good, though optional with the corporation as to their assumption, and in their exercise and performance local, be exercised. They are not special, as being designed for, and granted to, a particular municipality; for they are applicable to every part of the body politic where municipal government exists. Such powers, in legal contemplation, appertain to the municipal corporation as such, and may be adopted as a part of the governmental system.

The acts, under which the defendant was authorized to construct and maintain a system of waterworks, constitute a general law applicable to all incorporated villages in the state. They impose no duty, and, when availed of, the task undertaken is discretionary in its character. The grant of power must be regarded as exclusively for public purposes, and as belonging to the municipal corporation, when assumed, in its public, political, or municipal character. In *Bailey v. Mayor*, 3 Hill, 531, 38 Am. Dec. 669, to which reference is made in the opinion below, the city of New York, at a very early day, was authorized by special legislation to engage in the work of supplying its citizens with water, and to acquire lands and water rights for the purpose, and, as it is clear from the reading of the opinion of Chief Justice Nelson, the city was regarded in the light of any other private company, because of the special franchises conferred. Assuming that we could regard ⁵⁵ the doctrine of that case as authoritative at the present day, as to which there has been, and might be, some question (see *Darlington v. Mayor etc. of New York*, 31 N. Y. 164, 88 Am. Dec. 248), the decision is inapplicable to the present case. In *Hunt v. Mayor*, 109 N. Y. 134, the case turned upon the performance by the city of the duty cast upon it to keep its streets in a safe condition for travel. In *Cain v. Syracuse*, 95 N. Y. 83, the discussion was as to the nature of the duty imposed upon the defendant by the power in its charter to pass ordinances, among other things, for the razing of buildings which had become dangerous by reason of fire. The failure of the common council to pass a resolution in respect to the building in question was not deemed to be a neglect of a duty. It was a discretionary matter. Nothing was decided in that case, which controls the decision of the present case, or which affects the discussion materially.

Nor can we assent to the view that the defendant sustains such

an implied contractual relation to the public within its boundaries, with respect to the construction of this public work, as to be responsible for a failure to exercise reasonable care and diligence in respect to its maintenance. If the views which I have, somewhat briefly, expressed are correct, the defendant exercised a function which, like all governmental functions, was purely discretionary. What it undertook to do, when availing itself of the privilege of the general act, was to provide for the local convenience of its inhabitants.

The industry of the defendant's counsel has collated a great number of decisions by the courts of other states, which indicate a very general view that the powers conferred by the law of the state upon its municipal corporations to establish waterworks and fire departments are, in their nature, legislative and governmental. From them, I may select one or two. In *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533, it was said by the court: "As a part of the governmental machinery of the state, municipal corporations legislate and provide for the customary local convenience of the people, and, in exercising these discretionary functions, the corporations are not called upon to ⁵⁶ respond in damages to individuals, either for omissions to act or in the mode of exercising the powers conferred on them for public purposes and to be exercised at discretion for the public good. For injuries arising from the corporation's failure to exercise its public, legislative, and police powers, and for the manner of executing those powers, there is no remedy against the municipality, nor can an action be maintained for damages resulting from the failure of its officers to discharge properly and efficiently their official duties."

In *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90, it was said by the court: "The protection of all buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger; and cities and towns are, therefore, authorized by general laws to provide and maintain fire engines, etc., to supply water for the extinguishment of fires. The city did not, by accepting the statute and building its waterworks under it, enter into any contract with, or assume any liability to, the owners of property to furnish means or water for the extinguishment of fires upon which an action can be maintained."

In *Maximilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468, the reasoning of the opinion permits a clear inference that this defendant did not, by accepting the provisions of the statutes, as-

sume a duty of the kind which arises from the grant of a special power. Judge Folger uses this language, in his discussion of the two kinds of duties which are imposed upon a municipal corporation: "The former [referring to the case of a grant of a special power] is not held by the municipality as one of the political divisions of the state." Again he says: "Where the power is intrusted to it as one of the political divisions of the state, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents": Citing *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302.

This defendant, precisely, is intrusted with the power to maintain its waterworks because it is one of the political ⁵⁷ subdivisions of the state to which the general act has reference in its general grant of power or privilege.

Nor does the fact that water rents are paid by the inhabitants of the defendant affect the question. This fact is made use of to show the private corporate character of the waterworks system; and the suggestion is, that profit or benefits accrue to the defendant, whereby the corporate undertaking is affected with a private interest. But that is an incorrect notion. The imposition of water rents is but a mode of taxation and a part of the general scheme for the purpose of raising revenue with which to carry on the work of government. If profits accrue over the expense of the maintenance of the system, they go to benefit the public by lessening the general burden of taxation.

The fallacy, as it seems to me, which affects the argument that the municipal corporation can be made liable for the nonuser or misuser of its power, consists in that it fails to appreciate the true nature of the function which the corporation performs. It adds to its political machinery for the purpose of benefiting and of protecting its inhabitants. There is nothing connected with the work which is not of a governmental and public nature. It is in no sense a private business, and the authority to construct the works was given to it by the legislature, not at its own particular instance or application, but because it was one of the political subdivisions of the state and, as such, was entitled to exercise it. How could it justly be said that the maintenance of the waterworks system, any more than of the fire department, was a matter of private corporate interest? Is it not for all the inhabitants and for their good and protection? No interest was designed to be subserved, other than that of adding to the powers of a

community carrying on a local government. If that is true, the alternative is, that being for public purposes and for the general welfare and protection, the defendant assumed a governmental function and comes under the sanction of the rule which exempts government from suits by citizens.

⁵⁸ Further elaboration of the subject is quite possible; but the views expressed seem sufficient to justify the conclusion that the determination reached by the general term was erroneous.

The order and judgment appealed from should be reversed, and the judgment entered at the special term should be affirmed, with costs.

All concur (Bartlett, J., upon grounds stated in the opinion, and also upon the further ground that this court decided the principle here involved in *Hughes v. County of Monroe*, 147 N. Y. 49).

Ordered accordingly.

MUNICIPAL CORPORATION—DISTINCTION BETWEEN PUBLIC AND PRIVATE POWERS.—Two kinds of duties are imposed upon a municipal corporation—one for governmental purposes discharged by the corporation as one of the political subdivisions of the state; the other arising from the grant of some special power in the exercise of which the corporation acts as a legal individual: *O'Rourke v. Sioux Falls*, 4 S. Dak. 47; 46 Am. St. Rep. 760, and note. This question is further discussed in the extended note to *Goddard v. Inhabitants of Harpawell*, 30 Am. St. Rep. 377.

MUNICIPAL CORPORATIONS.—Their liability for injury caused by the negligent management of their waterworks is fully discussed in the extended note to *Goddard v. Harpawell*, 30 Am. St. Rep. 399.

MORRIS v. NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY.

[148 NEW YORK, 88.]

WITNESS—WAIVER OF RIGHT TO INSIST UPON SECRECY.—If two physicians are called upon to examine a person in their professional capacity under such circumstances that he has a right to insist that the knowledge gained by them shall not be disclosed, and he calls one of them to testify in his behalf at a subsequent trial, he thereby waives the right to insist upon secrecy, and the other may, therefore, be called and examined as a witness by his antagonist.

WITNESSES.—A WAIVER OF THE PRIVILEGE that a physician shall not disclose facts ascertained by him while attending his patient takes place when the physician is called as a witness by the patient, and the waiver, once made, becomes irrevocable, and cannot be retracted.

Action to recover for damages alleged to have been caused by the negligence of the defendant. A judgment entered in favor

of the plaintiff in the trial court was affirmed on appeal to the general term.

William Vanamee, for the appellant.

William F. O'Neill, for the respondent.

⁸⁹ O'BRIEN, J. The responsibility of the defendant for the personal injuries for which the plaintiff recovered in this case depended upon questions of fact. The questions with respect to the defendant's negligence and the plaintiff's negligence contributing to the injury, as well as the nature and character of the contract under which the plaintiff was in the defendant's cars as a passenger, were all properly submitted by the learned trial judge to the jury.

The only questions involved in this appeal arise upon exceptions taken by the defendant's counsel to the exclusion of certain evidence, offered by him, bearing upon the extent and nature of the plaintiff's injuries, and, hence, upon the question of damages. It appears from the record that, about the time of the commencement of this action, two physicians attended the plaintiff for the purpose of making an examination of her case, and ascertaining the extent and nature of the ⁹⁰ injuries which she received in the accident when in the defendant's cars. The plaintiff, herself, called one of them as a witness in her behalf, at the trial, who gave important testimony with respect to the extent and character of the injury. His testimony tended to show that the plaintiff was affected with some spinal trouble as the result of the accident. This opinion was based mainly upon the result of the personal examination of the plaintiff's person which he had made upon the occasion referred to with his associate physician. It appeared that both attended together, and, after removing the plaintiff's clothing, made an examination of her person with special reference to the existence of some disease of the spine as the result of the accident. But the plaintiff did not call the other physician, and, before the close of the proofs, the defendant called him and propounded to him certain questions, intended to elicit his opinion as to the nature and extent of the plaintiff's injuries from his observation and examination of her person on the occasion referred to. These questions were all objected to as inadmissible under section 834 of the code. The court sustained the objection and the defendant excepted. These exceptions fairly raise the question as to the defendant's right to the testimony of the witness. The learned counsel for the defendant contends that it should have been admitted, for the reason that

the physician did not attend in any professional capacity, but for the purpose of qualifying himself as a witness, and that the examination was not for the purpose of enabling him to prescribe for the plaintiff. It is quite true that, before this testimony could properly be excluded, it must appear that the relation of patient and physician existed between the plaintiff and the witness, and we think that it appears quite clearly in the record that the witness went to the plaintiff's house, on the occasion when he made the examination, as a consulting physician, and that all the information that he acquired with reference to her condition was in that capacity. Moreover, it appears that the witness had been, until a short time before, the plaintiff's regular physician, and that she consulted him with reference to the injury in question. ⁹¹ There can be no doubt upon the facts that both physicians attended the plaintiff upon the occasion of the examination as her physicians, in order to prescribe, or at least to diagnose the case, and to give such opinion and advice as the nature of the injury required.

It is also urged that the questions put to the witness and excluded were admissible for the purpose of impeaching the other physician who had been sworn by the plaintiff. Without reference to the answer which the plaintiff's counsel makes to this point, namely, that this method of introducing the testimony would be a plain evasion of the statute, it is quite sufficient to say that the questions were not framed in such a way as to permit an answer for the purpose of impeachment. In order to present such a point, the record must show that some specific question was put to Dr. Payne, the physician sworn by the plaintiff, as to some act or admission, at the consultation or afterward, by him, contradictory of, or inconsistent with, his testimony at the trial which was answered in the negative, or at least not admitted, and that the same question was propounded to Dr. De Kay, the physician called by the defendant and the impeaching witness. An examination of the record shows that this rule was not complied with, and the testimony was not, therefore, admissible upon any ground now urged by the defendant. The only ground upon which the exceptions can be sustained is, that the plaintiff, by requiring one of the physicians as her own witness to disclose the facts and results of the examination and consultation and make public what took place between the plaintiff and her two physicians, has waived the privilege and can no longer impose silence on the other. It is a case where two physicians attended the patient, both holding professional relations to her, and in a suit in which

the nature and extent of her injuries (as then appearing) is the important inquiry, she calls one of them and the defendant the other. She has the right, unquestionably, to avail herself of the testimony of the one which she thinks will be the most favorable for her case, but the question is, whether she can at the same time deprive the ²² defendant of the benefit of the testimony of the other. If she elects to waive her privilege as to one, and requires him to make the consultation public and to disclose the information, does she not necessarily waive it as to the other? If this is not so, the statute would seem to be a serious obstacle in such cases to the attainment of truth and justice. The proposition that a patient who has retained or employed two or more professional men, under such circumstances that none of them are permitted to disclose the information thus obtained, except with his consent, can call one of them as a witness to disclose what took place when all were present, and at the same time enjoin silence on all the rest, appears to be so unfair and unreasonable that it challenges investigation before accepting it as a rule of law. The statute provides that the physician may be called as a witness when the patient expressly waives the privilege. It is held that such waiver may be made on the part of the patient by calling him as a witness: *In re Coleman*, 111 N. Y. 220; *Rosseau v. Bleau*, 131 N. Y. 177; 27 Am. St. Rep. 578; *Alberti v. New York etc. R. R. Co.*, 118 N. Y. 77.

In this case, it was the privilege of the plaintiff to insist that both physicians should remain silent as to all information they obtained at the consultation, but she waived this privilege when she called Dr. Payne as a witness and required him to disclose it. The plaintiff could not sever her privilege and waive it in part and retain it in part. If she waived it at all, it then ceased to exist, not partially, but entirely. The testimony of Dr. Payne having been given in her behalf, every reason for excluding that of his associate ceased. The whole question turns upon the legal consequences of the plaintiff's act in calling one of the physicians as a witness. She then completely uncovered and made public what before was private and confidential. It amounted to a consent on her part that all who were present at the interview might speak freely as to what took place. The seal of confidence was removed entirely, not merely broken into two parts and one part removed and the other retained.

I have not been able to find any controlling authority in ²³ this court in support of the idea that the waiver applied only to the witness that the plaintiff called. On the contrary, the prin-

ciple decided in *McKinney v. Grand Street etc. R. R. Co.*, 104 N. Y. 352, supports the views herein expressed. That was a case where the plaintiff called and examined her own physician as to her physical condition on the first trial. On a subsequent trial, he was called by the defendant, and the same objection was made to his testimony that was made in the case at bar. This court held that it was admissible, on the ground that the statutory prohibition having once been expressly waived by the patient, and the waiver acted upon, it could not be recalled, but the information was open to the consideration of the entire public, and the patient was no longer privileged to forbid its repetition. The reasoning of Chief Judge Ruger in support of these propositions in that case is applicable here. It furnishes a safe basis for holding that when a waiver is once made it is general and not special, and its effect cannot properly be limited to a particular purpose or a particular person.

After the information has once been made public, no further injury can be inflicted upon such rights and interests of the patient as the statute was intended to protect, by its repetition at another time or by another person.

In *Marx v. Manhattan Ry. Co.*, 56 Hun, 575, it was held that the plaintiff, by testifying to what had taken place between himself and his physician, had waived his right to object to the examination of the latter when called as a witness for the defendant.

In *Trenor v. Manhattan Ry. Co.*, 28 Abb. N. C. 47, it was held that the plaintiff, by simply disclosing, as a witness, his physical condition in consequence of the defendant's acts, waived the right to object to his physician's testimony when called by the defendant. I have not been able to find that either of these cases came to this court. The one last cited certainly pushes the principle too far. The other may also be open to some doubt, and both are cited, not as controlling authority, but in order to show the views that very able ⁹⁴ jurists have entertained with respect to the construction of the statute.

In *Hope v. Troy etc. R. R. Co.*, 40 Hun, 438, it was held that the plaintiff, by waiving her right to object in respect to one physician, whom she had called as a witness in her own behalf, did not thereby waive her objection to the examination of other physicians who had attended her at other times when called by the defendant. This case was affirmed in this court without an opinion (*Hope v. Troy etc. R. R. Co.*, 110 N. Y. 643) by a bare majority. It, however, presented a very different question from the

one involved in the case at bar. The question here arises with respect to a single consultation or interview between the plaintiff and the two physicians, and not to separate and distinct transactions with as many different physicians. In the latter case, there is good reason for holding that the waiver of the privilege applies only to such consultations or transactions as the witness who is required by the patient to make the disclosure has participated in. That rule is broad enough for this case.

The case of *Record v. Saratoga Springs*, 46 Hun, 448, was undoubtedly quite similar, if not identical in its facts, with the case at bar. The testimony of the associate physician was excluded, and the general term affirmed the decision. The case was decided by two judges, and it is evident from the opinion of one, at least, that the decision turned upon the broad prohibitory words of the statute, and not upon the provision which permits the patient to waive the objection. These words are certainly broad enough to prohibit the testimony of every physician who has obtained information in a professional capacity, but the statute does not attempt to define what shall in any case constitute a waiver. That is left to be determined by the courts with reference to the facts of every case, upon general principles of reason and justice.

While the case last cited subsequently came to the second division of this court, it was affirmed without an opinion: *Record v. Saratoga Springs*, 120 N. Y. 646. In this condition of the authorities, we must regard the question as still open. We think that a construction ⁹⁵ of the statute which permits a patient, who has been attended by two physicians at the same examination or consultation, to call one of them as a witness to prove what took place or what he learned, thus making public the whole interview, and still retain the right to object to the other, is unreasonable and unjust, and should not be followed. The waiver is complete as to that consultation when one of them is used as a witness. The considerations and reasons upon which the statute was founded no longer exist when full disclosure is made by either with the consent of the patient, and every party to the transaction thus disclosed is relieved from any injunction of secrecy. The patient cannot limit the scope or effect of the waiver when made, any more than she can recall it. When the plaintiff in this case called one of the physicians, who disclosed the whole consultation, the law determined the legal effect of that act, irrespective of any mental reservations on her part. Upon every principle of reason and justice, this act amounted to a waiver of

the right to object to the testimony of the other physician, when called by the defendant, as to the same transaction.

For these reasons, we think the testimony excluded was admissible, and that the judgment must be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

WITNESSES—WAIVER OF RIGHT TO SECRECY.—Where, in an action for malpractice, the plaintiff testifies to an occurrence in his sickroom, the physician himself, or one present as a consulting physician, may testify as to the occurrence. The plaintiff, by opening the matter to investigation, removes the obligation of secrecy on the defendant's part: *Lane v. Boicourt*, 128 Ind. 420; 25 Am. St. Rep. 442. See, also, the extended note to *Thompson v. Ish*, 17 Am. St. Rep. 566, 570.

EVANS v. KEYSTONE GAS COMPANY.

[148 New York, 112.]

A GAS COMPANY, though it has the right to use the public streets, is bound to conduct its operations so as not to inflict injury upon neighboring property.

IF A GAS COMPANY PERMITS ITS PIPES in the public streets to be out of repair, so that gas escaping therefrom kills shade trees standing in such streets, the owner thereof is entitled to recover compensation from the gas company.

EVIDENCE THAT TREES OTHER THAN THOSE for the killing of which plaintiff is seeking to recover from a gas company were also injured by gas escaping from its pipes is admissible, because it tends to show that the same causes which killed plaintiff's trees similarly affected others in the same neighborhood and exposed to the same peril.

THE MEASURE OF DAMAGES RECOVERABLE FOR THE DESTRUCTION OF SHADE TREES on the plaintiff's premises is the difference between the value of such premises before and after such destruction.

Action to recover compensation for damages alleged to have been suffered by the plaintiff through the destruction of shade trees in front of his premises, by the escaping of gas from pipes belonging to the defendant corporation, which was engaged in the business of distributing and selling gas in the village of Olean. A judgment was entered in the trial court in favor of the plaintiff, and affirmed on appeal to the general term.

C. S. Cary, for the appellant.

Fred L. Eaton, for the respondents.

¹¹⁴ **GRAY, J.** This action was brought to recover damages of the defendant for the injury caused to shade trees belonging to

the plaintiff, by the escape of natural gas from a main, or pipe, laid along the street bounding his premises. The negligence charged is, that the gas main was so carelessly laid, constructed, and maintained as to permit the escape of the gas in large quantities, and to cause the death of the trees. Upon the trial, it appeared that there were three large maple trees in front of the premises, of a diameter ranging from twelve to sixteen inches, which shaded the west end of the plaintiff's house and plot.

Plaintiff testified that, after he commenced to reside upon the premises in question, the defendant constructed this new line, for the purpose of conveying natural gas, and that, thereafter, there was a perceptible and constant escape of gas in large quantities, until the pipes were taken up and calked. He described the decay and death of his grass and trees in successive years, during the time, and how, after the calking of the gas line, he reset trees which lived and grew. He also testified to the effect of natural gas upon the surrounding earth in depriving it of moisture. Other witnesses corroborated him with respect to the leakage of gas, the death of trees and vegetation during the time, and the dry condition of the soil near the places where the leakages were perceptible. As against this evidence, the defendant sought to show that the leaks were insignificant; that the dryness of the earth about them was confined to a small area, and that the plaintiff's branch pipe and lamp-post were out of repair and permitted ¹¹⁵ the escape of gas. The defendant gave evidence that its line was properly constructed and kept in repair, and that it had not been negligent in connection with the operation of its business. Without commenting at length upon the evidence, we feel constrained to hold that whatever the doubt which arises in the mind, as to the certainty of the loss of the shade trees being due to the leakage of gas from the defendant's main, there was enough in the facts and circumstances of the case to support the verdict which the jury rendered. It may not be altogether satisfactory; but we cannot say, as matter of law, that the injury to the plaintiff's place was not due to the causes described. The evidence was conflicting upon that question, as it was upon the condition of defendant's pipes, and permitted of opposing inferences by the jury. Their verdict cannot be said to rest upon mere surmise; for they had facts testified to, which, if they believed, would account for plaintiff's loss of his trees as he charged it to be. If we could see that the verdict could only have been reached by conjecture, we should not hesitate to reverse the judgment, upon the exception of defend-

ant to the refusal to direct a verdict in its favor. The evidence rises to a higher level than that of speculation. The coincidence of the decay and death of vegetation with the existence of the leakage of a large amount of gas, after the laying of the new main and until its recalking, and the fact of a healthful growth after the recalking could be regarded by the jury, in view of all the evidence, as leading to the conclusion that the effect of the natural gas escaping in the earth and in the atmosphere was to cause the occurrences complained of.

Doubtless, the defendant was lawfully in the street; but it was bound to use its rights and to conduct its operations so as not to inflict injury upon neighboring property. If we admit the possibility of an inference from the evidence that the injury to plaintiff's property was from the causes alleged, there is no difficulty in sustaining the recovery upon the principle of law above alluded to.

The appellant says that errors were committed upon the ¹¹⁶ trial, for which the judgment should be reversed. The plaintiff was permitted to testify as to the condition of trees upon the street beyond his place, after the construction of the defendant's gas line. The objection, now insisted upon, was after the answer of the witness and went to the materiality of the evidence; but, overlooking the question of practice, we have no doubt of the admissibility of the evidence. The issue turned upon the question of whether the escaping gas would account for the injury to plaintiff's trees, and any evidence showing, or tending to show, that trees in the immediate vicinity were similarly and simultaneously affected was competent. The two points for the jury to be convinced upon were, Was natural gas carelessly suffered to escape from the gas main? and, Was it the procuring cause of the destruction of vitality in vegetation? Whatever testimony bore upon these questions was admissible, and tended to elucidate the matter for consideration.

The witness was asked to state the value of the trees in question. The objection was as to the competency of the witness to testify on that subject and as to the materiality of the evidence "at this stage of the case." The argument now is, that the evidence was incompetent on the question of the damage. That is true, and the rule in such a case as this is the difference between the value of the land before and after the injury. This rule was lately examined in the light of the authorities by the second division of this court, in *Dwight v. Elmira etc. R. R. Co.*, 132 N. Y. 199, and was there approved of. The court in that case held it

applicable to the case of a loss of shade or of fruit trees, and held the principle of recovery to be the damage to the realty, if any, occasioned by the removal of the trees. But the objection argued was not based upon that ground; nor was it in the slightest degree suggested. The witness, with a remarkable appreciation of the rule which governed his case, did not, at first, answer as interrogated; but responded that he "would consider his place worth fifteen hundred dollars more than it is," obviously having in mind its value with the trees as they were. When ¹¹⁷ again requested to give the value of the trees, no objection was made, and then he answered responsively to the question. Subsequently, witnesses competent to speak upon the subject gave evidence as to the value of the plaintiff's lands before the decay or death of the trees, and as to its value upon the assumption of the trees being decayed or dead, thus conforming the case to the proper rule, and the trial judge also so charged.

We see no justification for interfering with the recovery, and the judgment of the general term should be affirmed, with costs.

All concur, except Haight, J., not sitting.

Judgment affirmed.

GAS COMPANIES—DUTY OF IN LAYING MAINS IN STREETS

A gas company having mains and pipes laid in the streets of a city owes a duty to the owners of realty therein to use reasonable and ordinary care in so planting its mains and pipes as to prevent the escape of gas therefrom in such quantities as to become dangerous to life or property: *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; 28 Am. St. Rep. 203, and note with the cases collected. See, also, the extended note to *Shepard v. Milwaukee Gas etc. Co.*, 70 Am. Dec. 488.

DAMAGES—DESTRUCTION OF TREES.—When forest trees grown to maturity, or nursery trees intended for marketing, are cut down or otherwise destroyed, the measure of damages is their value separated from the soil, but, even in the case of full-grown trees, their owner may recover damages to his land consisting of the difference in value of the land before and after their cutting or other destruction: *Dwight v. Elmira etc. R. R. Co.* 132 N. Y. 199; 28 Am. St. Rep. 563, and note.

BOGERT v. BLISS.

[148 NEW YORK, 194.]

A MORTGAGE CANNOT, AFTER PAYMENT, BE REISSUED so as to secure another loan, where the lender knows of such payment, though there is an oral agreement that the mortgage shall be assigned to him.

WHERE A MORTGAGE IS A LIEN MERELY, its payment necessarily discharges the lien and extinguishes the mortgage.

MORTGAGEE, REVIVING A SATISFIED MORTGAGE AS AGAINST.—A MORTGAGEE, taking his mortgage while a prior paid mortgage remains unsatisfied of record, cannot be compelled to occupy the position of a second mortgagee by proof of an oral agreement that the

first mortgage should remain in force for the purpose of securing a loan made after it has been discharged by payment.

THE STATUTE OF FRAUDS does not permit a mortgage to be created on land without a writing, and it therefore does not permit a mortgage which has been paid to be revived or reissued by subsequent oral agreement.

Action to foreclose a mortgage. The sale realized more moneys than were necessary to discharge the claim of the plaintiff, and the surplus was claimed by certain parties under the circumstances stated in the opinion of the court.

Abram I. Elkus and Edward C. James, for the appellant.

George Bliss, respondent, in person.

¹⁹⁷ ANDREWS, C. J. The controversy relates to the disposition of surplus moneys arising on a foreclosure of a mortgage. One Robert claims a prior lien thereon as assignee of a mortgage made by the defendant Striker to one Weil, dated May 15, 1891, payable June 18, 1891, for one thousand dollars, recorded May 18, 1891. The mortgage was paid at maturity by Striker, the mortgagor and owner of the equity of redemption, to Weil, the mortgagee, who on the same day executed and delivered to Striker a satisfaction of the mortgage, together with the bond, but the mortgage was then in the register's office, and for that reason was not delivered to Striker. The mortgage was paid in usual course, and at the time of the payment there was, so far as appears, no intention on the part of Striker, and no understanding between him and the mortgagee, that the mortgage should be kept alive. Subsequently, on July 2, 1891, Striker applied to Robert (a partner of Weil) for a loan of one thousand dollars, on the security of this extinguished mortgage, and the loan was made, Striker ¹⁹⁸ delivering to Robert at the time the bond and the satisfaction, and stating that Weil would assign the mortgage to him. The assignment was subsequently made, but not, as we infer, until after the mortgage executed to Bliss, the other claimant of the surplus. The Bliss mortgage was executed by Striker to Bliss August 28, 1891, and covered the same premises embraced in the Weil mortgage, and was given to secure a loan of fifteen hundred dollars made by Bliss to Striker, but in form was an absolute deed, and was recorded November 11, 1891. Bliss, when he took his mortgage, made no search of the title, and had constructive notice only of the Weil mortgage. The question is, whether Robert or Bliss is entitled to the surplus moneys. We think the conclusion of the general term that Bliss is entitled to them is correct.

The Weil mortgage was extinguished by payment before Striker applied to Robert for a loan, and Robert had notice that the mortgage had been paid by Striker. Striker delivered to him the satisfaction executed by Weil, and there is no pretense that it did not represent the actual fact that Striker had paid the mortgage. What Striker undertook to do was to reissue the mortgage and the bond to secure another loan equal to the amount of the mortgage. Robert assented to this proposition, and made the loan on the faith of the proposed security. But there was no writing and no actual assignment of the mortgage until after Bliss had taken his mortgage. All that Robert had until the assignment was made was the possession of the bond and the satisfaction of the mortgage and the verbal agreement of Striker that the mortgage should be assigned.

In this state, a mortgage is a lien simply, and the general principle is well settled that on payment the lien is ipso facto discharged and the mortgage extinguished. There are many cases where, for purposes connected with the protection of the title or the enforcement of equities, what is in form a payment of a mortgage will be treated as a purchase, so as to preserve rights which might be jeopardized if the transaction was treated as a payment. But we know of no principle which permits ¹²⁰ a mortgagor who has paid his mortgage and taken a satisfaction, there being at the time no equitable reason for keeping it afoot, subsequently to resuscitate and reissue it as security for a new loan or transaction, and especially where the rights of third parties are in question. It would make no difference in our view whether the reissue of the mortgage was before or after new rights and interests had intervened. We do not speak of the position of a subsequent grantee or mortgagee having actual notice of the reissue of a satisfied mortgage before he takes his mortgage or deed. It is possible that the circumstances of the reissue may be such as to furnish ground for a court of equity to intervene and compel the execution of a new mortgage, to accomplish the real purpose of the parties, and notice of such circumstances to the subsequent grantee or mortgagee might, perhaps, under special conditions, subject his right to the prior equity. But the contention that a person, having at the time notice that a mortgage had been paid by the mortgagor in usual course, can, by a verbal arrangement between himself and the mortgagor, give the extinct mortgage vitality again as security for a new loan, so as to give it priority over a subsequent con-

veyance or mortgage is not justified by the authorities in this state.

The statute of frauds does not permit mortgages on land to be created without writing. The reissue of a dead mortgage, if effect is given to the transaction, is in substance the creation of a new mortgage. If this was permitted, it would furnish an easy way to evade the statute. The law wisely requires that instruments by which land is conveyed or mortgaged should be executed with solemn forms, and that their existence should be made known through a system of registry, so as to protect those subsequently dealing with the premises. Public policy requires that dealings with land should be certain, and that transactions affecting the title should be open, and that secret agreements should not be permitted by which third persons may be misled or deceived. It would be a convenient cloak for fraud if a mortgagor, having paid a mortgage, could retain it in his possession uncanceled of record ^{and} and reissue it at pleasure. A party taking from a mortgagor a reissued mortgage has notice which should put him upon inquiry, and he takes at the peril that it has in fact been paid.

In the present case, not only had the mortgage been paid before Robert made his loan, but he knew the fact from incontestable evidence. If he had received an actual assignment before Bliss had taken his mortgage, he would not, we think, have been entitled to preference. Upon the facts actually existing, he had merely an agreement for an assignment, which at most created an equity enforceable by equitable action, and meanwhile Bliss had obtained a legal mortgage, having no notice of the agreement. Bliss had constructive notice of the mortgage to Weil. His mortgage was subject to that encumbrance, unless the mortgage had been paid. But he did not take subject to an arrangement between Striker and Robert to revive the mortgage, the lien of which had been extinguished by payment. The case of *Mead v. York*, 6 N. Y. 449, 57 Am. Dec. 467, is a direct authority upon the question here presented. It was there held that a mortgage, after being once paid by the mortgagor, cannot be kept alive by a parol agreement as security for a new liability incurred for the mortgagor as against the latter's subsequent judgment creditors: See, also, *Cameron v. Irwin*, 5 Hill, 272; *Jones on Mortgages*, sec. 943, and cases cited.

The appellant refers to two cases upon which he particularly relies—*Kellogg v. Ames*, 41 N. Y. 259, and *Coles v. Appleby*, 87 N. Y. 114. *Kellogg v. Ames*, 41 N. Y. 259, was an action to

foreclose a mortgage which the plaintiff before maturity purchased from one Douglass, who held an assignment thereof from the mortgagees, regular in form, the plaintiff paying therefor the full amount thereof. Douglass was not a party to the instrument, and he represented to the plaintiff, at the time of the purchase by the latter, that the mortgage was a valid and subsisting security, and the plaintiff purchased in reliance thereon, and took an assignment from Douglass, which he placed on record. Douglass subsequently conveyed the premises to the ²⁰¹ defendant Ames. It appeared that Douglass, after the mortgage was executed, had taken a conveyance of the equity of redemption in the land from the mortgagors, subject to the mortgage which in the deed to him he covenanted to pay. It also appeared that he thereafter, and before the assignment to the plaintiff, had delivered to the mortgagees from time to time hardware, which by agreement they accepted in full payment of the mortgage. The case came up on findings of fact and law, and the court decided the case on the findings alone. There was no finding that when the plaintiff purchased the mortgage he knew of the payment, or that Douglass owned the land or had bound himself to pay the mortgage. It was found that when the mortgage was paid it was the intention that the mortgage should be kept alive. In pursuance of this intention, the mortgagees assigned and delivered the mortgage to Douglass. The majority of the court held that the plaintiff could enforce the mortgage, but two of the six judges who concurred in the opinion stated that if it had been found that the plaintiff when he took the assignment had notice of the payment by Douglass, and of his relation to the land, they would have been of the opinion that the plaintiff could not recover. So far as appears, all the judges who concurred in the judgment may have held the same view. It was held that the principle of estoppel applied upon the facts found. This case furnishes no precedent for the claim made in the present case. It will be observed that in that case the mortgage was assigned to the plaintiff before it became due according to its terms; that it was apparently a valid security in the hands of Douglass; that the payments thereon were not made by the mortgagor, but by Douglass, with the intention and understanding at the time that it was to be kept alive and not satisfied; that the plaintiff took the assignment in good faith and without notice, and placed his assignment on record before the conveyance by Douglass to Ames. In the present case, the dealing was between Striker, the mortgagor and owner of the premises, and Robert,

in respect to a past due mortgage which Robert knew had been ~~202~~ paid. Robert doubtless supposed it could be reissued by Striker, and made his loan in reliance on Striker's consent that Weil should assign the satisfied mortgage to him as security for the loan. It was not, in fact, assigned until after Bliss had taken his mortgage. In *Coles v. Appleby*, 87 N. Y. 114, the plaintiff claimed as assignee of a mortgage made by Benham, which one Beach procured to be assigned by the mortgagee to the plaintiff. Beach had purchased the equity of redemption in the land, and bound himself to pay the mortgage. He subsequently paid the amount to the mortgagee, but under the arrangement that the mortgage was not to be satisfied, but that it should be assigned. The court sustained the right of the plaintiff to enforce the mortgage, saying: "The right of the plaintiff to enforce the bond and mortgage does not rest upon a parol agreement to restore the mortgage, but upon the intention at the time to preserve it as a lien, shown by the assignment thereof, and the circumstances attending the transaction."

We find no case which sustains the claim that a mortgage paid by the mortgagor, not intended to be kept alive at the time of the payment, can be thereafter reissued by him to secure another loan, made by a party cognizant of the fact, so as to give it validity as against a subsequent purchaser or mortgagee.

The order of the general term should be affirmed.

All concur, except Vann, J., not sitting.

Order affirmed.

MORTGAGES.—Where a mortgage has been discharged by payment of the debt secured thereby, it cannot be revived by a reloan to the mortgagor, to the injury of one whose encumbrance is bona fide and intervenes: Extended note to *Young v. Shaner*, 5 Am. St. Rep. 705.

MORTGAGES—STATUTE OF FRAUDS.—A verbal agreement between two parties that land shall be held as security for future advances is within the statute of frauds and void: *Curle v. Eddy*, 24 Mo. 117; 66 Am. Dec. 699, and note; *McCue v. Smith*, 9 Minn. 252; 86 Am. Dec. 100.

MORTGAGES—PAYMENT—DISCHARGE OF LIEN.—The satisfaction of a mortgage extinguishes the encumbrance upon the title for the benefit of whoever was owner at the time: *Gale v. Mensing*, 20 Mo. 461; 64 Am. Dec. 197, and note; *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655, and note. The payment of the money due upon a mortgage by one who is not a volunteer or intermeddler operates as a discharge of the mortgage: *Heisler v. Aultman*, 56 Minn. 454; 45 Am. St. Rep. 486. See also, the note to *Young v. Shaner*, 5 Am. St. Rep. 703.

**FARMERS' LOAN AND TRUST COMPANY v. BANKERS'
AND MERCHANTS' TELEGRAPH COMPANY.**

[148 NEW YORK, 815.]

INSOLVENT CORPORATIONS—PREFERENCES.—The right of a creditor of an insolvent corporation in the hands of a receiver to have a preference over bondholders under a first mortgage is strictissimi juris.

INSOLVENT CORPORATIONS.—CLAIMS NOT REPRESENTED BY RECEIVER'S CERTIFICATES cannot take precedence over the rights of bondholders.

INSOLVENT CORPORATIONS—PRIORITIES OF BONDHOLDERS OVER OTHER CREDITORS.—One loaning money to an embarrassed corporation, subsequently adjudged to be insolvent, and taking security therefor, is not in a position which entitles him, in equity, to have a lien on the mortgaged property of the corporation or its proceeds, in preference to a bondholder under a mortgage existing when the loan was made; and it is immaterial for what purposes the loan was made, or how the money received therefrom was applied, provided the bondholders were not parties to the transaction.

AN ATTACHMENT UPON PROPERTY IN THE HANDS OF A RECEIVER of the court is a contempt of the court which has taken the property into its possession through its receiver, and cannot be regarded as creating a lien.

INJUNCTION.—ONE WHO VIOLATES AN INJUNCTION by issuing and levying an attachment will not be permitted to gain any advantage thereby.

Appeal from a decree confirming the report of a referee, and adjudging the claim of the appellant, the Third National Bank, not to be a prior claim against the property of the respondent, the Traders and Merchants' Telegraph Company. The corporation last named owned and operated lines of telegraph in New York, Massachusetts, Rhode Island, and elsewhere, and received fifty thousand dollars of the appellant, upon the representation of its officers that such money was needed to meet the current obligations, and it gave as collateral security three hundred thousand dollars of its bonds, secured by a trust mortgage on its lines. The note given for the money went to protest, and the bonds taken to secure it were afterward sold, but, after applying the proceeds of the sale, more than twenty-three thousand dollars of the indebtedness remained unpaid. A proceeding was commenced in the courts of New York by one of the judgment creditors, in which a receiver was appointed September 24, 1884, of all its property and effects. He was, by the order appointing him, authorized to continue the operation of the telegraph lines, and all persons were, by the same order, enjoined from interfering with him in the discharge of his duties. Receiver's certificates were authorized to be, and they were, issued aggregating a large sum. A second suit was commenced against the debtor

corporation by bondholders, in which the receiver in the first suit was made a party, and in this second suit the same persons were appointed receivers as in the first, and further receivers' certificates were issued, amounting to more than half a million of dollars. A third suit was subsequently begun, in which receivers were appointed to succeed those appointed in the other suits. This last suit was to foreclose a mortgage. A decree of foreclosure was entered, under which a sale was made, the entire proceeds of which were required to satisfy the receivers' certificates already issued. After all these decrees appointing receivers had been entered, and the property had been taken into their possession, the appellant procured the issuing of attachments in Massachusetts and Rhode Island, and caused them to be levied on the property of the debtor corporation. The appellant claimed that it was entitled to preference in the distribution of funds realized in the foreclosure sale, upon the ground stated in the opinion of the court. This claim was denied, and the appellant was directed to cancel those attachment liens.

Everett P. Wheeler, for the appellant.

William W. Cook, for the respondents.

³²¹ **ANDREWS, C. J.** It is claimed in behalf of the Third National Bank that the money loaned to the Bankers and Merchants' Telegraph Company created a debt which, in ³²² equity, was entitled to rank as a charge on the proceeds of the foreclosure sale prior to the claim of the bondholders. It is undisputed that the mortgage to secure the bonds was executed November 23, 1883, and that the loan by the bank was not made until the following May. By the general rule, the bondholders who relied upon the mortgage as security for their debts, which was a specific charge upon the property of the Bankers and Merchants' Telegraph Company, are entitled to preference in the distribution of the proceeds. The claims of general creditors of a mortgagor are in general postponed to the mortgage, even when their debts were contracted prior to its execution. The bank seeks to raise an equity to preference in the case, although its debt was subsequent to the mortgage, by invoking the doctrine upon which courts of equity have acted in the administration of the assets of insolvent corporations, that expenses incurred by receivers in the management and preservation of the property which is the subject of the receivership may, by order of the court, be made a primary charge and displace the priority of lien which, in ordinary cases, attaches to a mortgage security existing

at the time of the insolvency. The courts have assumed to go still farther, and to adjudge priority of payment of debts contracted by a failing corporation within a few months prior to its adjudged insolvency for labor, supplies, and necessary current expenses incurred in the struggle to keep itself alive. There is a sound equity which supports the doctrine that, when the nature of the property is such that the business to which it has been devoted cannot be discontinued without great probable loss, the court may authorize it to be continued by its officer and receiver, pending the closing up of the affairs of the insolvent corporation. Expenses incurred by a receiver under such circumstances may be justly said to be expenses of preservation for the benefit of bondholders or other persons entitled to share in the final distribution, which ought to be first paid. But it is obvious that with the best intentions attempts by the court to carry on the business of a railroad or of a telegraph company through its receiver are hazardous, and we think ³²³ courts may well pause before extending the application of the principle to which we have adverted.

The petitioner in this case is a banking institution, and it loaned its money upon what at the time was ample security, and, as is to be inferred, in the ordinary course of banking business. It had record notice of the mortgage by the records in this state. Its security, as it has turned out, was inadequate, but by the payment made on the loan and sale of the bonds taken as security it has realized on its debt nearly as large a percentage as any of the unsecured creditors of the company whose debts were outstanding at the time of the appointment of the receiver who received receivers' certificates. The latter received only sixty-nine per cent of their claims. The bondholders and general creditors received nothing. The bank neither applied for nor received receivers' certificates. But the claim is, that when it made the loan the Bankers and Merchants' Telegraph Company was in pressing need of money to meet its current expenses, and that it was used by the company in paying debts of a character for which receivers' certificates were authorized to be issued by the judgment in the De Haven suit of January 6, 1885. It is also suggested that it was deceived by the assurances of the officers of the company when the loan was made. There is no foundation for the charge of fraud, and, moreover, if any fraud was committed by the company in securing the loan, the bondholders received no benefit, and their rights are not affected. The bank is not in the position of a certificate holder, and only the holders of receivers' cer-

tificates were, under the judgment in the De Haven suit, entitled to a preference over the bondholders. The right of a creditor of an insolvent corporation in the hands of a receiver to have a preference over bondholders under a first mortgage is *strictissimi juris*.

Assuming that the bank is entitled to be subrogated to the claims of the persons paid out of the loan, such claims are not entitled to preference out of the proceeds over the claims of the bondholders, because they were not represented by receivers' certificates, and it was only claims so represented ³²⁴ which, under the judgment in the De Haven suit, were entitled to preference. The bank has no equity to call upon those who held receivers' certificates, and were paid a part of their claims, to contribute to make the bank equal with them. They secured the proper evidence of their right to participate in the distribution, and the bank neglected to do so. The bank is entitled to no dispensation to give it a standing which it has not acquired. But we think the claim of the bank may properly be denied on the broad ground that a party loaning money to an embarrassed corporation, subsequently adjudged to be insolvent, and taking security therefor, is not in a position which entitles him in equity to be adjudged to have a lien on mortgaged property of the corporation or its proceeds in preference to bondholders under a mortgage existing when the loan was made, and that it is immaterial for what purpose the loan was made, or how the money received thereon was applied, provided the bondholders were not parties to the transaction. The recent cases, we think, support this view: *Penn v. Calhoun*, 121 U. S. 251; *Morgan's Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171; *Cole v. Cunningham*, 133 U. S. 107; *In re Regents' Canal I. Co.*, L. R. 3 Ch. Div. 411.

The bank presents another and different claim upon which it bases its right to priority of payment out of the fund. It asserts that it acquired a legal lien on the property and lines of the Bankers and Merchants' Telegraph Company in the states of Massachusetts and Rhode Island by the levy of its attachments in those states May 5, 1885, and it claims that these attachments were prior to the mortgage to the Farmers' Loan and Trust Company, by reason of the fact that it was not recorded in either of those states at the time of the levy of the attachments. The further claim is made that, under the statutes and decisions in Massachusetts and Rhode Island, attachments levied before the record of a mortgage acquire priority. We are of opinion that the bank can take nothing by its attachments. When they

were issued, the property levied upon was in the possession of the receivers in the De Haven suit, who were then engaged ³²⁵ in operating the entire lines of the company, including the lines in Massachusetts and Rhode Island, and this was known to the bank when it caused its attachments to be issued. The issuing of the attachments was a contempt of the process of the court. The judgment in the De Haven suit, entered January 6, 1885, by its terms vested the whole property of the company, wheresoever situate, in the receivers appointed thereby, and enjoined all persons from interfering with them in the discharge of their duties. It moreover provided for the issuing of receivers' certificates as a first lien on all the property of the company. The bank, when it caused the attachments to be levied, had full notice of the judgment, having six weeks prior to that time been served with a copy. The bank was a citizen of this state and amenable to the jurisdiction of its courts. The act of the bank was a clear violation of the injunction, and tended moreover to thwart the scheme formulated in the judgment in respect to receivers' certificates. We are of opinion that the bank cannot be heard, in a court of equity engaged in the administration of the proceeds of the mortgaged property, to assert an alleged lien having its origin in a violation of the injunction and judgment of the court. It is not material to consider whether, under the laws of Massachusetts and Rhode Island, the attachments created a lien prior to the mortgage. The bank was bound to submit to the injunction, and an attachment which might ripen into a judgment upon which the sale of the property levied upon could be made was an interference with the receivership, contrary to the spirit and intent of the judgment of January 6, 1885.

Upon the whole case, we think the bank failed to show any right to relief, and the orders appealed from should be affirmed.

All concur.

Orders affirmed.

CORPORATIONS—PREFERENCES BY.—An insolvent corporation has no right to make a preference as between its creditors: *Conover v. Hull*, 10 Wash. 673; 45 Am. St. Rep. 810, and extended note.

RECEIVERS — ATTACHMENT AGAINST — CONTEMPT.—Interfering with property in the possession of a receiver by attaching it is a civil contempt: *Holbrook v. Ford*, 153 Ill. 633; 46 Am. St. Rep. 917, and note.

INJUNCTION—VIOLATION OF.—A magistrate who issues, and a constable who executes, a writ after the issuance of an injunction, and a party who assists them, are all liable as trespassers: *Sere v. Armitage*, 9 Mart. 394; 13 Am. Dec. 311.

NASSOY v. TOMLINSON.

[148 New York, 324.]

AN ACCORD AND SATISFACTION REQUIRES a new agreement and a performance thereof. It must be an executed contract, founded upon a new consideration, although an agreement to accept an independent executory contract has been held sufficient.

COMPROMISE—CONSIDERATION.—IF A CLAIM IS UNLIQUIDATED, the acceptance of a part and an agreement to cancel the entire debt furnishes a new consideration sufficient to sustain the compromise.

A DEMAND IS NOT LIQUIDATED, even if it appears that something is due, unless it appears how much is due; and when it is admitted that one of two different sums is due, but there is a genuine dispute as to which is the proper amount, the demand is unliquidated within the meaning of that term as applied to accord and satisfaction.

ACCORD AND SATISFACTION.—If a check is sent to a person, and the claim is then made that it is for the entire sum due him, and he is requested to return a receipt in full, and he, knowing that the sender of the check still claims it is for the whole sum due, collects such check and sends a receipt on account, such acceptance and collection operate as a full accord and satisfaction, and he cannot maintain an action to recover the balance claimed to remain unpaid.

CONDITION—ACCEPTANCE OF.—If a check is sent to a person in full payment of his claim, and he has requested a receipt in full, his acceptance of the check is an irrevocable acceptance of the condition upon which it was thus sent, and the receiver cannot insist that it was accepted on account only.

Austen G. Fox, for the appellants.

Frank A. Dudley, for the respondent.

³²⁷ VANN, J. On the 6th of April, 1887, the plaintiff sold the property of the defendants, under an agreement that he ³²⁸ was to receive compensation for his services in making the sale, but there was a difference between them as to the amount. The sale was not completed until about June 20, 1887, on which day Mr. Chauncey, who represented the defendants in all their dealings with the plaintiff, wrote to him as follows: "I heard to-day from Mr. Griffith that the sale to Weston was completed on Saturday. I send you a check for three hundred dollars (1 per cent on \$30,000), your commission on the sale. Please sign and return the inclosed voucher." There was a check for three hundred dollars inclosed, payable to the order of the plaintiff, and also an unsigned receipt in these words: "Suspension Bridge, New York, June, 1887. Received of the Tomlinson Estate three hundred dollars, in full for commissions for sale to J. A. Weston of 66 acre lot. \$300." Under date of June 23, 1887, the plaintiff wrote to Mr. Chauncey, saying: "I don't know what you mean by sending me a check for \$300. I want my five per cent commission on the \$30,000." No reply was made to this

letter, although one was requested, and during the latter part of July or the first of August, following, the plaintiff, who had in the mean time retained both check and voucher, called on Mr. Chauncey in the city of New York, and, as he testified on the trial, asked him what he meant by sending a check for "three hundred dollars commission for selling the farm. I said that I wanted my five per cent commission, as the understanding was between us. He said he would n't give one cent more, and I left him. . . . I knew there was a dispute between us, I claiming fifteen hundred dollars, and he claiming that I was only entitled to three hundred dollars, and that his check paid that, and, with the knowledge of that condition of affairs, I kept the check from July, 1887, to January, 1888, and then indorsed it and drew the money, and sent him a receipt on account." The plaintiff never returned the blank voucher sent to him with the check, but, in January, 1888, he indorsed the check and drew the money on it, and then, under date of January 19, 1888, wrote to Mr. Chauncey stating that he inclosed a receipt for three hundred dollars as part payment ³²⁹ for his services, and that he still claimed he was entitled to five per cent commission and insisted on being paid at that rate. The receipt inclosed was for three hundred dollars, "in part payment for commission." On the 24th of January, 1888, Mr. Chauncey wrote to the plaintiff acknowledging receipt of the letter and voucher, and stating that he should "consider this payment in full for all commissions." The plaintiff did not return, or offer to return, the money so paid him. When the plaintiff rested, as well as at the close of the evidence, the defendants asked the court to direct a verdict in their favor, on the ground that, upon the foregoing facts, which were not disputed, the plaintiff was not entitled to recover, but the motions were denied and the defendants excepted.

Two questions of fact were submitted to the jury: 1. Whether there was an agreement to pay plaintiff at the rate of five per cent; 2. Whether the plaintiff agreed to accept the three hundred dollars "in place of his claim for five per cent commission." The jury were instructed to find for the plaintiff if they thought that the agreement to pay at that rate was made, and that the agreement to accept was not made; otherwise for the defendants. They rendered a verdict in favor of the plaintiff for twelve hundred dollars. The judgment entered on the verdict was affirmed by the general term upon its opinion written on a former appeal, but then the record did not contain the proposed receipt in full: *Nassoivy v. Tomlinson*, 65 Hun, 491-493.

The question presented by this appeal is, whether the undisputed evidence so conclusively established an accord and satisfaction as to leave no question of fact for the jury upon that subject. An accord and satisfaction requires a new agreement and the performance thereof: *Jaffray v. Davis*, 124 N. Y. 164. It must be an executed contract founded upon a new consideration, although an agreement to accept an independent executory contract has been held sufficient: *Kromer v. Heim*, 75 N. Y. 574; 31 Am. Rep. 491; *Morehouse v. Second Nat. Bank*, 98 N. Y. 503; 2 *Parsons on Contracts*, 7th ed., 817, 820. If the claim is liquidated, ³³⁰ the mere acceptance of a part, with the promise to discharge the whole, is not enough, for there is no new consideration: *Ryan v. Ward*, 48 N. Y. 204; 8 Am. Rep. 539. If the claim is unliquidated, the acceptance of a part, and an agreement to cancel the entire debt, furnishes a new consideration which is found in the compromise. A demand is not liquidated, even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction. Such is the case before us, as appears from the testimony of the plaintiff, already quoted. He claimed that the defendants owed him the sum of fifteen hundred dollars, under an agreement to pay him at one rate, while the defendants claimed that they owed him but three hundred dollars, under an agreement to pay him at another rate. The verdict of the jury upon this issue neither removed from the case the fact that a dispute had existed, nor affected its force, as otherwise the compromise of a disputed claim could never be made the basis of a valid settlement. We come, therefore, to the question whether there was an acceptance by the plaintiff of an offer by the defendants to pay the sum they conceded to be due in full satisfaction of the sum he claimed to be due. In order to determine this question, the letter of June 20, 1887, with the check and receipt inclosed therewith should be construed together, so as to see whether the offer was made upon a specified condition. When thus construed, we find the defendant saying to the plaintiff, in substance: "Here is a check for three hundred dollars to pay your commission on the sale; sign and return the inclosed voucher, in full of your commissions." As reflecting the intention of the parties, it is the same in effect as if the check had been written "in full," as was the case in *Reynolds v. Empire*

Lumber Co., 85 Hun, 470. The plaintiff understood the condition as his testimony shows, and he never signed or returned the voucher, and did not use the check for nearly seven months. In the mean time, he had ³³¹ an interview with the agent of the defendants and learned that they still adhered to their position of refusing to pay any more than the check sent "in full." After hesitating for five months longer, he used the check and sent the defendants a receipt on account, writing them that he claimed a balance. This declaration was *ex post facto*, and could have no effect unless acquiesced in by the defendants, but they promptly disclaimed and insisted that their debt was paid. We think that the undisputed evidence shows conclusively that the offer was made in settlement of the claim, and that the plaintiff so understood it, when, by using the check, he accepted the offer. The written evidence, the personal interview, and the acts of the plaintiff permit no other conclusion. The circumstances do not admit of different inferences or present any question of fact, for the letter and receipt can have but one interpretation.

The plaintiff cannot be permitted to assert that he did not understand that a sum of money, offered "in full," was not, when accepted, a payment in full. As was said in *Hills v. Sommer*, 53 Hun, 392, 394, he was "bound either to reject" the check, "or, by accepting it, to accede to the defendant's terms." The money tendered belonged to them, and they had the right to say on what condition it should be received. "Always the manner of the tender and of the payment shall be directed by him that maketh the tender or payment, and not by him that accepteth it": *Pinnel's case*, 5 Coke, 117. The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition, for if he accepted at all it was *cum onere*. When he indorsed and collected the check, referred to in the letter asking him to sign the inclosed receipt in full, it was the same, in legal effect, as if he had signed and returned the receipt because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered. The use of the check was *ipso facto* an acceptance of the condition. The minds of the parties then met so as to constitute an accord, and, as was said by this court ³³² in *Fuller v. Kemp*, 138 N. Y. 231, "the acceptance of the money involved the acceptance of the condition, and the law will not permit any other inference from the transaction." We cannot distinguish the case in hand from the case last cited, where a check for four hundred dollars was mailed with a

letter stating that it was sent as payment in full of an unliquidated demand for six hundred and seventy dollars. The creditor accepted the check and used it, but "again sent his bill to the defendant, charging six hundred and seventy dollars for his services and crediting upon it four hundred dollars received by check." The debtor answered, calling attention to the condition upon which he had sent the check, and requesting the creditor "either to keep the money upon the condition named, or return it to him by first mail," but no reply was made, and the money was not returned. Upon these facts, the court held that "when a debtor offers a certain sum of money in full satisfaction of an unliquidated demand, and the creditor accepts and retains the money, his claim is canceled, and no protest, declaration, or denial on his part, so long as the condition is insisted upon by the debtor, can vary the result."

The principle that controlled that case must also control this, and the judgment appealed from should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur, except Haight, J., not sitting.

Judgment reversed.

ACCORD AND SATISFACTION—EXECUTED CONTRACT.—An executory accord is no bar: *Mitchell v. Hawley*, 4 Denio, 414; 47 Am. Dec. 260, and note. An accord must be completely executed to sustain a plea of accord and satisfaction: *Kromer v. Heim*, 75 N. Y. 574; 31 Am. Rep. 491; *Hearn v. Kiehl*, 38 Pa. St. 147; 80 Am. Dec. 472; *Russell v. Lytle*, 6 Wend. 390; 22 Am. Dec. 537, and note.

COMPROMISE—CONSIDERATION.—A promise by a creditor to accept from his debtor less than the amount due to him by way of compromise is *nudum pactum* and void: *Daniels v. Hatch*, 21 N. J. L. 391; 47 Am. Dec. 169, and note; *Geiser v. Kershner*, 4 Gill & J. 305; 23 Am. Dec. 566, and note; *Young v. Jones*, 64 Me. 563; 18 Am. Rep. 279. See, also, the note to *Hall v. Power*, 46 Am. Dec. 700.

ACCORD AND SATISFACTION—ACCEPTANCE OF LESS THAN SUM DUE—EFFECT.—The payment of part of a debt according to the terms of the original obligation is not satisfaction of the whole, although the creditor agrees to, and does, receive the part paid in as full payment: *Rose v. Hall*, 26 Conn. 392; 68 Am. Dec. 402, and note; *Donohue v. Woodbury*, 6 Cush. 148; 52 Am. Dec. 777, and note; *Martin v. Frantz*, 127 Pa. St. 389; 14 Am. St. Rep. 859, and note. The voluntary acceptance by a creditor, after suit brought, of a sum of money less than the amount of his claim in full settlement of the indebtedness and of the action discharges both the debt and the costs: *Gates v. Steele*, 58 Conn. 316; 18 Am. St. Rep. 268, and note. This subject will be found further discussed in the notes to *Pierce v. Jones*, 28 Am. Rep. 293; *Twitchell v. Shaw*, 57 Am. Dec. 81; *Brooks v. White*, 37 Am. Dec. 98; *Le Page v. McCrea*, 19 Am. Dec. 473.

KNOX v. EDEN MUSEE AMERICAN COMPANY.

[148 NEW YORK, 441.]

CORPORATIONS.—CERTIFICATES OF STOCK IN BUSINESS CORPORATIONS have been given most of the elements of negotiability. A transferee in good faith and for value holds his title free from latent equities between prior parties in the line of transmission.

CORPORATIONS.—THE NEGOTIABILITY OF STOCK CERTIFICATES does not extend so far as to prevent the owner of stock which has been lost or stolen without his negligence, from claiming it from the hands of any person into whose possession it subsequently comes, although the holder may have taken it in good faith and for value.

CORPORATIONS—IMPLIED AGENCIES.—An officer of a corporation, in whose possession surrendered certificates of stock are, and whose duty it is to cancel them, has no implied agency to reissue them, nor to sell or transfer them, and if he does so, his act is not the act of the corporation.

ESTOPPEL.—ONE WHO INTRUSTS HIS PROPERTY TO HIS SERVANT OR AGENT, and thereby gives him an opportunity for theft, is not estopped from claiming such property, though the servant sells it to a purchaser in good faith.

A CORPORATION IS NOT LIABLE WHEN CERTIFICATES OF ITS STOCK, which have been surrendered, but not canceled, are taken from its custody by its servant and sold to a purchaser in good faith, though the by-laws require such certificate to be canceled when a new one is issued, and the servant was afforded an opportunity for committing the fraud by the leaving of the surrendered certificate in his possession without seeing that he performed the duty of canceling it, if nothing had come to the knowledge of the corporation that raised any doubt of the honesty or faithfulness of the servant.

AN EMPLOYER OR MASTER IS NOT TO BE DEEMED NEGLIGENT, because he does not anticipate, or provide against, the possibility of criminal acts on the part of his servants and employes. He is not, therefore, answerable for a loss sustained by a third person in purchasing property in good faith, which has been left under the control of a servant, and which the latter has fraudulently disposed of to an innocent purchaser.

CORPORATIONS—NEGLIGENCE.—THE VIOLATION OF A BY-LAW of a corporation in a single instance by issuing a new certificate of stock without first canceling the old certificate which has been surrendered, is not actionable negligence so as to render the corporation liable for injuries suffered by a purchaser from purchasing in good faith, from a servant of the corporation, the surrendered certificate without notice that it had ceased to be a valid outstanding certificate.

NEGLIGENCE.—THE CONSEQUENCE FOR WHICH A NEGLIGENT PERSON IS ANSWERABLE must be the natural result of the alleged negligent act, or one which might reasonably have been anticipated.

CORPORATIONS—NEGLIGENCE.—The omission of the officers of a corporation for the period of three weeks to ascertain whether a certificate of stock which had been surrendered had been canceled by an agent whose duty it was to cancel it, is not sufficient to support a charge of negligence.

Action to recover damages claimed to have been sustained by the plaintiff from the defendant's negligence in failing to cancel certificates of its capital stock surrendered to it for transfer. The defendant, Eden Musee American Company, Limited, is a cor-

poration, organized and doing business under the laws of the state of New York, with a capital stock of three hundred and thirty thousand dollars, divided into three thousand three hundred shares of the par value of one hundred dollars each. It had adopted by-laws regulating the issuing and transfer of its certificates, and which, in substance, provided that such certificates should be numbered and registered in the order of their issue, should be signed by the president or vice-president, countersigned by the secretary, and bear the seal of the company; that the certificates should be bound in a book and issued in consecutive order, and in the margin of the book should be entered the name of the person owning the shares therein represented, with the number of shares and date thereof, and each certificate should be receipted for in the certificate-book; that all certificates exchanged or returned should be canceled by the secretary, and, when canceled, pasted in the original place in the certificate-book, and that no new certificate should be issued until the old one had been canceled; that transfers of shares should be made on the books of the company by the holder in person or by power of attorney, duly acknowledged and filed with the secretary of the company. By these by-laws it was made the duty of the president to sign all certificates, of the treasurer to countersign, and of the secretary to affix the seal of the company thereon, and the secretary was given charge of the certificate-book, transfer-books, and ledger. The plaintiff was not shown to have had any knowledge of these by-laws. On May 8, 1891, and for several years prior thereto, and subsequently until October or November of the same year, E. A. Jurgens was the general manager of the business of the defendant corporation. In April and May, 1891, Frank M. Reynolds was a clerk employed by the defendant. Jurgens, during the course of his employment by the defendant, had not, prior to the transaction here in question, been guilty of any dishonest acts, and there was nothing to charge the corporation with notice that he was honest and trustworthy. In May, 1891, Reynolds applied to plaintiff for a loan for himself and Jurgens, and offered for discount his own note, indorsed by Jurgens. Plaintiff agreed to grant the loan only upon condition of its being secured. Thereupon, twenty shares of the capital stock of the defendant were offered for security, with a statement that they belonged to Jurgens. This security, being regarded as satisfactory by the plaintiff, he granted the loan, receiving as collateral security four certificates of stock, to wit: No. 221 in the name of Eva M. Chase, Nos. 497 and 498 in the name of Hattie L. Blish, and No. 517 in

the name of Seligsberg & Co. Each certificate was in due form, and had printed upon it as an indorsement the usual form of power of attorney to transfer, and all were signed in blank, except No. 221, which, instead of being in blank, designated Seligsberg & Co. as the person to make transfer of the certificate, and upon the latter certificate plaintiff made claim. As a matter of fact, all the certificates had been surrendered, and new certificates had been issued in lieu thereof. Jurgens was the person whose duty it was to have canceled the certificates, but he did not do so. All the certificates were, in April, 1891, the property of Seligsberg & Co., a business firm, of which Theodore Hellman, president of the defendant corporation, was a member. At that time, an offer to purchase the certificates was accepted, and Hellman took them to the office of the company, and left them there in the office safe under the care of Jurgens, to be canceled, and new certificates issued when the purchaser made payment. Some three weeks later, such payment was made, and the new certificates issued. The old ones were never canceled nor pasted in the stock certificate book, and when the new certificates were issued, no inquiry was made about the old certificates for the purpose of ascertaining whether or not they had been canceled; and it was not until January, 1892, that the officers of the defendant corporation discovered that Jurgens had neglected his duty in not canceling the old certificates. The referee found that the action of the president of the defendant corporation in signing new certificates without producing the old ones, and without ascertaining that they had been canceled, was a violation of his duty and of the by-laws of the company, and constituted negligence upon the part of the defendant. Further, that the failure of the officers and directors of the defendant to exercise any proper supervision over the transfer of certificates also constituted negligence upon the part of the defendant, and was the cause of the loss to the plaintiff of the amount lost, and therefore plaintiff was entitled to recover the value of fifteen shares of stock. Defendant appealed.

Charles Steele and William D. Guthrie, for the appellant.

Henry D. Hotchkiss, for the respondent.

453 ANDREWS, C. J. The rigid rule of the common law which prohibited the assignment of choses in action was, in England, at an early day, relaxed to some extent to conform to the usages of merchants and the necessities of commerce, and at length, by the aid of statutes and judicial decisions, bills of ex-

change and promissory notes were completely taken out of its influence, and they came to have distinct attributes and qualities not pertaining to any other form of contract. They were not only made transferable by delivery and suable in the name of the transferee, but, contrary to the general rule of the common law, "honest acquisition" for value was held to give to the transferee a new and original title, wholly independent of that of the prior holder, and subject to no infirmity which affected the paper in his hands. The real owner, who had been despoiled of the paper by robbery or theft, or who lost it without negligence, was concluded from reclaiming it, and the ⁴⁵⁴ maker, although he had been defrauded into executing it, could not be heard to allege the fraud as a defense against a bona fide holder. And the transferee, although he may have been negligent in taking it, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title, according to the doctrine now settled, will prevail. These familiar but arbitrary principles applicable to commercial paper, originating in commercial policy, the encouragement of trade, the convenience of having some representative of money readily convertible and commanding confidence, while they operate in many cases with great severity upon the rights of innocent persons, have contributed greatly to stimulate commerce and advance the prosperity of states. The principles applicable to negotiable paper have been extended to embrace public debentures payable to bearer, and bonds of corporations, and some of the incidents of negotiability have, either by custom or statute, been applied to instruments not strictly negotiable. Certificates of stock, in business corporations, are embraced in the class last mentioned. They are not negotiable in form, they represent no debt, and are not securities for money. But the courts of this country, in view of the extensive dealings in certificates of shares in corporate enterprises, and the interest, both of the public and of the corporation which issues them, in making them readily transferable and convertible, have given to them some of the elements of negotiability. The owner of shares may transfer his title by delivery of the certificate with a blank power of attorney indorsed thereon signed by the owner of the shares named in the certificate. Such a delivery transfers the legal title to the shares as between the parties to the transfer, and not a mere equitable right: *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; 7 Am. Rep. 341. The transferee in good faith and for value holds his title free from latent equities between prior parties in the line of transmission. Under the doc-

trine of implied agency and the application of the principle of estoppel to the situation, the true owner is, in many cases, precluded from asserting his title. The case of ⁴⁵⁵ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, is a leading case on the subject, and marks the limit to which the court has hitherto gone in subordinating the rights of the true owner of a stock certificate to the title of a transferee derived under one who, being in possession of the certificate by the consent of the true owner, has transferred it in fraud of his rights. That case holds that an agent to whom the owner has delivered a certificate of stock duly indorsed for transfer, with a limited power of disposition for a special purpose, may bind the title thereto as against the true owner by transferring it to a bona fide transferee who has no notice of the limitations of the agent's authority, although the transfer was made for an unauthorized purpose, and with the intention on the part of the agent to commit a fraud upon his principal. The certificates there in question were pledged by the owner with brokers to secure advances, having indorsed thereon in form an unconditional power of attorney to make all necessary transfers, but with a limited authority to use the power only when necessary to make the pledge available. The brokers, in violation of their duty, pledged the shares for a large sum for their own purposes, and the controversy was between the original owner and the pledgees of the brokers. It was decided that, under the circumstances disclosed, the original owner, having placed the certificates in the hands of the brokers with power of disposition, was estopped, as against the pledgees in good faith and for value, from denying their authority to transfer, upon the principle that the owner should rather suffer from his misplaced confidence in the brokers than those who dealt with them on the strength of an apparent authority. In the well-known case of *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, the same principle of implied agency was applied to charge the corporation with liability in damages for spurious stock issued by Schuyler, the president and transfer agent of the company.

The courts have been frequently importuned to extend the qualities of negotiability of stock certificates beyond the ⁴⁵⁶ limits mentioned, and clothe them with the same character of complete negotiability as attaches to commercial paper, so as to make a transfer to a purchaser in good faith, for value, equivalent to actual title, although there was no agency in the transferrer, and the certificate had been lost without the fault of the true owner, or had been obtained by theft or robbery. But the

courts have refused to accede to this view, and we have found no case entitled to be regarded as authority which denies to the owner of a stock certificate which has been lost without his negligence, or stolen, the right to reclaim it from the hands of any person in whose possession it subsequently comes, although the holder may have taken it in good faith and for value. The precise question has not often been presented to the courts, for the reason probably that they have with great uniformity held that stock certificates were not negotiable instruments in the broad meaning of that phrase, but, whenever the question has arisen, it has been held that the title of the true owner of a lost or stolen certificate may be asserted against any one subsequently obtaining its possession, although the holder may be a bona fide purchaser: *Anderson v. Nicholas*, 28 N. Y. 600; *Bangor Electric Light etc. Co. v. Robinson*, 52 Fed. Rep. 520; *Biddle v. Bayard*, 13 Pa. St. 150; *Barstow v. Savage Min. Co.*, 64 Cal. 388; 49 Am. Rep. 705. See *Shaw v. Railroad Co.*, 101 U. S. 557. It may be observed that the elaborate opinion of Judge Rapallo in *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, to show that the plaintiff in that case was estopped from asserting his title on the ground of implied agency, was quite unnecessary if a transfer of a stock certificate indorsed in blank to a bona fide holder conferred a title as against the true owner, irrespective of the fact whether he voluntarily parted with the possession or was deprived of it by felony or fraud. It is plain, we think, that the argument in support of the judgment in this case, based on the complete negotiability of stock certificates, is not supported by, but is contrary to, the decisions. If public policy requires that a further advance should be made in more completely assimilating them to commercial paper in the qualities of negotiability, the legislature ⁴⁵⁷ and not the courts should so declare. Under the law as it has hitherto prevailed, there does not seem to have been any serious hindrance in dealing with property of this character. It may, perhaps, be doubted, taking into consideration the interests of investors as well as dealers, whether it would be wise to remove the protection which the true owner of a stock certificate now has against accident, theft, or robbery. The system of registry of negotiable bonds, which prevails to a considerable extent, authorized by statutes of some of the states, and of the United States, seems to indicate a tendency to restrict, rather than to extend, the range of negotiable instruments.

Nor, in our opinion, can the judgment below be sustained upon any principle of agency in *Jurgens*, express or implied, to issue

the surrendered certificates, which, on the issue of the new certificates to Siebrecht, became mere vouchers in possession of the company. If it can be said that the direction of the president to Jurgens to cancel the certificates made him the agent of the company for that purpose, it was an authority to destroy and not to use. His act in abstracting them from the safe and uttering them as valid certificates had no relation to the authority conferred. It was not an act of the same kind as that which he was authorized to perform. He had no apparent authority to issue them as genuine certificates, because he had no authority to issue certificates for any purpose, and what he did was, as was said in *Manhattan Life Ins. Co. v. Forty-second Street etc. R. R. Co.*, 139 N. Y. 146, "a willful and criminal act perpetrated for private gain, and not connected with any official authority or semblance of authority which he possessed as the defendant's agent." The certificates were, at all times after their surrender and before they were abstracted by Jurgens from the safe of the defendant, in the legal possession of the company. The company never placed them in the possession of Jurgens or invested him with the indicia of ownership. He had access to the safe as the mere servant of the defendant. The doctrine of implied agency is, ⁴⁵⁸ we think, wholly inapplicable to the circumstances of this case.

We come, therefore, to consider the ground upon which the learned referee placed his judgment against the defendant, viz., the negligence of the company. The claim of liability of the defendant on the ground of negligence is based on the fact that, in violation of its by-laws, it permitted the surrendered certificates to remain uncanceled in its safe, to which Jurgens had access, and thereby enabled him to commit the fraud, and upon the further allegation that the company neglected to exercise a proper supervision over its business and the conduct of its employes, and committed to Jurgens the management of its affairs without special inquiry into the manner in which he discharged his duties. We are of opinion that the company was not chargeable with any negligence which gives a right of action for the injury caused to the plaintiff by the fraudulent use by Jurgens of the surrendered certificates. The surrendered certificates were placed by the company in its safe in its office, of which Jurgens had the key, and thereby, it may be said, afforded him the opportunity to commit the crime of which he was guilty, in abstracting and uttering them as valid. But it is not true, as a general rule, that a man may not intrust his property to the custody of his servant, except at the peril of losing his title thereto if the servant steals

and disposes of it to another. There must be something more than the mere intrusting to a servant of the custody of a chattel and the consequent opportunity for theft, in order to preclude the master from reclaiming it, if stolen by the servant and sold to another: *Rapallo, J.*, in *McNeil v. Tenth Nat. Bank*, 48 N. Y. 329; 7 Am. Rep. 341. The rule declared by *Ashurst, J.*, in *Lickbarrow v. Mason*, 2 Term Rep. 70, frequently quoted, that "whenever one of two innocent persons must suffer by the act of a third, he who has enabled the former to occasion the loss must sustain it," has no application to such a case. The case in which the rule was stated affords a good illustration of its application. The consignor and vendor of the goods had, by the delivery of a bill of lading, ⁴⁵⁹ delivered the possession of the goods to the holder, with power, according to the law merchant, to transfer them by indorsement of the bill, and it was held that, as against a transferee in good faith for value, the right of stoppage in transitu was lost. It was a case where the vendor had by his affirmative act enabled the holder to commit a fraud upon his rights, and it was justly held that he should bear the loss rather than the innocent purchaser. The familiar statement of *Lord Holt*, in *Hern v. Nichols*, 1 Salk. 289, "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger," was made in a case where the question was, whether a merchant was liable for the deceit of his factor in the sale of goods represented to be of one quality when they were of another. The principle announced by *Lord Holt* has been frequently applied to such and similar cases. But the employment of a servant to whom is intrusted the master's property, with no power of disposition, is not alone such a putting of trust and confidence in the servant by the master as to enable the latter, by his wrongful act, to defeat the master's title. The rule which would convert the mere employment of a servant into an authority in him, as to third persons, to sell or dispose of his master's goods intrusted to him for safe-keeping, would be highly dangerous, and has no sanction in the adjudged cases.

It remains to consider whether there were any special circumstances in this case which take it out of the general rule adverted to. *Jurgens* had been in the employment of the defendant for several years prior to the transaction in question, and nothing had come to the knowledge of the defendant which raised doubt as to his honesty and faithfulness. The facts found by the referee show that the defendant reposed confidence in his integrity,

and, so far as appears, the abstraction and uttering of the surrendered certificates was his first act of malversation during his employment. His power in respect to the issuing of certificates on the transfer of stock was clerical only. In case of transfer, he was accustomed to cancel the surrendered ⁴⁶⁰ certificates and paste them in the certificate-book, prepare the new certificate and impress the company's seal thereon, and then procure the president of the company to sign it. In every case prior to the one in question, the president signed the new certificate only, when the surrendered certificate was presented to him by Jurgens, canceled, together with the new certificate. There was a departure from that practice in the single instance in question under the special circumstances found by the referee. The president of the company knew when he signed the new certificate that the old certificates had been surrendered and were then in possession of the company, because he had himself placed them in the safe, and the fraud of Jurgens was made possible because the president relied upon Jurgens to cancel the surrendered certificates as he had directed him. It is urged that the improper use made of the certificates might reasonably have been expected to result from leaving them in the safe of the company in his care uncanceled. In other words, the claim is, that the company ought to have anticipated that Jurgens might commit the crimes of forgery and larceny, and put the certificates on the market if they were left uncanceled under his control. We do not assent to this suggestion. If the company knew that Jurgens was dishonest, or had reason to suspect his honesty, a different question would be presented. But it is not generally an omission of ordinary prudence that an employer deals with his employes on the assumption that those who have hitherto been faithful in the performance of their duties will continue so to be, or because he does not anticipate and provide against the possibility of their criminal acts. Breaches of trust and confidence, unfortunately, are not infrequent. But honesty is, nevertheless, we believe, the general rule of human conduct, and one may indulge in this faith in human nature and trust those who have proved themselves worthy of it, without subjecting himself to a charge of negligence if it should turn out that they afterward yielded to temptation and used their position to the injury of others. "It is one thing to say that a man shall be amenable for such immediate ⁴⁶¹ consequences of his acts as a reasonable man might foresee and dread and, therefore, shun. But it is another and very different proposition to maintain that a man shall forfeit his property because

he has done an act which will not be perilous unless others are guilty of misconduct which that act does not cause": Williams, J., *Ex parte Swan*, 7 Com. B., N. S., 447. See, also, *Bramwell, L. J., Baxendale v. Bennett*, L. R. 3 Q. B. Div. 530.

The fact that in the particular instance the defendant did not observe the by-law, and issued the new certificate without the actual cancellation of the surrendered certificates, was not, we think, as to the plaintiff, actionable negligence. It may be admitted that a business corporation is bound to exercise reasonable care in respect to the transfer of its shares. The defendant had adopted the usual precautions, and its by-laws required that transfers should be made only on the surrender and cancellation of outstanding certificates. The certificates on their face carried an assurance by the company that the shares represented had not been transferred on the books of the company, while the original certificates were outstanding. There was no representation on the face of the certificates that surrendered shares would be actually canceled by the company. The company, however, had by the by-law provided that this should be done, and it is said, and it is undoubtedly true, that this regulation was in conformity to the usual practice of stock corporations. By-laws are primarily for the protection of the corporation enacting them and its stockholders. The regulation that transfers shall only be made on the books on surrender of the outstanding certificates is essential as well for the protection of the company as the dealers in the stock. The regulation for actual cancellation of surrendered certificates is a still further protection. But can it be justly said that this latter regulation was so obligatory on the company that a single departure therefrom under special and peculiar circumstances, which gave an opportunity for Jurgens' crime, was, as to the plaintiff, actionable negligence? We think it was not. To constitute actionable ⁴⁶² negligence, there must not only be a violation of duty owing by one to another or to the public, but the injury must be the natural consequence of the alleged negligent act, or one which might reasonably have been anticipated. Parke, B., in the *Bank of Ireland v. Trustees of Evans' Charities*, 5 H. L. Cas. 389, where it was claimed a corporation was bound by the fraudulent affixing by its secretary of the seal of the corporation in his custody to a power of attorney to transfer its funds in the Bank of Ireland, states the true ground of actionable negligence in such a case. Speaking for the judges he says: "They are all of opinion that the negligence which would deprive the corporation of their right to insist that the transfer was invalid

must be negligence in or immediately connected with the transfer itself." Blackburn, J., in *Swan v. N. B. Australasian Co.*, 2 Hurl. & C. 181, states the principle with even greater perspicuity. He says: "The neglect must be in the transaction itself, and be the proximate cause of leading the party into the mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."

The claim that the injury to the plaintiff was occasioned by the omission of the defendant to exercise proper supervision over the conduct of Jurgens has, we think, no force. There was an interval of about three weeks between the time when the certificates were surrendered to the company and their abstraction and transfer by Jurgens. If, during this period, the officers of the defendant had examined the contents of the safe, it might have been ascertained that the certificates were uncanceled. An examination after that time would not have benefited the plaintiff, at least there is no evidence that a discovery of the fraud after it had been accomplished would have changed his position. The transfers of stock on the books of the company were comparatively infrequent. The president ⁴⁶³ had reason to suppose that Jurgens would obey his directions and cancel the certificates, and the omission to inquire whether he had done so, during the period mentioned, is, as we think, quite insufficient to support the charge of negligence.

Finally, if the company had been the owner of some of its own shares, or if it had owned shares in other corporations which had been deposited in its safe for safe-keeping, and they had been stolen and sold by Jurgens to the plaintiff, there can be no doubt that the company could reclaim them, and the loss would fall upon him. It is difficult to see how he could acquire a better right to the surrendered certificates or charge the company with damages resulting from Jurgens' crime.

Having reached the conclusion that there was no actionable negligence on the part of the defendant, it is unnecessary to consider the other questions argued at the bar.

The judgment below should be reversed and a new trial ordered, with costs in all the courts to abide the event.

All concur.

Judgment reversed.

NEGLIGENCE—DUTY TO GUARD AGAINST DANGER.—A person is not negligent in failing to provide against a danger that could not have been reasonably expected: *Russell v. Monroe*, 116 N. O. 720; 47 Am. St. Rep. 823, and note.

CORPORATIONS—STOCK CERTIFICATES—NEGOTIABILITY. Certificates of stock are assignable, and pass by indorsement as bills of exchange and promissory notes pass: *Supply Ditch Co. v. Elliott*, 10 Col. 327; 3 Am. St. Rep. 586, and note. Certificates of corporate stock are merely evidence of the ownership of shares, and are not negotiable: *Young v. South Tredegar Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752, and note. To the same effect see *East Birmingham Land Co. v. Dennis*, 85 Ala. 565; 7 Am. St. Rep. 73.

A CORPORATION PERMITTING SHARES OF STOCK TO BE TRANSFERRED without authority from the stockholder may be compelled to replace them or pay him their value, although it was innocently deceived by a forged power of attorney: *Note to Sewall v. Boston Water Power Co.*, 81 Am. Dec. 705. A corporation must see that no unauthorized transfers of its stock are made, and is liable to anyone injured by a breach or neglect of this duty: *Marbury v. Ehlen*, 72 Md. 206; 20 Am. St. Rep. 467, and note; *Taft v. Presidio R. R. Co.*, 84 Cal. 131; 18 Am. St. Rep. 166; *Caulkins v. Gas Light Co.*, 85 Tenn. 683; 4 Am. St. Rep. 786, and note.

MOTT v. UNDERWOOD.

[148 New York, 463.]

TENANTS IN COMMON OF A NATURAL OYSTER BED have an equal right to enter thereon, and to remove natural oysters.

A **TENANT IN COMMON OF AN OYSTER BED** cannot, by draining it, and scattering a few seed oysters over it, deprive any of his cotenants of the right to take natural oysters therefrom, though in so doing, the latter must, to some extent, disturb the planted oysters.

COTENANT'S RIGHT TO THE USE OF THE COMMON PROPERTY.—A court of equity will not interfere between cotenants, even to restrain waste, unless it be of a malicious character or so unusual or unreasonable as to constitute a wanton destruction of the estate.

A. A. Spear, for the appellants.

Nicoll Floyd, for the respondents.

408 **MARTIN, J.** On the first day of July, 1891, a large portion of Great South bay in the county of Suffolk, New York, was owned by Helen T. and William S. Smith, the infant heirs of Robert R. Smith and the town of Brookhaven, under its corporate name of the trustees of the freeholders and commonalty of the town of Brookhaven, as tenants in common. The heirs of Robert R. Smith and the town of Brookhaven each owned an undivided one-half. The entire property contained about forty thousand acres of land under water, nearly all of which was suitable for oyster culture. Much of it was capable of nourishing and maturing oysters when planted upon it, and some of it, known as oyster beds, produced spontaneously both marketable

and seed oysters. The oyster beds were much the most valuable part of the land.

On or about the day mentioned, Cornelia T. Smith, as widow of Robert R. Smith, and Cornelia T. Smith and Thomas S. Strong, as general guardians of Helen T. and William S. Smith, made a lease to the plaintiffs of about seventy acres of the land for the purpose of planting, cultivating, and growing oysters thereon. The lease was for the term of ten years, at an annual rent of one hundred and seventy-five dollars. The premises leased was an oyster bed known as the "Reef and Swash" bed. It was equaled in the quantity and quality of oysters it produced by but few beds in the bay. Its yield was, with few exceptions, regular each year, and comprised both seed and marketable oysters. The portion known as the "Reef" contained about thirty-five acres, and the "Swash" about the same. The lease purported to rent the whole of the seventy acres. In it the oysters planted or growing upon the premises were excepted from the covenant therein for the peaceable possession and enjoyment of the premises. Upon the delivery of the lease, the plaintiffs staked and buoyed the ⁴⁶⁷ premises. During the season, from the fall of 1891 to the spring of 1892, they permitted the baymen to go upon the beds and take all the natural oysters they could obtain, and they took substantially all that could be taken at the time. In the spring of 1892, marketable oysters were growing thereon, and the usual amount was taken from the premises. In September of that year, seed and native marketable oysters of two and three years' growth were growing there to the usual extent. In June, 1892, the plaintiffs resurveyed the premises, reset the stakes and buoys thereon, and dredged the "Reef." In the latter part of that month and early in July, the plaintiffs spread eleven hundred bushels of shells and one hundred bushels of Virginia seed oysters over the whole premises. The quantity of shells required to properly cover the premises for the propagation of oysters was thirty-five thousand bushels. On September 1st, there was a fine set of young oysters over the whole of the premises, which was largely the result of the plaintiff's cultivation.

The defendants, at the times hereinafter mentioned, were inhabitants of the town of Brookhaven, as such were permitted by the town to take oysters from the premises, and all the defendants but Abram Smith were duly licensed by the town to take oysters from the undivided half of the land under water in the South bay belonging to the town, for which they paid a license fee. Between the 1st and 19th of September, 1892, the defend-

ants entered upon the premises leased to the plaintiffs, and took and disturbed, to a slight extent, the oysters that had been planted by the plaintiffs. All the oysters proved to have been taken by any of the defendants from the leased premises were marketable oysters of two or three years' growth, and it was impossible to gather the natural product from the premises without, to some extent, taking or disturbing the oysters planted by the plaintiffs. The defendants were men of small means, and unable to respond in damages to the plaintiffs. The town, for many years before this action, and up to the time of this trial, had purposely permitted the premises in question and other beds in South bay to be used ⁴⁶⁸ by the inhabitants of the town for taking seed and marketable oysters as a means of subsistence, and had refused to lease to anyone the exclusive use of any of the oyster beds. When the lease to the plaintiffs was given, they had notice and full knowledge that it was given against the will of the town of Brookhaven. The oysters taken by the defendants up to September, 1892, were taken for market purposes. When the lease was given the town was not cultivating the premises. The foregoing are substantially the facts found by the court.

As conclusions of law, the court held that the premises so leased were held and owned by the town of Brookhaven and the heirs of Robert R. Smith as tenants in common; that the lease to the plaintiffs was valid; that the plaintiffs possessed the rights in common in the property in question which the heirs of Robert R. Smith had, and the defendants possessed those which the town of Brookhaven had, and neither possessed any other nor different rights; that under the lease the plaintiffs had a right to take the natural oysters from the premises, but that neither of the cotenants could legally exclude the other from entry thereon or from taking the natural product thereof; that the planted oysters growing upon the premises between the first and nineteenth days of September, 1892, were the property of the plaintiffs, but that they could not legally prevent the defendants from entering upon the premises or from taking the natural growth of oysters thereon, and directed that the complaint be dismissed with costs.

By this action the plaintiffs sought to enjoin the defendants from entering upon the premises and taking or disturbing the oysters growing thereon, and to recover damages for such injury as they had sustained by reason of the acts of the defendants in disturbing the oysters planted by them. As there was no proof of the extent of any injury sustained by the plaintiffs, the action was, in effect, one for an injunction. The findings of fact made

by the learned trial judge and affirmed by the general term are fully sustained by the evidence, and, therefore, the question presented upon this appeal is, ⁴⁶⁶ whether, upon the facts as found, the court was justified in directing a judgment for the defendants.

Both parties admit that the relation which existed between them was that of tenants in common, and consequently there was a unity in their right of possession, as that is the very nature of the estate. The parties were tenants in common of the natural oysters, and the defendants as such had the same right as the plaintiffs to enter upon the premises and remove them. As to that, there is no dispute or controversy. But the appellants contend that, having dredged the land and placed oyster shells and seed oysters upon it, they are entitled not only to prevent the defendants from interfering with the oysters thus planted, but also to enjoin them from taking the natural ones, because in doing so they would, to a slight extent, disturb those planted by the plaintiffs. That the oysters taken by the defendants were chiefly of two or three years' growth, and, therefore, not the oysters planted by the plaintiffs, the court has found and the evidence establishes. The most that can be said is, that the defendants in removing the oysters, as to which they were tenants in common, have slightly disturbed the oysters planted by the plaintiffs. The precise question presented is, whether the plaintiffs could deprive the defendants of their right to take any of the natural oysters by scattering a few seed oysters over the premises in such a manner as to render it impossible to remove the natural ones without disturbing those planted. If they could not, then the decision of the courts below is right and should be affirmed.

The appellants rely upon the case of *Le Barron v. Babcock*, 122 N. Y. 153; 19 Am. St. Rep. 488. We find nothing in that case which upholds their claim. In *Le Barron v. Babcock*, 122 N. Y. 153, 19 Am. Rep. 488, the land was held by the plaintiff and the party represented by the defendant as tenants in common. The plaintiff was in peaceable possession with the acquiescence of his cotenant. The oats and hay that were taken by the defendant had been severed from the freehold by the plaintiff, and were personal chattels. In that case, it was said that when, in the due course of husbandry, the ⁴⁷⁰ oats and hay were peaceably and in good faith severed from the common estate where they were grown, the title vested in the cotenant who had severed them. It was also said that if the oats and hay were owned by the plaintiff and Mrs. House, it was not a conversion of them for the defendant, acting by her authority, to draw them

away, and it was only upon the theory that the plaintiff owned them in his own right that the defendant was held liable. Neither the defendants nor their grantors ever acquiesced in the plaintiffs having any exclusive or other possession of this land, except such as they had as tenants in common with them. Nor were the oysters taken severed from the freehold by the plaintiffs so that they became personal chattels. The land and the oysters thereon belonged to the tenants in common, and neither possessed any such title to the oysters, planted or natural, as would enable him to maintain an action for trespass or conversion against his cotenant for taking them from the land thus held in common.

It is difficult to discover any principle which would justify a court of equity in restraining the defendants from taking the oysters which they had a right to remove, simply because in doing so some slight injury might result to those the plaintiffs had strewn over the lands. As the rights of tenants in common are equal in the use and enjoyment of the estate, it is a general rule that a court of equity will not interfere between them, even to restrain waste, unless it be of a malicious character or so unusual and unreasonable as to constitute a wanton destruction of the estate: Freeman on Contenancy, sec. 323; High on Injunctions, sec. 692; Beach on Modern Equity Jurisprudence, sec. 735; Smith on Equity, 418. Another well-established rule of equity jurisprudence is, that an injunction will not be granted when it will operate inequitably or contrary to the real justice of the case: Troy etc. R. R. Co. v. Boston etc. Ry. Co., 86 N. Y. 107, 125. In this case, there is no evidence that the defendants' acts in removing the oysters which were the natural products of the land, were malicious, unusual, or unreasonable, while it does show that if an injunction was granted, it would operate inequitably and contrary to real ⁴⁷¹ justice by depriving the defendants of their admitted rights. There is nothing to show any disposition on the part of the defendants to unnecessarily interfere with or destroy the seed oysters planted by the plaintiffs. The only interference upon their part has been such as could not be avoided without an entire surrender of their rights to the use of the property.

Under these circumstances, we are clearly of the opinion that the trial court properly dismissed the plaintiffs' complaint upon the merits, and that the judgment of the general term should be affirmed, with costs.

All concur.

Judgment affirmed.

COTENANCY.—As to the rights of cotenants to the common use of the estate, see the extended note to *Harman v. Gartman*, 18 Am. Dec. 659. The possession of one cotenant is the possession of all, and each has the present right to enter upon the whole land, and upon every part of it, and to occupy and enjoy the whole: *Metcalf v. Miller*, 96 Mich. 459; 35 Am. St. Rep. 617, and note.

MENNEILEY v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

[148 NEW YORK, 586.]

INSURANCE.—ACCIDENT.—A provision in a policy of life insurance exempting the insurer from liability for death or disablement arising from accidents that bear no external and visible marks, and from anything accidentally taken, administered, or inhaled, contact with poisonous substances, inhaling gas, or any surgical operation, does not exempt the insurer from liability from death by the accidental inhaling of illuminating gas.

INSURANCE.—THE INHALING OF GAS within the exemptions of insurance policies means a voluntary and intelligent act of the insured, and not a voluntary and unconscious act.

INSURANCE.—ACCIDENTS.—MARKS OF.—A provision in a policy of insurance that, to render the insurer liable, the death or disablement must not be from an accident that bears no external or visible marks, means that there must be some external and visible evidence that the death was accidental, and not that there must be external and visible marks on the person of that decedent.

Action against an insurance company to recover a sum stipulated to be paid on the death of S. D. W. Menneiley from accident. The defense was upon the ground that the insurer was exempt from liability under the provision referred to in the opinion of the court. The insured was found dead in his room at the Millard Hotel in Omaha, Nebraska, on the morning after the 12th of October, 1891, and his death had been caused by the accidental escape of illuminating gas into his room. The agreed case showed that the death was accidental, and that there were no external and visible marks upon the body of Menneiley, caused by the accident, "unless the facts that illuminating gas emanated from his body when artificial respiration was produced to the perception of the person producing such artificial respiration, that the room, on entering the same, was easily perceived to be full of illuminating gas, and that the gas was then escaping therein, and that inspection of the body showed life to be extinct, be held or found to constitute such external and visible marks within the meaning of the term 'external and visible marks' contained in the policy. The defendant does not admit that such facts constitute 'external and visible marks' within the meaning

of the term 'external and visible marks' contained in the policy; and the plaintiff claims that they do." Both the trial court and the general term decided that the plaintiff was not entitled to recover.

William Nathaniel Cogswell, for the appellant.

W. A. Sutherland, for the respondent.

599 *MARTIN, J.* This action is upon a policy or contract of insurance issued by the defendant to Samuel D. W. Menneiley, by which, in case of his death from any accident, within the provisions of the policy, the defendant agreed, within three months thereafter, to pay to the plaintiff the sum of five thousand dollars.

The conditions contained in the policy, so far as applicable to the questions involved in this case, are as follows: "This policy does not insure against death or disablement . . . from accidents that shall bear no external and visible marks . . . nor against death or disablement arising from anything accidentally taken, administered, or inhaled, contact of poisonous substances, inhaling gas, or any surgical operation or exhaustion consequent thereon." The general term held that the clause in the policy which provides that it does not insure against death or disablement arising from anything accidentally taken, administered, or inhaled, described an act that was not voluntary and intelligent, but accidental, and that the admitted facts bring this case within that exception. That court also held that the facts did not establish a case within the exception as to inhaling gas, citing the decision of *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758. Thus, the sole ground upon which judgment was directed for the defendant was, that it was not liable because the cause of the death of the insured was within the exception in the policy as to death arising from anything accidentally taken, administered, or inhaled. Moreover, the respondent admits that in this state, under the authority of *Paul v. Traveler's Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758, the words "inhaling gas," contained in the policy, when read in the light of the context, apply only to cases where gas is inhaled intentionally, voluntarily and consciously, and that under the decision in that case the judgment of the general term cannot be upheld on the theory that that provision exempted the defendant from liability under its policy. In *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758, Judge Gray in delivering the opinion of the court, said: "But in expressing.⁶⁰⁰ its intention not to be liable for death 'from inhaling of gas,' the

company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which, *ex vi termini*, would be included the dentist's work, or to a suicidal purpose. Of course the deceased must have, in a certain sense, inhaled gas; but, in view of the finding that the death was caused by accidental means, the proper meaning of words compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act necessarily involved in the process of inhaling." In that case, it was distinctly held that the defendant was not exempt from liability under such a provision where the death of the insured was caused by the accidental inhaling of illuminating gas. The facts in that case were so nearly like those in the case at bar that no distinction between them exists. *Paul v. Traveler's Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758, was referred to in *Bacon v. United States Mut. Accident Assn.*, 123 N. Y. 304, 308, 20 Am. St. Rep. 748, and its doctrine expressly recognized as correct. It was also followed in *Pickett v. Pacific etc. Co.*, 144 Pa. St. 79, 91; 27 Am. St. Rep. 618. It follows that the judgment appealed from cannot be sustained upon the ground that the clause in the policy excepting death from inhaling gas from its provisions exempts the defendant from liability in this case.

The respondent, however, urges that upon the admitted facts, the general term properly held that the provision with reference to "anything accidentally taken, administered, or inhaled," exempted the company from any liability whatever under its policy. We think otherwise. That provision in the policy clearly implies voluntary action on the part of the insured or some other person. The insured must take or inhale, or another must administer. The manifest purpose of the provision is to exempt the insurer from liability where the insured has voluntarily and consciously, but accidentally, taken or inhaled, or something has been voluntarily administered which was injurious or destructive of life. We think that the particular accidents ⁶⁰¹ intended to be excepted by that provision are the accidental taking or inhaling into the system of some injurious or destructive agency under the mistaken belief that it was beneficial, or, at least, harmless. That is made more apparent by that portion of the provision which relates to something "administered," as it cannot be reasonably construed as referring to a thing involuntarily and unconsciously administered. Indeed, it is quite difficult to understand how a

thing could be involuntarily and unconsciously administered. Coupled together as these provisions are, the same rule of construction must be applied to that portion which relates to something accidentally inhaled as applies to the portion which relates to a substance accidentally taken or accidentally administered. All the cases thus provided for plainly involve voluntary and conscious action on the part of the insured or some other person. The leading and controlling idea in this provision is the performance of a voluntary act which accidentally causes the death or injury of the insured. That a proper construction of the policy requires us to hold that it applies only to cases where something has been voluntarily and intentionally, although mistakenly, taken, administered, or inhaled, there can, we think, be but little doubt. As thus construed, this provision manifestly did not exempt the defendant from liability in this case, as it was admitted that the death of the insured was occasioned by accidental means, and was caused by involuntarily and accidentally breathing illuminating gas which had escaped into the room where he was sleeping at the time of his death. The argument that the provision as to inhaling gas has been given the same effect as is now given to the other and more general one, and that such could not have been their purpose, has little force. The inhaling of gas having been specially provided for when taken for surgical and like purposes, it is only when it is inhaled for some other purpose, or under other circumstances, that the general provision applies. The special provision is applicable when gas is inhaled for surgical and like purposes; the general provision applies when it is inhaled for other purposes. Applying to ⁶⁰² the construction of this policy the principles stated in the opinion in *Paul v. Traveler's Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758, it is obvious that the construction we have placed upon the policy is the proper and correct one.

The only remaining question relates to the provision which declares that the policy "does not insure against death or disablement . . . from accidents that shall bear no external and visible marks." It is somewhat difficult to understand precisely what was intended by this clause of the policy. We are, however, of the opinion that the language employed, when fairly construed, indicates that its purpose was to provide that a case of death or injury should not be regarded as within the policy, unless there was some external or visible evidence which indicated that it was accidental. In other words, that only such injury as could be shown by external and visible evidence to have been accidental

should be regarded as within the policy. In this case, it is admitted that the decedent's death was occasioned by his involuntarily and accidentally breathing illuminating gas, which had accidentally escaped into his room; that there were no visible marks of the accident upon the body of the deceased, but when artificial respiration was produced illuminating gas emanated therefrom to the perception of the person producing such artificial respiration; that upon entering the room it was perceived to be full of gas, and that gas was then escaping therein, and that an inspection of the body showed life to be extinct. We think this admission furnishes sufficient evidence of an external and visible character that the death of the decedent was accidental to exclude it from this exception in the policy, and hence that it was one of the accidents against which the defendant intended to insure. The respondent discusses this question upon the theory that this clause in the policy should be construed as though it read "from accident where there shall be no external and visible marks upon the body of the deceased." A fair construction of the language does not, we think, justify the conclusion that such was its intent and purpose; but that the more reasonable construction is that which has already been suggested.

603 If we are correct in these conclusions, it follows that the judgment of the general term should be reversed, and the judgment upon the verdict directed for the plaintiff should be affirmed, with costs to the plaintiff in all the courts.

All concur, except Andrews, C. J., not voting, and Haight, J., not sitting.

Judgment accordingly.

INSURANCE — ACCIDENT—INHALATION OF GAS.—Death by external and violent means, within the meaning of an insurance policy, may be occasioned by the breathing of illuminating gas: *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758. Death caused by asphyxia or suffocation, due to the accidental and unconscious inhalation of carbonic acid or other deadly gas in a well, is death by external, violent, and accidental means, within the meaning of an insurance policy providing that the insurance shall not extend to death caused "by inhaling gas": *Pickett v. Pacific etc. Life Ins. Co.*, 144 Pa. St. 79; 27 Am. St. Rep. 618, and note.

INSURANCE — ACCIDENT—EXTERNAL VISIBLE MARK.—Insurance against accident which stipulates that it shall not cover injuries of which there is no visible external mark upon the body of the assured, covers an accident of which there was no visible mark at the time of the injury, if there was such mark afterward and as a result of such injury: *Pennington v. Pacific etc. Life Ins. Co.*, 85 Iowa, 468; 39 Am. St. Rep. 306. See, especially, the note to *Schroeder v. Crawford*, 34 Am. Rep. 240.

HANOVER NATIONAL BANK v. AMERICAN DOCK AND TRUST COMPANY.

[148 NEW YORK, 612.]

A CERTIFICATE OR RECEIPT ISSUED BY A WAREHOUSE AND STORAGE company is negotiable, and a purchaser thereof in good faith, and without notice of any fact to put him on inquiry, is entitled to receive from the company the property described on payment of lawful charges.

A STORAGE OR WAREHOUSE COMPANY failing to produce goods called for in its receipt must assume the burden of accounting for them, or pay their full value.

CORPORATION, AUTHORITY OF OFFICER TO ACT FOR HIMSELF.—The president of a warehouse company having authority to issue its receipts and certificates has no authority to issue them in his own favor even for property actually deposited by him.

WAREHOUSE CERTIFICATES—NOTICE.—If a warehouse certificate purporting to be for goods deposited shows on its face that it is in favor of an officer of the corporation, and that he, as such, issued it, a purchaser of the certificate, in order to charge the corporation, must show that it authorized the officer to act for it in cases in which he was personally interested.

PRINCIPAL AND AGENT.—THE AUTHORITY OF AN AGENT IS ENLARGED as to third persons by implication, when the principal permits him to do acts not expressly authorized, or which are recognized as valid after they have been done.

PRINCIPAL AND AGENT.—IF, THROUGH INATTENTION or otherwise, a principal suffers his agent to act beyond his authority without objection, he is bound to those who are not aware of any want of authority, to the same extent as if the power had been directly conferred.

A WAREHOUSE OR STORAGE CORPORATION IS ANSWERABLE for certificates or receipts issued by one of its officers in his own favor, if it had knowledge that he was in the habit of issuing such certificates, and did not put an end to his acts of that nature after having a reasonable time to do so.

NOTICE—DUTY OF INQUIRY.—A purchaser of a negotiable instrument, who purchases under circumstances that throw on him the duty of inquiry as to its validity, assumes no greater risk by his failure to inquire than the burden of proving that the facts which he could have discovered had he inquired would have protected him.

CORPORATIONS.—THE IGNORANCE BY THE DIRECTORS of a corporation of the acts of a president does not exempt it from liability for such acts, unless such directors were reasonably diligent in the method and details of conducting the business under their control.

CORPORATIONS.—DIRECTORS, IMPUTING KNOWLEDGE TO.—WHATEVER ENTRIES IN THE BOOK OF A CORPORATION, made in the ordinary course of its business, would have disclosed, the jury are warranted in finding had come to the knowledge of its directors, who were charged with the duty of reasonable supervision of the conduct of its officers.

Action brought by the plaintiff, a national bank, against the defendant, a warehouse and storage corporation, to recover possession of a quantity of cotton, or its value, if such possession could not be had. M. W. Stone was from 1876 to 1890 vice-pres-

ident of defendant, and thereafter until his death in 1891, he was its president. All this time he had, according to the defendant's by-laws, power to sign certificates or receipts issued by the defendant, though other officers were also empowered to act in the same capacity. He in fact signed all receipts issued by the defendant, and was known as its business head, and it was regarded as the better policy to leave the duty of issuing such receipts entirely in his charge in order that he could better keep "track of them," and avoid the danger of issuing duplicate certificates. While he was vice-president, he issued certificates in his own favor, purporting to be for cotton deposited, and dated June 15, 1881, November 9, 1881, March 16, 1886, April 14, 1886, and May 24, 1886. All of these certificates were used, returned, and canceled in the regular course of business. Upon one of the certificates, the cotton called for had not been returned all at one time, but upon five separate occasions, upon each of which indorsements showing the partial delivery were made upon the certificates by one Gendar, who was then a book-keeper for the defendant. The form of certificate issued to Mr. Stone was the same as if they had been issued to a stranger to the corporation. The plaintiff for many years prior to 1891 had been loaning money to Stone upon certificates as collateral, and had at various times made inquiries at the office of the defendant whether any officer other than Stone was authorized to sign the certificates, and had received an answer in the negative. In March, 1891, plaintiff made a loan to Stone of five thousand dollars, taking as collateral security a certificate of the defendant, in the usual form, signed by Stone as president, of one hundred and seventy-two bales of cotton. The certificate was indorsed by him individually, and in the list of the officers of the corporation appearing on the margin of the certificate was his name as president, and there was printed across the paper the words, "This receipt is valid only when signed by either the president or treasurer." No inquiry was made by any officer of the defendant, except of Stone, as to whether the cotton was on deposit. Subsequently, in January and February, 1891, other loans were made to Stone, and similar certificates of deposit taken as security. After his death in March, 1891, all the certificates received by plaintiff were found to have been issued by Stone without there being any basis therefor. The blanks for the certificates issued by Stone had been obtained by him from the lithographer, they having been laid aside as defective for some reason, and the numbering thereon was not made by the printing machine in common use, but was probably

stamped by a rubber stamp. The defendant asked the court to direct a judgment in its favor, but thereupon the counsel for the plaintiff asked "to go to the jury on the question whether the action of the defendant in permitting Mr. Stone to issue certificates in his own favor during the years 1881 and 1886, was not such an acquiescence in his act as gave the plaintiff a right to rely upon the validity of such a certificate when issued by Mr. Stone," and also whether the answer given when inquiry was made as to whether any other officer than Mr. Stone could issue certificates, "did not justify the plaintiff in relying upon this collateral security as being valid when signed by Mr. Stone, and whether the long course of dealing, allowing Mr. Stone to have entire control should not estop the defendant from claiming that this certificate is invalid." The court granted the motion of the defendant, and denied the application of the plaintiff. The action of the trial court was reversed upon appeal to the general term, and a new trial granted, whereupon a further appeal was taken to this court.

Thaddeus W. Kenneson, for the appellant.

Thomas S. Moore, for the respondent.

⁶¹⁹ VANN, J. As a verdict was directed against the plaintiff, it is entitled to the most favorable inferences that can fairly be drawn from the evidence: *Raabe v. Squier*, 148 N. Y. 81. The jury, therefore, might have found the facts as they appear in the foregoing statement, and might have drawn such inferences from those facts as any reasonable view thereof would permit.

A certificate issued by the defendant was negotiable, and a purchaser thereof, for value and without notice of any fact to put him on inquiry, was entitled to receive from the defendant the property described therein on payment of the lawful charges: *Bank of New York v. American etc. Co.*, 143 N. Y. 559; *Laws* 1872, c. 881, sec. 6. As the defendant failed to produce the goods when called for, the burden was cast upon it, *prima facie*, of either accounting for them or paying for ⁶²⁰ them: *Schwerin v. McKie*, 51 N. Y. 180; 10 Am. Rep. 581. It did neither, but when this action was commenced, alleged as a defense that said certificate was issued by Medad W. Stone, its president, to his own order, without any authority from the board of directors. While Stone had express authority to sign and issue warehouse receipts for cotton deposited with the defendant by persons other than himself, he had no such authority to sign or issue warehouse receipts in his own favor, even for cotton that had actually been

deposited by him: *Bank of New York v. American etc. Co.*, 143 N. Y. 559.

As the certificate on its face gave a purchaser such notice as should put a prudent person upon inquiry in regard to Stone's authority, the plaintiff, in order to succeed, was required to show that implied authority had been conferred upon him to issue certificates to himself for cotton that he had actually deposited. If he was authorized, either expressly or impliedly, to issue certificates to himself for his own cotton on deposit, and he issued a receipt, on his personal account, for cotton not on deposit, in the language of the case last cited "the defendant would be liable to respond to a bona fide holder for value of such receipt": *Bank of New York v. American etc. Co.*, 143 N. Y. 559. This is upon the ground that an agent may bind his principal within the limits of the authority with which he has apparently been clothed in respect to the subject matter. Thus the authority of an agent is enlarged, as to third persons, by implication, when the principal permits him to do acts not expressly authorized. For the protection of innocent persons, the law will imply authority in an agent to do acts which, although forbidden by the principal before they are done, are, nevertheless, recognized by him as valid after they are done. If, through inattention or otherwise, the principal suffers his agent to act beyond his authority without objection, he is bound to those who are not aware of any want of authority to the same extent as if the requisite power had been directly conferred: *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 58. Under such circumstances, the principal is estopped from asserting the truth, by his own conduct in ⁶²¹ inducing third persons to believe that the agent had due authority to act in the given case.

If, therefore, Stone issued certificates to himself for cotton, to the knowledge, express or implied, of defendant's directors, their acquiescence in such acts, after allowing them a reasonable time to put an end to action of that nature would estop them from denying, as to purchasers for value, that the power to so certify in fact existed. Acquiescence, under such circumstances, would permit the inference that the act of certifying in his own favor was within his actual authority (*Martin v. Niagara Falls etc. Co.*, 122 N. Y. 165), and with that power in existence, or by implication presumed to exist, the issuance of the certificate in question would come within the scope of his authority, and the presence of the cotton in storage was an extrinsic fact in regard to which his representations as agent would bind

the defendant: *Bank of Batavia v. New York etc. R. R. Co.*, 106 N. Y. 195; 60 Am. Rep. 440. The act of certifying would thus become a representation by Stone that the cotton was on deposit, since that fact would "necessarily and peculiarly" be within his knowledge as the defendant's agent: *Fifth Avenue Bank v. Forty-second Street etc. R. R. Co.*, 137 N. Y. 231; 33 Am. St. Rep. 712.

It appeared upon the trial that, out of more than twenty-six thousand certificates issued by the defendant, substantially all were signed by Stone. Mr. A. J. Pouch, the secretary and treasurer for two years, and treasurer alone for eleven years more, when on the witness stand, would not say that he, himself, had signed as many as six, and he thought that Mr. Hascy, who was secretary for twelve years and until he died in 1891, might have signed some. Mr. F. H. Pouch, who succeeded A. J. Pouch as treasurer, and continued in that capacity until Stone's death, would not swear that he had signed more than two. On several occasions, while the plaintiff was lending Stone money on the faith of these certificates, inquiry was made by the bank, through one of its officers, of the defendant's secretary "as to whether any other officer of the company than Mr. Stone was authorized to sign certificates," and each time Mr. Hascy ⁶²² said in substance that the exclusive authority to sign receipts had been conferred on Mr. Stone.

Whether or not this was enough to carry the case to the jury we are not required to decide, for the purchaser of a negotiable instrument, who purchases under circumstances that throw upon him the duty of making inquiry as to its validity, assumes no greater risk by his failure to inquire than the burden of proving that the facts which he could have discovered, had he inquired, would have protected him: *Wilson v. Metropolitan etc. Ry. Co.*, 120 N. Y. 145; *Cowing v. Aultman*, 71 N. Y. 435, 442; 27 Am. Rep. 70. Therefore, if the plaintiff when charged with the duty of making inquiry had actually done so, whatever its officers prosecuting the investigation would naturally have discovered, according to any permissible inference from the evidence, it can now invoke to establish the implied authority of Mr. Stone. What could the jury have found in this regard, within the rules governing their powers, if the case had been submitted to them for decision? They could have found, in addition to facts already mentioned, that cotton had been stored from time to time by Stone, and that this was regularly reported to the company; that he had issued to himself two certificates as early as 1881, and

three more in 1886; that they were made out by the secretary of the company, and that one of these certificates, indorsed by Stone, individually, was promptly returned and placed among the records of the defendant as a completed transaction. Moreover, as all of these certificates were issued for a current commodity, which in the usual course of business does not remain on storage but a short time, the jury could further have found that they were, within a reasonable time, indorsed, returned, and put in the books of the company, the same as those given to other patrons. Furthermore, one of these certificates would have shown that five partial deliveries were made before final surrender of the receipt, each indorsed by the book-keeper, in the employ of the defendant, in the usual course of business. Thus it would have appeared that Stone had openly assumed to issue certificates to himself for deposits ⁶²³ of cotton, with no evidence that any objection had been made by the directors, or in their behalf. The number of times that he did so is mainly important in its bearing upon the probability that the directors knew that he did it at all. While it does not appear that they actually knew of these transactions, it was a question of fact for the jury to say whether they ought not to have known, under all the circumstances, as their ignorance was no excuse, unless they were reasonably diligent in supervising the method and details of conducting the business under their control.

The language used by the supreme court of the United States with reference to a bank may be repeated here as applicable to the defendant: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect officers of the bank and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business": *Martin v. Webb*, 110 U. S. 7, 15.

Whatever the entries in the books of the defendant, made in the ordinary conduct of its business, would have disclosed, the jury would have been warranted in finding had come to the knowledge of the directors, who were charged with the duty of

reasonable inspection of the books and reasonable supervision of the conduct of the officers.

They might have been satisfied that the directors knew that Stone was occasionally creating obligations against the company in his own favor, and that the directors "gave him authority by acquiescing in its exercise": *Fifth Nat. Bank v. Navassa Phosphate Co.*, 119 N. Y. 256, 261. While the evidence is not conclusive, it tends to establish that ⁶²⁴ fact, and we think presented a question that should have been submitted to the jury. They could reasonably have believed from all the evidence that these acts of Stone, and the authority assumed by him, were approved by the company, and that he, therefore, possessed actual authority to issue certificates in his own favor. Upon this basis, as we have already seen, the defendant would be estopped from denying the validity of the certificate in question, and the plaintiff would be entitled to recover.

We think that the learned general term was correct in its conclusion, and that its judgment should be affirmed, and judgment absolute directed against the defendant, in accordance with the stipulation contained in the notice of appeal.

All concur.

Judgment accordingly.

WAREHOUSE RECEIPTS—NEGOTIABILITY OF.—This subject will be found fully discussed in the extended note to *Rice v. Cutler*, 84 Am. Dec. 753. In the absence of a statutory provision, a warehouse receipt is not negotiable: *Note to Commercial Bank v. Hurt*, 42 Am. Dec. 48.

CORPORATIONS—LIABILITY FOR ACTS OF PRESIDENT.—The president of the board of trustees of a corporation, in the absence of express or implied authority, has no more power to bind the corporation than any other individual trustee: *Lyndon Mill Co. v. Lyndon Literary etc. Inst.*, 63 Vt. 581; 25 Am. St. Rep. 783, and note. To the same effect see *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352; 50 Am. St. Rep. 330, and note.

JARVIS v. MANHATTAN BEACH CO.

[148 NEW YORK, 652.]

A PRINCIPAL IS LIABLE IN A CIVIL ACTION for the fraud or other malfeasance of his agent perpetrated in the course of his employment, although the principal did not authorize, justify, nor know of, the misconduct.

CORPORATION, FRAUDULENT ISSUE OF STOCK, LIABILITY FOR.—If the transfer clerk of a corporation, having possession of stock bearing the genuine signatures of its officers, makes out such certificate in the name of a fictitious person, and forges his indorsement thereon, himself witnessing the signature, and presents such certificate to brokers to be sold, and they, upon due inquiry of the officers of the

corporation, did not discover anything to impugn the genuineness and validity of the certificate, and therefore sold it on account of the clerk, giving their guaranty of genuineness, the corporation is answerable to them for the loss suffered through their guaranty.

CORPORATIONS—STOCK CERTIFICATE.—BAD FAITH on the part of a broker who receives a stock certificate from the transfer clerk of a corporation, and subsequently sells it for his account, is not established by proving that the same broker had acted for the clerk in some previous similar transactions, and had there taken the precaution of first sending the certificate to the office of the corporation, and procuring a transfer to be made, which precaution had not been adopted in the case before the court, if it further appears that the broker had sent the certificate to the proper officers, and had received information that it had been duly issued and registered.

Action to recover damages alleged to have been sustained by defendant's refusal to transfer a certificate of shares of its capital stock. The trial court gave judgment in favor of the plaintiff, which was affirmed by the general term.

William J. Kelly, for the appellant.

Charles Steele and William D. Guthrie, for the respondent.

655 O'BRIEN, J. The plaintiff in this action recovered a judgment for damages sustained by his assignors in consequence of the defendant's refusal to transfer a certificate for one hundred shares of its capital stock upon request, whereby the holders of the certificate were compelled to purchase other shares of equal amount. The defendant had a capital stock of five million dollars divided into fifty thousand shares of one hundred dollars each. A large portion of the stock was issued and the certificates were listed upon the New York Stock Exchange and were the subject of purchase and sale by the public. The certificates were signed by the defendant's president and assistant treasurer, and, in order to guard against frauds, countersigned and registered by the Central Trust Company, which acted as registrar of transfers, in order to authenticate the genuineness of the certificates. The defendant had an office in the city of New York, where the transfers of its stock were made, and a transfer clerk was in attendance there to make the transfers. On the 30th of September, 1882, this transfer clerk delivered to a firm of brokers in New York, in the ordinary course of business, a certificate for one hundred shares of the defendant's capital stock to sell for his account. The certificate bore the genuine signatures of the defendant's president and assistant treasurer, and was countersigned by the Central Trust Company, with a certificate of its registration on the day of its date indorsed thereon. It was in all respects regular in form, and carried upon its face

every assurance of genuineness, and certified that one B. Bignell was the owner of one hundred shares of defendant's capital stock. What purported to be the signature of Bignell was indorsed thereon, under the blank form of transfer, and this signature was witnessed, or purported to be witnessed, by the transfer clerk who presented it to the brokers. It appeared that this certificate was in fact spurious, fabricated by the transfer clerk over the genuine signatures of the president, assistant treasurer, and registrar, upon the blanks used by the defendant in issuing genuine certificates, that Bignell was not a holder of any stock, and that his name upon the ⁶⁵⁶ paper was a mere fictitious and fraudulent device. It was shown that, by the rules of the stock exchange, certificates sold there must either stand in the name of some member and be indorsed in blank by him, or, if standing in the name of some other person and indorsed in blank by him, must be guaranteed by a member of the exchange. The purpose of this rule is to give to the purchaser the security of the indorsement or guaranty of some member, and hence the selling broker becomes a surety for the validity and genuineness of the certificate. The defendant had knowledge of this rule or custom, but did not follow it in practice. When making transfers of stock, in case the signature of the holder was unknown to it, then it had to be attested by a witness whom it did know. In the present case, the signature, indorsed on the certificate, was attested by its own transfer clerk, whose signature was well known, and so the certificate was apparently in a condition for transfer under the practice adopted at the defendant's office.

The brokers, to whom the certificate was presented by the transfer clerk, sold it in the open market for his account, but were, as already stated, obliged to guarantee its genuineness. In order to ascertain whether they could safely do so, they sent the certificate by a messenger, first to the office of the Central Trust Company, the registrar, and then to the defendant's office to inquire whether it was genuine and acceptable for transfer. The Central Trust Company informed him that the certificate was properly registered, and the person in charge at the defendant's office informed him, as the plaintiff claims, that the certificate was all right for transfer. The brokers did not procure it to be transferred, but being thus assured that it was in a condition for transfer at any time, they made the guaranty upon it and sold it for the account of the transfer clerk, paying to him the proceeds, retaining only the regular commissions.

Subsequently, and about two years after, when it was ascer-

tained that the certificate was spurious and worthless, the brokers were obliged to make their guaranty good and took ⁶⁵⁷ it back from the purchaser, procuring and delivering to him a genuine certificate which they purchased in the market. Upon the refusal of the defendant to recognize the certificate, or indemnify the brokers for their loss, they assigned the right of action to the plaintiff.

In March, 1884, the transfer clerk, who had been in the defendant's employ for several years, absconded, and then the defendant, for the first time, ascertained from an examination of the books that for years he had been engaged in fraudulently issuing certificates of its stock, including the one in question. The evidence tended to show that, prior to his departure, he had sole charge of the business of transfers and of the stock ledger and transfer-books; that practically no supervision was exercised over his conduct and no examination made of the books, though if made the fraud of the clerk would have appeared as it did when the examination was made after the absconding. On these facts and circumstances, the case was submitted to the jury, and a verdict was rendered in favor of the plaintiff for the amount which it cost the brokers to replace the spurious certificate with a real one, with the interest, and the general term has affirmed the judgment.

The principles upon which a corporation may be held liable to a bona fide holder of certificates of stock, fraudulently issued or put in circulation by the wrongful or criminal acts of its officers or agents, are quite well settled. Numerous cases involving these questions have received the attention of this court and quite recently some new features of such transactions have appeared: *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Fifth Avenue Bank v. Forty-second Street etc. R. R. Co.*, 137 N. Y. 231; 33 Am. St. Rep. 712; *Manhattan Life Ins. Co. v. Forty-second Street etc. R. R. Co.*, 139 N. Y. 146; *Knox v. Eden Musee etc. Assn.*, 148 N. Y. 441; ante, p. 700.

The liability in such cases is determined by an application of the general rules of law that govern the relations of principal and agent as developed and applied to corporations, acting solely through such agencies. The principal is liable to a ⁶⁵⁸ third person in a civil action for the fraud or other malfeasance of his agent, perpetrated by the latter in the course of his employment, although the principal did not authorize, justify, or know of the misconduct. In this case, the certificate contained the genuine signatures of three authorized officers or agents of the

defendant, namely, the president, the assistant treasurer, and the registrar. The paper upon its face was an assurance to the public, through the acts of its officers, that a person named therein, whether a real or fictitious person, was the owner of one hundred shares of its capital stock. It had upon its face all the essential evidence of genuineness, and it was presented to the brokers for sale, apparently in proper form for transfer, by the very agent of the defendant that it had held out to the public as the person who had the power to represent and act for it in making such transfer. When the paper was delivered to the brokers by the transfer clerk, having indorsed thereon what appeared to be a regular transfer, it is difficult to see why it was not received by them with every reasonable assurance that the defendant was able to give, that the certificate was not only genuine stock, but in a condition to be transferred upon the books in favor of anyone who should receive it in good faith. The paper in fact, however, was nothing but a fictitious and fraudulent device on the part of the transfer agent which he had fabricated for purposes of his own, and although the evidence tended to show that his frauds in this respect could have been detected or prevented by the exercise of reasonable diligence on the part of the defendant's officers, yet, as the brokers knew, or ought to have known, that he was dealing with himself in respect to the certificate, it may very well be that this circumstance was sufficient to put them on their guard and to impose upon them the duty of making some inquiry as to its origin and validity. The paper came to them accredited by the genuine signatures of the proper officers of the defendant and countersigned by the registrar, whose duty it was to guard against unauthorized or fraudulent issues of the stock. These signatures carried with them, to strangers at least, the very highest assurance ^{and} of the genuine character of the security. But we do not think it is necessary in this case to decide what the liability of the defendant would be in case it appeared that the brokers took the certificate without inquiry, since the proof tended to show that they were not negligent in that respect. This was really the only question of fact contested at the trial and submitted by the court to the jury. While such certificates do not possess all the qualities of commercial paper, they do possess some of them, and innocent parties, dealing in them, will be protected upon analogous principles and, in a proper case, will be entitled to compel recognition as stockholders, where power exists to issue new certificates or to indemnify if there was not.

We think that the judgment in this case can stand upon the

verdict of the jury which implies a finding of fact that before the brokers received the certificate for sale, or guaranteed its genuineness, they sent it to the defendant's office in order to ascertain whether they could safely do so, and were informed by the person in charge that it was in a condition for transfer. This was, in substance, an assurance that the stock would be transferred in case the brokers took it, or, at least, that there was no defect in the instrument to prevent the transfer. The brokers having acted upon the faith of the assurance, the defendant must be held estopped from denying the liability to indemnify them, or their assignee, from the result of such action: *Clews v. National etc. Assn.*, 105 N. Y. 398; *Kenyon v. Knights Templar etc. Assn.*, 122 N. Y. 247, 254; *Stokes v. Mackay*, 140 N. Y. 640.

There was some dispute at the trial as to the precise scope of the representations made at defendant's office by the person in charge as well as his authority to make them, but these questions were submitted to the jury upon evidence which admitted of opposing inferences, and the verdict must, on this appeal, be taken as establishing not only the representations as stated but the authority of the person in the office to deal with the subject and to make them. Assuming, as we must, that the brokers, before assuming any liability in ⁶⁰⁰ regard to the certificate, made general inquiry of the defendant as to its character and condition, and were then assured it was genuine and in condition for transfer, and, relying upon such assurance, they sold the certificate, making the guaranty required by the rules of the exchange, the case contains all the elements of an estoppel against the defendant. It is urged by the learned counsel for the defendant that upon the proofs the only inquiry made was as to the form of the certificate. It is scarcely to be supposed that brokers constantly dealing in stocks would take the trouble to inquire of the corporation whether its certificates were made up in proper form. The jury had the right upon all the testimony to adopt the more probable theory that the information sought by the brokers was, not as to the form, but as to the genuineness of the certificate, and that they sent it to the office of the defendant in order to know whether they could safely deal with it. The evidence as to the precise representation made at the defendant's office, and the identity and authority of the person who made it, was not very clear or satisfactory. There can be no doubt, however, that the brokers sent the certificate to the defendant's office for verification. The uncertainty arises in regard to what took place there and the parties to the transaction, and, when it is borne

in mind that the witnesses were testifying years afterward to transactions of every-day occurrence, it is not surprising that they were unable to give the precise words used or all the details of the interview. The proof was of such a character that, under all the circumstances, the court was not warranted in withdrawing from the jury the question as to what representations, if any, were actually made as to this certificate at the defendant's office, as well as the agency and authority of the person in charge to make them.

The defendant's counsel asked the court to submit to the jury the question whether, in taking the certificate, the brokers acted in good faith. The request was refused, and the defendant excepted. The only evidence on this point was, that in several previous transactions these same brokers acted for the same transfer clerk in the sale of shares of defendant's stock, ⁶⁶¹ and, upon receiving the certificates, sent them to the defendant's office and procured them to be transferred in the name of some of their clerks, whereas in this case they made no transfer. We think that bad faith on the part of the brokers could not be found upon this testimony, especially in view of the fact that before dealing with the certificate they took the precaution to send it to the registrar, the Central Trust Company, and were informed there that it had been properly registered, and then to the office of the defendant, where they were informed, in substance, as the verdict implies, that the certificate was in a condition for transfer. While the case, in some respects, was a close one, we think that it presents no legal error that would warrant us in interfering with the verdict.

The judgment must, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

AGENCY—LIABILITY OF PRINCIPAL.—A principal is liable to third persons in a civil suit for the frauds, deceptions, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize, justify, or participate in, or know of, such misconduct: *Fifth Avenue Bank v. Forty-second Street etc. Ry. Co.*, 137 N. Y. 231; 33 Am. St. Rep. 712, and note.

CORPORATIONS—FRAUDULENT ISSUE OF STOCK—LIABILITY.—For a fraudulent increase of its capital stock a corporation is answerable, because such increase is the act of the corporation: *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545; 47 Am. St. Rep. 290, and note.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

FARABEE v. McKERRIHAN.

[172 PENNSYLVANIA STATE, 234.]

MORTGAGE—RECORD OF.—A mortgage left at the recorder's office to be recorded, but actually recorded in the deed-book, and indexed in the index of deeds, is sufficiently recorded to constitute a lien from the time it was left for record.

INSTRUMENTS—RECORD OF, WHEN TAKES EFFECT.—An instrument is recorded the moment it is lodged in the proper office for record and the fees paid, although it is not actually entered in the books until months afterward, or is entered in the wrong book.

INSTRUMENTS IN WRITING NOT REQUIRED BY LAW TO BE RECORDED in a particular book may be recorded in any book kept by the recorder.

INSTRUMENTS—RECORD OF.—A statute requiring recorders to prepare and keep two indexes of deeds and two of mortgages, but containing no repeal of prior legislation, relating to the recording of deeds and mortgages, does not create any new rule of constructive notice of recorded instruments.

A MORTGAGE TO SECURE FUTURE ADVANCES, may, by agreement of the parties, be made to include money advanced before the execution of the mortgage.

H. B. Axtell, J. P. Teagarden, and J. W. Ray, for the appellant.

R. L. Crawford, for the appellee.

238 GREEN, J. The only question in this case is, whether a mortgage left at the recorder's office to be recorded, but actually recorded in the deed-book and indexed in the index of deeds, was sufficiently recorded to constitute a lien from the time it was left for record.

In the case of Luch's Appeal, 44 Pa. St. 519, we held that mortgages must be recorded in mortgage-books and are not properly

recorded in any other species of book where they cannot be found by means of the mortgage index.

²³⁹ But in *Glading v. Frick*, 88 Pa. St. 460, Luch's Appeal, 44 Pa. St. 519, was distinctly overruled in an elaborate opinion delivered by Mr. Justice Paxson, in which the subject was reconsidered and carefully reviewed. Summing up the whole matter, the opinion declares: "In contemplation of law, a paper is recorded the moment it is lodged in the office and the fees paid. In point of fact, it may not be, and in many instances is not, actually entered in the books until months afterward. Where a man has complied with the law by depositing his papers in the recorder's office and paying the fees, it would be a hard rule that would deprive him of his lien or his estate because of an error of the recorder in recording the instrument in the wrong book. It would be different were there an act of assembly directing in what book the particular paper should be recorded. In such a case, the recorder might be liable upon his official bond for a failure to record as required by law. In the absence of any such act, we are unable to see how we can declare that a paper is not recorded when the holder has done all that the act of assembly requires in placing it on record. To do so would seem very much like legislation."

We ruled in this case that, where certain instruments of writing are not required by law to be recorded in a particular book, they may be recorded in any book kept by the recorder; and a building contract is valid though recorded in a deed-book.

We have never departed from the ruling in *Glading v. Frick*. In the case of *Stockwell v. McHenry*, 107 Pa. St. 237, 52 Am. Rep. 475, our late brother Clark, delivering the opinion, said: "Prior to the act of the 17th of March, 1875, at least, it was well settled that a deed was, in contemplation of law, recorded when it was left in the recorder's office, and put upon the entry-book for that purpose. The duty of the recorder was to record it, and the responsibility rested upon him for any default in the proper discharge of that duty; the consequences of his default could not be visited upon the owner, who had done all that the law required in depositing the deed in the office for that purpose. A different doctrine was perhaps declared in Luch's Appeal, 44 Pa. St. 519, where it was held that mortgages must be recorded in a 'mortgage-book,' and that they are not properly recorded in any other book where they cannot be found by means of a 'mortgage index,' but that case was expressly overruled in *Glading v. Frick*, ²⁴⁰ 88 Pa. St. 460, where it was said by Paxson, J.: 'We

feel ourselves constrained to return to the rule laid down by Chief Justice Gibson in *McLanahan v. Reeside*, 9 Watts, 511; 36 Am. Dec. 136: "It is, indeed, of no account," says the chief justice, "that the conveyance and the articles were not recorded in the book set aside for mortgages; the keeping of such a book is an arrangement to promote the convenience of the officer by contracting the surface over which he is to search for a particular thing; he is bound to furnish precise information, get it as he may, of every registry in his office, whether made in the right place or not."

In *Clader v. Thomas*, 89 Pa. St. 343, we said, speaking of *Luch's Appeal*, 44 Pa. St. 519: "That case, however, has since been overruled by this court in *Glading v. Frick*, 88 Pa. St. 460, and it is now settled that a deed is, in contemplation of law, recorded, when it is left for record in the recorder's office, and the record cannot be lost by being transcribed by the recorder or his clerk in the wrong book."

In the case of *Paige v. Wheeler*, 92 Pa. St. 282, referring to a defeasance which was not recorded in the mortgage-book, but in the agreement-book, Mr. Justice Mercur, delivering the opinion, said: "Inasmuch, however, as the defeasance was not recorded in the mortgage-book, but in the agreement-book, it is claimed that it was improperly recorded, and therefore if in fact a mortgage, the sheriff's sale passed a title discharged therefrom. It may be conceded that this was the correct view under the authority of *Luch's Appeal*, 44 Pa. St. 510. That case, however, has been expressly overruled by *Glading v. Frick*, 88 Pa. St. 460. It is there held that such an instrument of writing is properly recorded in any book kept by the recorder of deeds."

In *Shebel v. Bryden*, 114 Pa. St. 147, the present chief justice, referring to the fact that a deed of assignment was first indexed in the limited partnership docket, and not in the deed-book index, said: "This did not invalidate the recording of the instrument. In contemplation of law, it was recorded and took effect from the time it was left with the recorder for the purpose of being duly recorded. This principle is recognized in *Glading v. Frick*, 88 Pa. St. 463; *Clader v. Thomas*, 89 Pa. St. 343; *Paige v. Wheeler*, 92 Pa. St. 282; *Marks' Appeal*, 85 Pa. St. 231."

After all these utterances, it is in vain to contend that *Luch's* ²⁴¹ *Appeal*, 44 Pa. St. 519, is any longer of authority, or that *Glading v. Frick*, 88 Pa. St. 460, is not the law as declared by repeated decisions of this court. The principle of that case is, that when the holder of an instrument to be recorded has left

it with the recorder to be recorded, it is to be regarded as actually recorded from that time, whether it was actually recorded at that time or not, or whether it was recorded in the wrong book.

But it is urged that the act of March 18, 1875 (Purdon's Digest, 565, 568), in effect changes the law upon this subject as it was prior to its passage, and that under that act all mortgages must be recorded in mortgage-books and indexed in mortgage indexes, in order to constitute notice to subsequent purchasers and encumbrancers. We are unable to sustain this contention. The act of 1875 contains no direction that deeds shall be recorded in deed-books, or mortgages in mortgage-books, and, so far as that aspect of the subject is concerned, there is manifestly no change in the law as it stood up to the date of the act. All that the act does is to direct that, in addition to the indexes which the recorders in each county are required to keep, they shall prepare and keep two indexes of deeds and two of mortgages, direct and ad sectum, in one of which the recorder shall enter the name of the grantor, the name of the grantee, and the volume and page in which the instrument is recorded, and in the other of which he shall enter the name of the grantee, the name of the grantor, and the volume and page of record, all in the order named in the act. The indexes are directed to be arranged alphabetically, and in such a way as to afford an easy and ready reference to the deeds and mortgages respectively. The second section provides that, as soon as the indexes are prepared, the recorder shall index in its appropriate place and manner every deed and mortgage thereafter recorded in his office and the time the same is recorded. The third section provides that the entry of recorded deeds and mortgages in said indexes shall be notice to all persons of the recording of the same. This act contains no repeal of any of the prior legislation of the state, nor is it inconsistent with any part of it. It did not assume to create any new rule of constructive notice of recorded instruments.

The act of the 28th of March, 1820 (Purdon's Digest, 588, Pub. Laws, 122), provides that mortgages left for record shall be liens from the time ²⁴² they are recorded or left for record, and the contention of the appellants would practically destroy that part of this act which gives the same effect to being left for record as to being actually recorded. In Wyoming Nat. Bank's Appeal, 11 Week. Not. Cas. 567, we held that a mortgage actually recorded, though not entered upon the index, is entitled to precedence over a subsequent judgment. We said: "Whatever the effect of the failure of the recorder to enter the mortgage on his book of en-

tries would have been in the case of a lien intervening between that time and the recording of the mortgage, we think such recording is a valid entry and record against a subsequent judgment."

It is no answer to this or any of the cases heretofore cited to say that they were decided either before the act of 1875 was passed, or upon facts arising prior to its passage, because that act is not in conflict with them. Moreover, the appellee's mortgage was actually recorded in the book of deeds on August 2, 1884, nearly eight years before the judgments of the appellant were obtained. Being there recorded, it was in the line of the title of the mortgagor and would have been at once discovered by any creditor desiring to investigate his title. Without extending the argument, we dismiss all the assignments of error relating to this subject.

The sixth assignment raises a question upon the construction of the mortgage, to the effect that it was given only to secure future advancements to the mortgagor, and therefore could not embrace the sum of two thousand six hundred and forty-five dollars and seventy-one cents, which it is agreed was advanced before the mortgage was given. But the auditor very correctly disposed of this contention by showing that on the day the mortgage was executed the mortgagor gave to the mortgagee a note under seal for two thousand six hundred and forty-five dollars and seventy-one cents, payable in four years, which contained the clause, "being a part of the amount secured by my deed dated March 20, 1884." The parties thus made the sum named a part of the indebtedness to secure which the mortgage was given, which they had a perfect right to do. It had precisely the same effect as if the mortgagor had paid over the amount to the mortgagee and then immediately taken back the money as a present advancement. There is no merit in this or the remaining assignments, and they are all dismissed.

Decree affirmed at the cost of the appellant.

MORTGAGES—RECORD OF—SUFFICIENCY OF.—An agreement in the nature of a mortgage need not be recorded in the mortgage-book, it seems, under the Pennsylvania recording act, but may be recorded in the book of deeds, the keeping of separate books being merely for the recorder's convenience: *McLanahan v. Reeside*, 9 Watta, 508; 36 Am. Dec. 136, and note.

THE REGISTRATION OF A DEED IS COMPLETE WHEN IT HAS BEEN FILED with the register for such registration: *Davis v. Whitaker*, 114 N. C. 279; 41 Am. St. Rep. 793, and note. See, especially, the extended note to *Beebe v. Morrell*, 15 Am. St. Rep. 295.

A MORTGAGE TO SECURE AN EXISTING DEBT AND TO COVER FUTURE ADVANCES is valid: *Googins v. Gilmore*, 47 Me. 9; 74 Am. Dec. 472, and note. See, also, the discussion of this subject in the monographic note to *Divver v. McLaughlin*, 20 Am. Dec. 659.

FRAZIER v. BUTLER BOROUGH.

[172 PENNSYLVANIA STATE, 407.]

MUNICIPAL CORPORATIONS — STREETS, CHANGE OF GRADE.—If, under the authority of municipal legislation, very considerable change is made in the grade of a driveway or street, rendering necessary considerable change in the sidewalks, involving peril to the passing public, the municipal authorities are required to exercise close supervision of the conduct of property owners to prevent injury to the traveling public.

MUNICIPAL CORPORATION — STREETS — OBSTRUCTIONS DURING IMPROVEMENT.—The temporary obstruction of the public streets for purposes of improvement, if a reasonable necessity exists therefor, is not unlawful, and the municipal authorities are not answerable in damages for permitting it. Whether such obstruction is reasonably necessary is a question of fact for the jury to determine.

MUNICIPAL CORPORATIONS — NUISANCE IN STREET — KNOWLEDGE OF COUNCILMAN AS NOTICE TO MUNICIPALITY.—Knowledge by a member of a municipal council of a nuisance in a street is not of itself notice to the municipality, although express notice to such councilman in his official capacity is notice to the municipality and its council charged with the duty of supervising the streets; but his knowledge and acts as an individual are not notice to the municipality of which he is an official representative.

MUNICIPAL CORPORATIONS — KNOWLEDGE OF COUNCILMAN AS NOTICE TO COUNCIL.—Knowledge, as a private individual, of a lotowner, who is a city councilman, of an obstruction negligently left in the street in front of his premises while a sidewalk is being constructed, is not notice to the city council of which he is a member.

T. C. Campbell and W. A. Forquer, for the appellant.

S. F. Bowser, E. L. Ralston, and J. B. Greer, for the appellee.

⁴¹¹ **DEAN, J.** Peter Schenk and H. Schreideman owned two lots fronting one hundred and ninety-four feet on Jefferson street in Butler borough; the sidewalks were of boards, for which they desired to substitute permanent stone pavement, and accordingly they let the contract for the preparatory grading to Samuel Kidd. The grading was somewhat heavy, being a cut at one end and a fill at the other; the contractor commenced the work on March 16, 1892, and continued it until completed. During the progress of the work, large piles of earth and rubbish were deposited on the street, which last, between the curbs, was twenty-five feet wide; a large part of this earth and rubbish was removed each day, but generally there remained each night a ⁴¹² pile of that taken

out, and this had been the case from the 16th of March, the commencement of the work, until the 24th, a period of eight days; but it was not the same that had been taken out the first day; may have been that deposited on the day before; the evidence seemed to show the contractor did not remove the earth and rubbish as fast as it was deposited on the street, the result being it was continuously encumbered with a pile of it, night and day. After dark on the last-named date, March 24th, the plaintiff was driving with a companion along the street in a buggy, at an ordinary speed, when his wheel struck the pile of rubbish, the buggy was upset, and he was seriously injured; there was no light or watchman to warn travelers of the obstruction. He brought suit for damages, and the jury, under the law announced by the court as applicable to the evidence, awarded him eight hundred dollars. Judgment being entered on the verdict, defendant appeals, assigning six errors. The first is to the instruction of the court, that as the year before the borough had cut down the grade of the street to a depth of several feet, it must have been known to the authorities that the sidewalks would be cut down to a grade to conform to the street, and it was therefore their duty to see to it that by such work the street was not rendered dangerous, and unnecessarily obstructed. There was no error in this instruction. The streets and highways of boroughs are under the control and supervision of councils; if by municipal legislation, as here, very considerable changes in grade of the driveway or street were made, rendering necessary considerable change in the sidewalks, care, according to the circumstances, required close supervision on part of the borough authorities of the conduct of property owners. It was not the case of a property owner merely replacing an old board walk in front of his property with a stone walk, where no other change was necessary, but that of the excavation to the depth of two to five feet for the breadth of the sidewalk of large quantities of earth and rubbish along the driveway of a much used street only twenty-five feet wide.

Clearly, it was the duty of the borough authorities, under such circumstances, to exercise more watchfulness, than under those involving no such danger to the traveling public.

The second assignment is to the instruction on the right of the lotowner to obstruct the street with the rubbish. The ⁴¹² plaintiff alleged the piling of earth on the street was wholly unnecessary; that there was ample room on the owners' lots for the deposit of such material; but that if it was necessary to use the street for this purpose it was not necessary to leave any portion

of it over night. The court left it to the jury to say whether, under all the circumstances, it was necessary to use the street as a place of deposit, and whether it was reasonably necessary to leave the material there for a day or several days. In this there was no error; he had already told them the temporary obstruction of the public streets for purposes of improvement, if a reasonable necessity existed therefor, was not unlawful, and the borough was not answerable in damages for permitting such obstruction; but whether this obstruction was reasonably necessary was a question of fact, and this was for the jury to decide.

The third assignment is to the answer of the court to plaintiff's third point. Peter Schenk, one of the improving lotowners, who, through his contract with Kidd, deposited the rubbish, was a member of the borough council; therefore, plaintiff put this point to the court: "That if Peter Schenk, a member of the town council, had knowledge of this obstruction, it visits notice on the municipal authorities." To this the court answered as follows: "In the absence of any evidence showing that the care of the streets had been committed to particular members of the town council, every member thereof must be taken as the agent of the borough. For that purpose, a notice to a member must be regarded as notice to the body to which he belonged. It does not appear how frequently borough councils met, and it would be intolerable to hold that the obstruction must be permitted to continue until the body would be assembled in an official meeting." In fact, this was no answer to the point, and if the verdict had been the other way, plaintiff might well have complained of the answer as not responsive to his point. The court was asked to say that if Peter Schenk had knowledge of this obstruction, that was notice to the borough; this involved, first a question of fact, whether he had knowledge; it did not follow, because he had contracted with Kidd to make the excavation, he had knowledge that the contractor was leaving any portion of the material on the street, so as to impede or make dangerous travel; a careful scrutiny of Schenk's ⁴¹⁴ testimony leaves this fact in doubt; but if he had knowledge as a lotowner, was that notice to the borough? Knowledge and notice are not necessarily and not always the same. Undoubtedly, if anyone had given notice to Schenk, councilman, of the character of the obstruction put upon the street by Kidd, so far as notice to one member of councils would affect the borough, there would have been notice. But whether, as a fact, he had knowledge, the jury was not instructed to find, and whether, as matter of law, such knowledge was notice to the

borough, the court did not determine. So, practically, the point was not answered—was not affirmed.

, The case, in this particular, really went to the jury on the instructions in the general charge as follows: "The law assumes that after a certain time they shall take notice of obstructions of such a character. That depends upon the circumstances of the case, to be sure, and how long the obstruction may remain upon the street, in order to charge the officers of the borough with notice. We refer you to the rule, hereinbefore laid down with regard to the degree of diligence which the officers are to exercise according to the extent of the use of the street, and other facts which might bring knowledge home to them, and of which they should take notice." The same instruction, in substance, was given in the answer to defendant's second point, thus: "Though if you should conclude the particular pile of rubbish on which the plaintiff was injured had not been on the street over a day or two, if you find that others of a similar character had previously, from time to time, occupied substantially the same place, so that the one complained of was but a later one of a series of such obstructions, the municipality may be affected with notice, if, considering the extent of travel upon Jefferson street, the demands of the public thereon, and the period of time over which such obstruction extended, and in view of the law already stated as to the duties of borough officers in this behalf, you think they should, in the exercise of reasonable diligence, have known of the obstruction."

Considering the whole charge, on the question of notice, the case was clearly and correctly submitted to the jury. They were instructed that they might infer, if from the character of the obstruction it was conspicuous or noticeable, and if it had been long continued, that the borough had notice of it.

⁴¹⁵ But an affirmance of plaintiff's third point would have been error. Knowledge by a member of councils of a nuisance is not of itself notice to the borough; to so hold would make the borough answerable for every individual violation of municipal law and ordinances by all its members. As this borough does not seem to have had a street committee, commissioner of highways, or other officers to whom was specially confided the duty of supervising the streets, that duty must necessarily be considered as resting with the borough councils as a body; express notice given to any one of these in his official capacity of a violation of borough law would be notice to the body of which he was a member; but his knowledge and acts as an individual are not notice

to the municipality of which he is an official representative. Assuming each member to have been an agent of the borough in the supervision of its streets, and the knowledge of the agent to have been the knowledge of his principal, that knowledge must come to him in the course of the transaction of the business of his principal. Here, Schenk's knowledge, if he had such knowledge, came to him as an individual lotowner, engaged in the improvement of his lot; this had no relation to his official duty as councilman; he was performing no duty as a member of that body, but was in fact answerable to it for the manner in which he conducted his improvement as a lotowner. The council could have notified him to stop placing earth unnecessarily on the street, and leaving it there; could have had him arrested for the violation of the borough ordinances prohibiting such obstruction, if he persisted; and this because he was not in that particular business a councilman acting in his official capacity, but was acting as an individual lotowner in violation of the borough law. The case would have been otherwise had he, as councilman, been superintending and directing the excavation of a street or sidewalk for the borough; under such circumstances, knowledge on his part would have been the knowledge of the principal. And while thus officially acting, he would not have been personally answerable to third parties, but his principal would have been affected with notice of his acts within the scope of his authority, and would have been alone answerable. But in this case his personal responsibility is wholly unimpaired, because his acts were unofficial. To say that because Schenk knew of the unsafe method, ⁴¹⁶ therefore his principal, the borough, knew, would compel us to go further and say, as the borough knew its agent, Schenk, was wrongfully obstructing the street, the agent is not answerable to the principal for any injury caused thereby; this would leave every member of councils free to adopt dangerous methods for the improvement of his own property, and at the same time leave the borough answerable to the general public for the damages consequent upon his acts; that is, the borough would become insurers of its officers against responsibility for individual wrongful acts.

While the court came dangerously near giving the erroneous instruction asked for, it did not in fact give it, and the jury went to their room controlled by the correct instructions in the general charge, and the answer to defendant's second point. Therefore this assignment of error is not sustained.

The fourth and fifth assignments raise in effect the same question as the second and require no further notice.

The sixth is to the refusal of a prayer for peremptory instruction for defendant. The case was clearly one for the jury, and the court could not, without error, have withdrawn it from them. All the assignments of error are overruled, and the judgment is affirmed.

MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—LIABILITY.—Although a city may have imposed upon lot owners the public duty to keep the sidewalks in front of their premises in repair, or to raise or lower them to an established grade, yet the city and not the owner, remains answerable in a private action for injuries resulting from his negligence or his own omission to act: *Betz v. Limingi*, 46 La. Ann. 1118; 49 Am. St. Rep. 344, and note.

MUNICIPAL CORPORATIONS—OBSTRUCTIONS IN STREET—LIABILITY.—Towns are not liable for necessary interruption of travel and inconvenience to public in repairing streets and sidewalks: *Kinball v. Bath*, 38 Me. 219; 61 Am. Dec. 243; *Clark v. Fry*, 8 Ohio St. 3 8; 72 Am. Dec. 590, and note. A city's liability to repair a street is suspended while grading or other alterations are going on rendering such street temporarily impassable: *James v. San Francisco*, 6 Cal. 528; 65 Am. Dec. 526, and note.

MUNICIPAL CORPORATIONS—DEFECTS IN STREET—NOTICE TO A CITY COUNCILMAN of a defect in the street of a city is notice to the city, though the councilman is not at the time engaged in any official act: *Logansport v. Justice*, 74 Ind. 378; 39 Am. Rep. 79, and extended note. See, also, *Dundas v. Lansing*, 75 Mich. 499; 13 Am. St. Rep. 457.

WARD v. JACK.

[172 PENNSYLVANIA STATE, 416.]

LIMITATIONS OF ACTIONS—NEW PROMISE.—An acknowledgment sufficient to remove the bar of the statute of limitations, must contain a clear and unequivocal acknowledgment of the debt, a specification of the amount of it, or a reference to something by which the amount can be definitely and certainly ascertained, and an express or implied promise to pay it.

Assumpsit to recover a balance due for work performed as a blacksmith. The plaintiff began to work for one Neel in June, 1876, and continued in his employ, until January, 1891. He admitted that he had been fully paid for the work done between June, 1883, and January, 1891. He brought this suit to recover for the labor performed by him between June, 1876, and June, 1883. The suit was commenced January 22, 1893, and soon thereafter Neel went to California for his health. He died there in 1893, and his executor, J. D. Jack, was submitted upon the record as defendant. The defendant denied that he was indebted to the plaintiff in any sum whatever. The plaintiff, in support

of his claim, introduced pass-books which had been in the possession of Neel for many years, and also the conversation detailed in the opinion. Judgment for plaintiff and defendant appealed.

A. M. Todd and J. A. Wiley, for the appellant.

T. J. Duncan, for the appellee.

419 McCOLLUM, J. The learned court below properly characterized the plaintiff's claim as stale, and held that, under the pleadings, he could not recover upon it, unless the bar of the statute was removed by the conversation testified to by Watson. The case was submitted to the jury under instructions which allowed them to ⁴²⁰ find, in the conversation referred to, a clear and unequivocal acknowledgment of the claim, a reference by which the amount of it could be definitely ascertained, and a promise to pay it. Whether the conversation authorized the conclusions drawn from it is the principal question to be considered on this appeal. It was brief, and we quote the material part of it. Watson said: "Mr. Neel and I were sitting on some lumber, and Mr. Ward came down and asked Mr. Neel about his books. He asked Mr. Neel about the settlement of his books. Mr. Neel said, "Mr. Ward, that ought to have been settled long ago, and you shall have your money inside of ten days; before this, though, Mr. Ward said to him that the limitation was about to cut him out. Neel replied to him, Mr. Ward, I would n't allow that limitation to cut you out if it was now, if it was six years now. He said he would have Flint look after the books.'" There was nothing developed in the cross-examination of the witness which qualified his testimony as we have quoted it, and we must therefore accept it as a correct statement of the conversation relied on by the plaintiff to toll the bar of the statute. In order to give it the effect he claims it is entitled to, it must be held to contain a clear and unequivocal acknowledgment of the debt, a specification of the amount of it, or a reference to something by which the amount can be definitely and certainly ascertained, and an express or implied promise to pay it. If these essentials to the maintenance of the suit are included in the conversation detailed by Watson, they must be found in that part of it which may be correctly summarized thus: "Ward asked Neel about the settlement of his books," and Neel replied, "That ought to have been settled long ago, and you shall have your money within ten days." The expression, "you shall have your money," means no more than the words, "I will pay all I owe you," and these were regarded as insufficient in *Miller v. Baschore*, 83 Pa. St. 356, 24

Am. Rep. 187, to remove the bar of the statute, although they plainly referred to the balance due on Miller's note which Baschore then held. In *Landis v. Roth*, 109 Pa. St. 621, 58 Am. Rep. 747, the promise of the former was express and related to a note which the latter held, and it was adjudged insufficient, although it was not shown that "Landis had given Roth any other note than the one in suit." These decisions followed the rule on which *Burr v. Burr*, 26 Pa. St. 284, was determined, ⁴²¹ and in which *Knox, J.*, speaking for this court on the subject we are now considering, said: "The better rule undoubtedly is, that the acknowledgment must not only be clear, distinct, and unequivocal of the existence of a debt, but that it must also be plainly referable to the very debt upon which the action is based. It matters not where the uncertainty lies, whether in the acknowledgment or in the identification, its existence is equally fatal to the plaintiff's recovery." We cite these cases as illustrations of the rule in regard to the identification of the debt alleged to have been acknowledged, and because we think the case in hand is fairly governed by them. "Ward asked Neel about the settlement of his books," is too vague and uncertain to be justly regarded as an identification of the debt or such a reference as the law requires as a substitute for it.

Judgment reversed and venire facias de novo awarded.

LIMITATIONS OF ACTION—NEW PROMISE.—An unqualified acknowledgment of a debt as existing constitutes a new promise sufficient to take the debt out of the statute of limitations: *Custy v. Donlan*, 159 Mass. 245; 38 Am. St. Rep. 419, and note. This question is fully treated in the notes to the following cases: *Spangler v. Spangler*, 9 Am. St. Rep. 116; *Linderman v. Pomeroy*, 24 Am. St. Rep. 496; *Norton v. Shepard*, 40 Am. Rep. 160-162; *Allen v. Collins*, 35 Am. Rep. 417-420; *Shockey v. Mills*, 36 Am. Rep. 197, 198; *Landis v. Roth*, 58 Am. Rep. 749-751.

ENTERPRISE OIL AND GAS COMPANY v. NATIONAL TRANSIT COMPANY.

[172 PENNSYLVANIA STATE, 421.]

COTENANCY—LIABILITY TO ACCOUNT.—There is no implied obligation on the part of a cotenant in possession to account to his cotenant for mere use and occupation.

COTENANCY—ASSIGNMENT OF LEASE.—If several cotenants of an oil lease assign it to an operator, who is to deliver a part of the product to them as royalty, and one cotenant does not join in the assignment, but notifies the assignee not to deliver any oil to his cotenants, he cannot recover his share of the oil without proof that his cotenants have received more than their share. If he affirms the assignment, he must take his share with the others upon a distribution

of the royalty after deducting all proper charges and expenses. If he disaffirms the assignment, he has no claim to any share in the royalty, and must look to the assignee as a cotenant, who has not acquired his title.

Assumpsit to recover royalties under an oil lease. On October 1, 1889, C. J. D. Strohecker was the owner of several oil and gas leases, which he assigned to the Enterprise Oil and Gas Company, an association or partnership consisting of thirty-two shares of stock valued at one hundred dollars per share. On October 17, 1890, this company assigned one-half of such leases to J. M. Latchaw, retaining a royalty of one-eighth of the oil produced. Latchaw formed a company, called the Latchaw Armour Company, which drilled a well and produced oil, one-eighth of which was run into the lines of the National Transit Company in the name of, and to the credit of, the Enterprise Oil and Gas Company to the extent of one thousand and sixty-eight barrels. On October 1, 1893, one J. T. Johnson notified the National Transit Company not to deliver any oil to the Enterprise Oil and Gas Company. Johnson claimed to be the owner of one-sixteenth of the leases in question, which he had purchased from said Strohecker, and he also claimed that he had never entered into or become a member of the partnership known as the Enterprise Oil and Gas Company. The National Transit Company delivered the oil in dispute in this suit to said Johnson, and defended on the ground that said oil was produced from said sixteenth interest so owned by said Johnson. Judgment against the Enterprise Oil and Gas Company suing to recover its royalties from the National Transit Company in the oil so delivered to Johnson and the plaintiff appealed.

L. McQuistion and J. C. Vanderlin, for the appellant.

R. P. Scott, for the appellee.

⁴²⁵ MITCHELL, J. This case was unfortunately tried on a wrong theory throughout. The oil was received by the defendant for account of plaintiff, and so credited on the defendant's books. Prima facie, therefore, it belonged to plaintiff, and though it would be a good defense to show that it was claimed by the real owner, yet such defense involved the burden of proof that the claimant had in fact the better title. This the defendant entirely failed to show. It defended on Johnson's title, or rather permitted him to do so in its name.

Johnson's interest, as agreed by all parties, was an undivided sixteenth. Whether it was a sixteenth in the partnership, or a sixteenth in the leases as a tenant in common, the issue on which

the jury were permitted to find a verdict, was, for the purposes of this case, entirely immaterial. In either aspect, as already said, his interest was undivided, and he never had any separate possession either of the land or of the oil. There was not only no evidence that this particular oil was his, but, on the contrary, a *prima facies* that it was the plaintiff's. It was delivered by their lessee to the defendant as a carrier for them. The possession of the carrier was their possession as against all the world but a claimant showing a better title. The utmost that Johnson showed, even on his own claim to be a tenant in common, was that as to one-sixteenth of the oil his title was the same, as good but no better, than that of the other fifteen cotenants represented by the plaintiffs. The status of the case ⁴²⁶ even in the most favorable light for Johnson, was the same as if he had been suing his cotenants for his share of the profits of the land.

The rights and remedies of tenants in common among themselves have been the subject of some discussion in this state. At common law, as each was entitled to the joint possession of the whole, there was no liability to account to each other, except upon an express agreement to act as bailiff, or an actual ouster which would sustain an ejectment for restoration of possession and meane profits. The act of 4 Anne, chapter 16, section 27, dispensed with the necessity of express appointment as bailiff, and gave an action of account against the cotenant "receiving more than comes to his just share or proportion," and in this state it has been settled, after some variance of opinion, that the action is not necessarily in account render, but, where there has been an express promise, it may be in assumpsit: *Gillis v. McKinney*, 6 Watts & S. 78. In *Borrell v. Borrell*, 33 Pa. St. 492, the majority of the court sustained assumpsit on an implied obligation to account, but this case was practically overruled in *Kline v. Jacobs*, 68 Pa. St. 57, where the subject was discussed by Sharswood, J., and the rule clearly laid down that there is no implied obligation to account for mere use and occupation by one tenant in common, who has by his title a right of possession of the whole, although it is joint, and that assumpsit can only be maintained on an express promise to pay rent or to account. The best summary of the law in our own books will be found in the admirably clear and accurate opinion of Judge Thayer in *Norris v. Gould*, 15 Week. Not. Cas. 187.

But all of our cases, including even those which have most favored the action in assumpsit, such as *Borrell v. Borrell*, 33 Pa. St. 492, and *Luck v. Luck*, 113 Pa. St. 256, have held that unless

on an express promise of a liquidated sum, all the cotenant is obliged to account for is a share of the profits. The utmost, therefore, that Johnson could have recovered if this had been a direct action against his cotenants would have been the excess which they had received over their proper share of fifteen-sixteenths. But he was allowed to recover the whole of the oil in controversy on the ground that as a tenant in common of one-sixteenth he was entitled to one-sixteenth of the entire product of the lease, without having given a scintilla of evidence that ⁴⁸⁷ any of his cotenants had received more than their due share. Under the evidence as it stood, there was no defense at all made out, and the jury should have been directed to find for plaintiffs for the full amount of the oil.

There is another difficulty in the way of Johnson's title in the present case. The oil in controversy was delivered by the lessee to his lessors, the plaintiffs, as rent under his lease. Johnson cannot affirm and repudiate the lease in the same breath. If he is a party to it, he must take his share as the others do upon a distribution of the rent after deducting all proper charges and expenses. If he is not a party to the lease, he has no claim to any share in the rent, and must look to the lessee as a cotenant who has not acquired his title.

Judgment reversed and venire de novo awarded.

COTENANCY—LIABILITY OF COTENANT FOR USE AND OCCUPATION.—As between cotenants, the occupying tenant is liable for rent on so much of the property as produced rent when he took possession: *Annely v. De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725, and notes. When one of several tenants in common of a farm, all being of full age, occupies it, and takes in the usual course of husbandry the annual profits thereof, without having ousted or denied the rights of his cotenants, he is not liable to account to them, or to any of them, for the profits so taken: *Le Barron v. Babcock*, 122 N. Y. 153; 19 Am. St. Rep. 483, and note. See the note to *Appeal of Fulmer*, 15 Am. St. Rep. 666, 667, and the extended note to *Early v. Friend*, 78 Am. Dec. 665—668.

COTENANCY.—THE RIGHT OF ONE COTENANT TO CONVEY the common property, or to grant an easement or other right to be exercised upon such property, will be found discussed in the note to *Benedict v. Torrent*, 21 Am. St. Rep. 593—595.

⁴⁵³ The two questions on which the issue turns are: 1. Was the township negligent? If so, 2. Was that negligence the proximate cause of plaintiff's injury?

The answer to the first question was for the jury, but as the learned judge of the court below, on the undisputed facts, declared, as matter of law, any negligence of defendant was not the proximate cause of the accident, we must assume, for purposes of the case before us, defendant negligently left an open roadway, only twelve feet wide without guardrails on a bridge used by the traveling public. The duty of defendant must be measured by the ordinary and usual demands of the traveling public in that locality. Travel by vehicles of extraordinary weight, or by animals of extraordinary or strange habits, the authorities were not bound to foresee and provide for. But the ordinary methods of travel by horses, buggies, and wagons, they ought to have foreseen; and made reasonable provision for the safety of the public on the highway. If this horse had taken fright when on the bridge, and because of the absence of guardrails backed the buggy off, we think no one, in the face of our numerous adjudicated cases, would have questioned the answerability of the defendant. In *Lower Macungie Tp. v. Merkhoffer*, 71 Pa. St. 276, one of the animals shied, and the team was precipitated into an ore excavation alongside the road, where there were no guardrails; the township was held liable. In *Newlin Tp. v. Davis*, 77 Pa. St. 317, the bridge had no guardrails; the horse frightened at a piece of plank and backed off; the township was held liable. In *Scott Tp. v. Montgomery*, 95 Pa. St. 444, from some unknown cause, the horse suddenly shied, and sprang off the road down a steep bank; there was no barrier or guardrail; the defendant was held answerable. In *Hey v. Philadelphia*, 81 Pa. St. 44, 22 Am. Rep. 733, the horse took fright at the whistle of a locomotive, sprang over a wide roadbed down a declivity into the river; there was no guardrail; the city was held responsible. And so we might cite many other cases to the same point. The absence, in view of the circumstances, of reasonable safeguards for ordinary travel, was held, in all of them, to be the immediate and proximate cause of the injury.

If, then, the defendant would have been answerable for damages resulting from its negligence, had the horse from fright ⁴⁵⁴ plunged over or backed off the bridge, when being driven over it, does the fact that he backed the buggy on and then off the bridge, after being fourteen feet beyond it, relieve defendant from liability?

When, as here, the facts are not disputed, at least not controverted, the conclusion is often a matter of law for the court; and it may be conceded, on these facts, the application of the maxim, *Causa proxima non remota spectatur*, is not free from difficulties. In cases of mere negligence, aggravated by no element of malice, to ascertain whether the negligence be the proximate cause, it is stated by Paxson, J., in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653: "The injury must be the natural and probable consequence of the negligence—such a consequence, as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer." And, as is remarked by Black, C. J., while discussing the same doctrine in *Pittsburg v. Grier*, 22 Pa. St. 54, 60 Am. Dec. 65: "It is not the law, that men are responsible for their negligence only to the extent of the injuries they knew would result from it. If it were, there could be no recovery except for malicious wrongs."

As already noticed, it cannot be questioned, under the authorities, that defendant might and ought to have foreseen the danger to ordinary travel over a narrow bridge without guardrails. It is alleged, however, that the special facts take this out of the cases of ordinary and foreseeable travel. Do they? It may at once be conceded, that if the traveling public always or generally drove only very gentle and easily managed horses, in daylight, at a slow gait, over very narrow bridges, such an accident as here happened would not have been the natural and probable consequence of the neglect to put up guardrails, for then the circumstances in this case would have been extraordinary. But no such limited use of a public highway would be made in any township in the state, and this the authorities well knew; that it would be traveled night and day by those driving gentle and spirited animals, some that would take fright, others that would not, was known to them. If, with such knowledge, this accident might or ought to have been foreseen, and with reasonable care have been provided against, then was their negligence the proximate cause of the injury?

⁴⁵⁵ It is argued that defendant could not foresee the exceptional movement of a frightened horse; but this assumption does not determine whether negligence of defendant was the proximate cause, for a provision for safety did not depend on seeing so far. Of all our domestic animals, the horse is probably the most intelligent, yet among all of them he is most subject to fright; a bit of white paper stirred by the wind in the roadway will startle and sometimes render him uncontrollable; what

movement he will make in one of his paroxysms of terror, human intelligence cannot anticipate, and still worse, because of his superior strength and agility, cannot control. Such facts are within the common observation of mankind. It is the habit of the horse, not his particular movement in the exercise of it, which last is beyond human foresight, that defendant ought to have known and provided against. The conclusion of appellee is founded on wrong premises, in substance these: The township authorities were not bound to make provision against that which they could not reasonably foresee; that a horse would back a buggy on and off a bridge which he had already crossed, could not reasonably have been foreseen; they did not foresee such exceptional conduct, and their neglect to provide against what no one could foresee was not, therefore, the proximate cause of the injury; the unforeseeable backing of the horse was the proximate cause, and the absence of guardrails only rendered more serious the consequences. But from the established facts the premises from which to determine the application of the rule are not correctly stated in appellee's proposition. They should be stated thus: The township authorities were bound to foresee and reasonably provide against a common danger to ordinary travel on that highway; it is well known that one of such dangers arises from the habit of fright in the horse, and it is just as well known that when affrighted no one can foretell his conduct; the presence of guardrails would have been a protection from the danger of going over the bridge, no matter what the movement of the horse; therefore, the habit of the horse being known, they ought have put up the guardrails, and their neglect of duty in this particular was the proximate cause of the injury. Or to express it in another form: The fright of the horse was ordinary, and to be expected; that his conduct when in fright would be unreasoning, insane, and ^{and} unlooked for, was also to be expected; if it were otherwise, it would have been extraordinary, because contrary to common observation; the township authorities should have guarded against that which was to be expected, and it will not excuse the negligence of the supervisors or make that negligence the remote cause to assert they could not foresee the particular freak of conduct in a terrified horse.

The cases cited and most relied on by the court below and appellee are *Chartiers Tp. v. Phillips*, 122 Pa. St. 601, and *Herr v. Lebanon*, 149 Pa. St. 222; 34 Am. St. Rep. 603. But neither is in conflict with *Newlin Tp. v. Davis*, 77 Pa. St. 317, and its many kindred cases. As stated by our brother Mitchell in *Haverly v.*

State Line etc. R. R. Co., 135 Pa. St. 50, 20 Am. St. Rep. 848, in speaking of the apparent conflict in the cases in the application of the rule in determining whether the negligence was the remote or proximate cause of the injury: "The different results which were reached in them depended not on any different view of the law, but of the facts. . . . But whatever the result of the views taken of the facts in these cases, the principles of decision are the same in all."

In *Chartiers Tp. v. Phillips*, 122 Pa. St. 601, our brother Green, in stating this court's view of the facts, on which view alone the judgment is founded, says: "It is beyond all question that the direct and immediate cause of the plaintiff's injury was the overturning of the wagon in which he was riding. It is equally certain that the wagon was upset by the sudden falling of the animal that was drawing it. What caused the mare to fall is not clear, and is not explained by the plaintiff's testimony. She did not take fright, was not running away, but on the contrary was moving very slowly through a mud puddle. She got entirely through, and then, to use the language of the plaintiff, 'the mare just fell over and fell with her head and neck right across the fence.' The fence gave way, and the plaintiff was precipitated down the bank by the side of the road, and was injured. Of course, the fence, whether sufficient or insufficient to sustain the force of the fall, had nothing to do with producing the fall. The defendant alleged, and gave evidence to prove by the declarations of plaintiff to a number of witnesses, that the mare was harnessed with a collar too small for her, and that it choked her, and this choking was the real cause of her falling. If this was the true cause, it is difficult to understand ⁴⁵⁷ how defendant could be held responsible for the fall or its consequences."

The extraordinary and impossible to be foreseen circumstance of the choking which is not a habit, but which occasioned the fall, is put prominently forward as the controlling fact which determined the proximity of the cause. It is even strongly intimated that if the mare had plunged down the declivity from fright or while running away, an outbreak of the habit of the average horse, the conclusion would have been different. In determining whether a conclusion of law in any adjudicated case is a precedent in a subsequent one, the value of the first, usually, is measured by its similarity or dissimilarity to the second in its controlling facts. And even if the court, announcing the conclusion, misapprehends or mistakes the facts, the conclusion, to be of any value as a precedent, must be taken as applicable to the facts as assumed by the

court; they, as concerns the judgment, are the facts, and, whether existing or nonexisting, either prompt or compel the conclusion of law that determines the judgment. For that reason, it would be a waste of time to notice the controversy here between counsel as to what were the facts in *Chartiers Tp. v. Phillips*, 122 Pa. St. 601; for our purpose, and as a precedent in all cases after it was decided, the facts as stated in it by this court must be taken as correct.

On the facts as assumed in the opinion, notice the ruling: "The defendant in the fourth point asked the court to charge the jury that if the accident was caused by the uncontrolled struggle of a choking horse, or from this cause concurring with a defect in the highway, their verdict must be for defendant. To this, the court replied: 'Refused, unless the plaintiff by his negligence contributed to, or was the cause of, the uncontrollable struggle of the horse.' The vice of this answer is, that the court confounded the effect of an independent cause of the accident with the effect of plaintiff's contributory negligence, and really held that it required a combination of the two in order to relieve the defendant from the responsibility for the accident. Now the contributory negligence of plaintiff alone and by itself, if it existed, was sufficient to discharge the defendant from all liability. So, also, if the accident was produced by an intervening and independent cause, for which defendant was not responsible, that too would relieve defendant ⁴⁵⁸ from liability. The point should have been affirmed as it stood." So on the facts, as viewed by this court, there was error in this particular.

Then again, to quote from the opinion discussing the third assignment of error: "Although the choking of the mare resulting from a too tight collar was the immediate cause of the accident, it is practically held to be no defense, unless plaintiff had knowledge of it, or ought to have known it. . . . Whether he had or had not knowledge of the smallness of the collar, and that it was choking the horse, the effect of the choking as productive of the accident would be precisely the same, and hence, if, as an independent producing cause of the accident, it would suffice to relieve the defendant from responsibility, it would accomplish that result without any reference to the plaintiff's knowledge." So, on the two assignments of error noticed, the judgment was reversed. The facts bore but little semblance to those in this case. *Herr v. Lebanon*, 149 Pa. St. 222, 34 Am. St. Rep. 603, opinion by our brother Williams, the second case cited

and relied on by appellee, approaches in similarity of facts *Chartiers Tp. v. Phillips*, 122 Pa. St. 601.

The roadway was wide, and in excellent condition; there was a descent on the lower side of the street, and no guardrail; the horse drawing the vehicle, whether from sickness or because the vehicle was too heavily loaded, choked and fell; struggled to regain his feet; in its struggles, the driver could not control it; each time it got partly up it fell again, and each time nearer the edge of the bank, until it went over, and it went over, not in the ordinary use of the street, but because of its inability to manage its load. The point of the reasoning in vindication of the judgment is, that in view of the peculiar facts, the defendant was not answerable for the damage resulting proximately from the struggles of a choking, overladen horse, and while the absence of a barrier probably rendered the injury more serious, it was in no sense the cause of it. The decision in the same case holds with and cites *Hey v. Philadelphia*, 81 Pa. St. 44, 22 Am. Rep. 733, that: "It is the duty of road officers to provide roads suitable for ordinary travel conducted in the ordinary manner, and to provide such safeguards as may be needed to meet the risks of such travel."

The cause in each of these cases, whether produced by the ⁴⁵⁹ fault of the driver or not, was out of the ordinary, was so rare as to be extraordinary, and on that, as a controlling fact, the application of the rule is based; it was as improbable of foresight as if a vicious person had suddenly and maliciously seized the horse by the head and pulled him over. As to the other cases cited by appellee: In *WorriLOW v. Upper Chichester Tp.*, 149 Pa. St. 40, as a fact, there was no negligence on part of the defendant. In *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145, 30 Am. St. Rep. 792, and *Kieffer v. Hummelstown Borough*, 151 Pa. St. 304, both were decided on the ground that the particular causes of the accidents were out of the ordinary, and such as could not have been foreseen and guarded against.

We do not see, however, in any reasonable view of the particular circumstances which immediately preceded this accident, that they were the efficient cause of it, and that the negligence of defendant only made the injury more serious. The plaintiff, when injured, was in the ordinary, lawful use of the highway; while so using it, she dropped her hat, as the horse stepped on the bridge. Watson, exercising care, did not stop on the dangerous structure, but fourteen feet beyond, and then returned to pick up the hat; then the horse took fright, backed but a few steps on and

off the bridge; this was but incident to the ordinary use of the highway; it was not maintained for horses only that never took fright; the ordinary horse might take fright as he approached the bridge, run on and plunge off it; he might frighten at the fluttering birds in the briers on the rocks or at the noise of the waterfall, as alleged here, for these objects were continually present at that place, and consequently, after he had crossed the bridge, might back on and off it.

Speculating on the doctrine of proximate and remote cause in supposed or hypothetical cases seems to have been a sort of intellectual recreation with text-writers on the subject, since the squib case in 2 W. Black, R. 893; with many, the rule laid down in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, would be criticised as lacking in scientific precision; but approximate certainty in the administration of justice, on evidence in an issue, is all we can hope to attain to. The same rule was, in substance, though in somewhat different language, adopted in many cases before *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293; 27 Am. Rep. 653. In terse language, without leaving room for theorizing where the evidence is conflicting, and no fault is attributable to the plaintiff, it brings the jury at once to the ascertainment ⁴⁶⁰ of the controlling fact: Was the consequence such as, under the circumstances might and ought to have been foreseen and provided against? It eliminates all speculation as to the cause of the cause, which often is merely interesting, and aids not in determining just responsibility. As is said by Strong, J., in *Insurance Co. v. Boon*, 95 U. S. 130, the proximate cause is the dominant controlling one, and not those which are mere incidents. The dominant cause here was a bridge negligently dangerous to the ordinary horse at all times, when he displayed one of his common characteristics. True, his fright was an incident without which the dominating cause could not have operated to produce the injury; but the same may be said of most of the incidents connected with the trip on the highway that evening. If plaintiff had not dropped her hat, if Watson had not stopped to get it, and so, running back to the originating cause, going to the "sociable" behind a horse instead of on foot; all were in a certain sense causes of the injury, without which the accident would not have happened, but occurring in the ordinary, lawful use of the highway, the law regards them as but incidents, and still holds the neglect of duty as the dominating or proximate cause.

The judgment is reversed and a venire facias de novo is awarded.

NEGLIGENCE—PROXIMATE CAUSE—WHAT IS.—The proximate cause of an event is that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred: *Dickson v. Omaha etc. Ry. Co.*, 124 Mo. 140; 46 Am. St. Rep. 429, and note. See the extensive note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 808, where the subject is fully treated.

TOWNSHIPS—DUTY AS TO HIGHWAYS.—Township officers or others whose duty it is to keep a public highway safe and suitable for travel are only bound to ascertain the ordinary needs of travel conducted in the ordinary manner, and they are not bound to anticipate the danger to which the frightened horse of a traveler may expose him: *Horstick v. Dunkle*, 145 Pa. St. 220; 27 Am. St. Rep. 685, and note; *Herr v. Lebanon*, 149 Pa. St. 222; 34 Am. St. Rep. 603, and note; *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145; 30 Am. St. Rep. 792, and note with the cases collected.

COUNTIES—LIABILITY FOR DEFECTIVE BRIDGE—FRIGHTENED HORSE.—A county is answerable to a person who was driving up to the approach to a public bridge when his horse suddenly became frightened, and, before he could do anything to control the horse, it backed over the unprotected wall of the approach, falling upon and destroying the buggy, and inflicting personal injury upon the driver, if the accident would not have happened had a suitable railing been placed along the approach: *Rohrbough v. Barbour County Court*, 39 W. Va. 472; 45 Am. St. Rep. 925, and note. To the same effect see *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568, and *Hey v. Philadelphia*, 81 Pa. St. 44; 22 Am. Rep. 733.

UPPER TEN MILE PLANK ROAD COMPANY v. BRADEN.

[172 PENNSYLVANIA STATE, 460.]

HIGHWAYS.—THE TITLE TO THE WATER OF a spring within the right of way of a turnpike company is in the owner of the fee, who has a right to use the whole of it, to conduct it by pipes wherever he desires to consume, sell, or waste it, so long as he does not inflict injury to the roadbed.

HIGHWAYS—RIGHT TO SPRING THEREIN.—A turnpike company has no easement in a spring within its right of way. It has a right of way for public travel only over the land upon which the waters of such spring descend, and, for the purpose of preserving its roadbed in a condition suitable for travel, it may drain the water off; but it has no right to appropriate, or to take exclusive possession of the spring, or to exclude the owner therefrom.

A. S. Sprowls, for the appellant.

N. E. Clark, W. I. Berryman, and R. W. Irwin, for the appellee.

465 **WILLIAMS, J.** The report of the learned master deems in an able and logical manner with the questions of fact and law involved in this case. The conclusions reached have, however, as it seems to us, been influenced by an inaccurate definition of the respective rights of the owner of the soil and the owner of the easement of way over it. The findings of fact show that the

plaintiff corporation is the owner of a wagon road the right of way for which was obtained by the exercise of the right of eminent domain. This road passes over a part of a farm known as the Poyd farm. In grading the road over this farm, it became necessary to make a cut, the banks on the upper side of which were some ten or twelve feet high. In making this cut, a fine vein or spring of water was opened, which gushed out of the rocks some three or four feet above the roadway. For some years the water was used to supply a watering trough placed below the spring, and the surplus water was conducted away by means of a ditch on the upper side of the roadway. More recently, the corporation has removed this trough several hundred feet to the land of another farmowner, has inclosed the spring in solid masonry, made watertight overhead as well as on the sides, and conducted all the water away and off the defendant's land by means of iron pipes, delivering a small portion of it into the new trough, and making some other disposition of the rest of it. The defendant went in search of his spring, and opened a hole into the cistern so that he could see what was being done with the water. He also insisted that he had a right to use the water for his cattle, and expressed his purpose to blast away the rocks at that point and prepare a permanent and convenient place for the establishment of a watering trough for his own use and the use of the public. To prevent him from opening the watertight cistern built about his spring, and to compel him to pay for repairing the damage done to it in his effort to find out what was being done with the water, this bill was filed, and the case went to a master to hear the evidence and to make appropriate findings of fact and law under the old practice. The master held, upon these facts, that the spring belonged to the owner of the soil on which it was, but in his third conclusion of law held that "the title of the owner is so qualified by plaintiff's easement that the spring can only be enjoyed subject ⁴⁶⁶ to the easement." This was a mistake, and it gave direction to all that followed. The plaintiff's easement qualified the manner in which the defendant might use his spring, but it did not qualify his title. The title was as absolute and unqualified to the water as to the rocks out of which it issued, and the defendant had the right to take it where he pleased and use it as he pleased: *Mills on Eminent Domain*, 70. He had no right to use it in such a manner as to inflict injury on the plaintiff's roadbed, but he had the right to use the whole of it, to conduct it by pipes wherever he desired, to consume it, to sell it, or waste it.

The plaintiff has no easement in the spring. It has a right of way for public travel over the land upon which the waters of this spring descended; and, for the purpose of preserving its roadbed in a condition suitable for travel, it may drain the water off. The right is one of drainage of the roadbed only. It is not a right to appropriate, or to take exclusive possession of, the spring itself, or to exclude the owner therefrom: *Mills on Eminent Domain*, 71. The corporation had gone much farther in this case. It had taken exclusive possession of the spring. It had taken upon itself for some purpose the responsibility of preserving the absolute purity of the water, so that it could be delivered on the land of another person without contamination from surface water. For this purpose, it had literally sealed it up in a watertight reservoir, into which iron pipes were introduced by means of which the spring was transported off the land of the owner and set down some hundreds of feet away upon the land of another person. Because the owner was curious to know what was being done with his spring, and had opened a hole into the reservoir that he might learn the situation, this bill was filed and a chancellor appealed to in order to restrain his curiosity by injunction, and to punish him for his temerity in seeking to know what the corporation was doing with his spring. An injunction has been decreed and damages have been assessed in accordance with the prayer of the bill. This result is due to the mistaken definition of the rights of the parties found in the third conclusion of law to which we have referred. The master and the court below have proceeded on the theory that the title of the defendant has been qualified and restricted by the easement of passage over the ⁴⁶⁷ roadway so that, as between him and the corporation, he has no right to the use of the spring if the corporation finds it convenient, for the purpose of drainage, to take exclusive possession of it and transport it to any point where it may wish to use it off the land of the owner. The true rule is, that the easement qualifies, not the title to the spring, but the manner of its use. The corporation has a roadway at the side of which the defendant has a spring. Each must so use his own as to inflict no unnecessary injury on the other, but neither can forcibly exclude the other from what is his own. It was neither against law nor against equity for the defendant to seek access to his spring, and, although this may not have been done in a peaceable spirit, it was nevertheless in the exercise of a clear legal right. The corporation may drain its road, but it cannot, in the exercise of the right of drainage, take forcible possession of this spring, exclude the owner from ac-

- cess to it, and transport it for its own use, or for the use of any other person, off the owner's land. The right of drainage does not include the right of appropriation, nor does it justify the forcible exclusion of the owner from access to a spring of water that comes to the surface on his own land outside the beaten track of the roadway. Subject, however, to the owner's right of access, the method of drainage to be adopted is for the corporation to determine.

The decree appealed from is reversed, the injunction is dissolved, and the bill dismissed at the costs of the plaintiff.

TURNPIKE COMPANIES—RIGHTS IN LAND GRANTED FOR HIGHWAY.—By the transfer of a turnpike road from the public to a corporation, the title to the soil is not changed, but remains in the owners of the soil of the adjoining lands, and they have the same use and enjoyment of it they had before. The easement or right of way is transferred to the corporation, to be held by it while it works and keeps the road in repair, subject to the public's right to use it upon paying toll: *Douglass v. Boonsborough etc. Road Co.*, 22 Md. 219; 85 Am. Dec. 647, and note.

KAUSS v. ROHNER.

[172 PENNSYLVANIA STATE, 481.]

WILLS—CONTRACT TO MAKE—RECOVERY FOR SERVICES.—If a girl who has lived in the family of a decedent, occupying the relation of daughter to him, proves a contract by the decedent to leave her all his property, such proof does not entitle her to recover all of his estate; but it overcomes the presumption arising from the family relation that her services were performed without the expectation of reward, and enables her to recover on a quantum meruit the reasonable market value of her services.

LIMITATION OF ACTIONS—CLAIM FOR SERVICES.—If compensation for services does not become due until the death of the person for whom they are rendered, the statute of limitations does not run against the claim until the death of such person.

WITNESSES—COMPETENCY—DEATH OF PARTY.—A living witness to a conversation between a deceased party and the plaintiff having testified, the plaintiff is competent to contradict him as to such matters only as he has testified to, and to state his recollection of what was said, under a statute making a surviving party competent to testify to any relevant matter which occurred before the death of the other party, if such matter occurred between himself and a person who is living, and who testifies against him at the trial, "or if such relevant matter occurred in the presence or hearing of such other living and competent person."

Assumpsit to recover for personal services. *Mary Kauss*, whose real name is *Mary Swager*, had lived in the family of *J. G. Kauss* from 1876, when she was six years old, until the death of *Kauss* in October, 1894. He had no children and his wife was an invalid. He agreed with *Mrs. Swager* to take *Mary*, and, if

she should remain with him until his death, she should have all of his estate. He died intestate leaving his wife surviving him. Judgment for plaintiff for three thousand dollars. Defendant appealed.

W. H. Lusk, for the appellant.

L. McQuistion and J. C. Vanderlin, for the appellee.

⁴⁸⁷ FELL, J. While much of the testimony intended to establish a contract to compensate the plaintiff for the services she rendered the decedent consisted only of the proof of loose declarations of testamentary intention, there was enough that was direct ⁴⁸⁸ and positive to justify the submission of the question of the existence of a contract to the jury. Proof of the contract did not entitle the plaintiff to recover the value of the estate: *Hertzog v. Hertzog*, 34 Pa. St. 418; *Graham v. Graham*, 34 Pa. St. 475; *Pollock v. Ray*, 85 Pa. St. 428. But it overcame the presumption arising from the existence of the family relation that the services were performed without the expectation of reward, and enabled her to recover on a quantum meruit the reasonable worth of her services. As the right to compensation did not mature until the death of John Kauss, the statute of limitations interposed no bar to the recovery of any part of the claim.

It was not error to permit the plaintiff to testify. A witness called by the defendant had testified to a conversation which occurred in his presence between the plaintiff and the decedent touching the contract relation between them. In contradiction of this testimony, the plaintiff was allowed to state what this conversation was. Her examination was limited to the conversation which had been detailed by the preceding witness, and no new matter was introduced. By the act of June 11, 1891, a surviving party is made competent to testify to any relevant matter which occurred before the death of the other party, if such matter occurred between himself and a person who is living and who testifies against him at the trial, "or if such relevant matter occurred in the presence or hearing of such other living and competent person." To this should be added the construction given in *Roth's Estate*, 150 Pa. St. 261, that the surviving party is not competent unless the living witness has been called, and then to such matters only as he has testified to. The act applies to conversations or occurrences which took place in the presence or hearing of the witness who has testified and whom it is proposed to contradict: *Thomas v. Miller*, 165 Pa. St. 216. See, also, *Krumrine v. Grenoble*, 165 Pa. St. 98. The living witness to the

conversation between the decedent and the plaintiff having testified, the plaintiff was competent to contradict him, and to state her recollection of what was said.

The plaintiff's claim was not without substantial merit, but she was entitled to recover, if at all, only upon her strict legal standing, and to the extent of the market value of the services ⁴⁹⁹ which she performed. The case belongs to a class requiring the most thorough scrutiny, and in which jurors should be carefully instructed and restrained. In this respect, we feel constrained to hold that the charge of the learned judge was inadequate, and to some extent misleading. That portion of the charge which is the subject of the seventeenth assignment of error set up a wrong standard by which to estimate her wages, and, instead of confining the jury to the proper grounds for recovery, tended to incite them to follow their own inclinations and to do what the decedent had failed to do, give the plaintiff practically the whole estate. In addition to board, clothing, care, education, and full maintenance, the verdict gives her wages at a rate exceeding three dollars a week from the time she was six years old, and for no reason more apparent or convincing than that given by one of her principal witnesses to justify his estimate of the value of her services, that "she ought to have it." This result could not have been reached by any fair calculation, and we assume that it would not have been if proper instructions had been given.

The standard was the market value of what she had furnished, and to this the jury should have been confined by clear, distinct, and guarded instructions; and they should not have been permitted under color of wages to have found the value of a bargain which she could not, and was not attempting to, enforce.

The seventeenth assignment of error is sustained, and the judgment is reversed with a venire de novo.

WILLS—AGREEMENT TO MAKE—RECOVERY OF SERVICES. When services are rendered by one person to another in pursuance of a parol mutual agreement between them that compensation should be made by will, and the party receiving such services dies without making the expected compensation, the party rendering the services is entitled to compensation out of the estate of the deceased creditor for the value of such services: *Grant v. Grant*, 63 Conn. 530; 38 Am. St. Rep. 379, and note; *Estate of Kessler*, 87 Wis. 660; 41 Am. St. Rep. 74, and note.

LIMITATIONS OF ACTIONS IN CASE OF DEATH.—A cause of action cannot be said to have accrued prior to the time when an action can be instituted thereon: *Note to Riner v. Riner*, 45 Am. St. Rep. 695.

WITNESSES—COMPETENCY—DEATH OF PARTY.—A surviving party to a transaction will not be permitted to testify against a deceased

party or his representative, on the ground that others were jointly interested with the decedent in the transaction, if none of them participated in the transaction or are able to testify concerning it: *Harris v. Bank*, 23 Fla. 501; 1 Am. St. Rep. 201. See, also, the note to *Gage v. Phillips*, 37 Am. St. Rep. 501.

MUSGRAVE v. DICKSON.

[173 PENNSYLVANIA STATE, 629.]

SUBROGATION—PARTIAL PAYMENT.—Subrogation rests upon purely equitable grounds, and cannot be enforced against superior equities. Unless a surety pays the debt in full, he is not entitled to subrogation, and, until this is done, the creditor must be left in full possession and control of the debt and the remedies for its enforcement.

SUBROGATION. — A SETTLEMENT BETWEEN SURETY AND DEBTOR fixes the amount of the liability of the latter, and the extent of the right to indemnity; but it does not affect the right to subrogation, which is never allowed to the prejudice of a creditor.

APPELLATE PRACTICE—EXCEPTIONS—ASSIGNMENT OF ERROR.—If a commissioner, to whom a case has been referred, reports in favor of subrogation, wholly ignoring an answer denying that the debt has been paid in full, and such report is sustained by the court without considering such answer, the supreme court is bound to consider the question of such omission on appeal, if it is made the subject of an exception to the report, and also of an assignment of error.

W. I. Craig, for the appellants.

J. M. Stoner and J. C. Dicken, for the appellee.

⁶³¹ **FELL, J.** This proceeding is founded upon a petition by Samuel Musgrave, one of the sureties on a replevin bond, for subrogation to the rights of the plaintiff in the judgment. An answer was filed by the appellant, the plaintiff, in which he averred that the judgment had not been fully paid, and in which he stated other supposed equitable grounds in denial of the right claimed. A separate answer was filed by the defendants, in which they alleged that they had transferred their property and business to the cosurety, J. C. Dicken, to secure him and Samuel Musgrave from any loss they might sustain by reason of the bond, and that from the management of their business an amount had been realized by Dicken more than sufficient to cover the payment made by Musgrave. It was agreed by both sureties that the amount due the defendants from the management of the business should be credited by Musgrave on account of the money which he had paid. The issues thus raised were referred to a commissioner. The terms of the reference do not appear from the record, but it is stated in the appellee's history of the case that the commis-

sioner was "to take testimony and find the facts in issue by the petition and answers."

The commissioner, having taken and considered the testimony, reported that the defendants, after the allowance of all proper credits, were indebted to the petitioner in the sum of eight hundred and seventy-two dollars and seventy cents, and to this amount subrogation was ordered by the court. A large part of the testimony has not been brought up with the record. From an examination of what appears, we see no reason to doubt the correctness of the conclusion reached, either as to the obligation to account or as to the amount due. The issue raised by the answer of the plaintiff seems to have been wholly ignored. Whether any testimony was taken under this issue we are not informed. None appears with the record. Its omission would be ground for the affirmance of the order if there was a finding and report by the commissioner. Neither has been made. In the whole proceeding as it is presented, no reference is made to this issue from the time it is raised by petition and answer until it is finally disposed of by the order making absolute the rule to show cause why subrogation should not be allowed. Its importance may have been an afterthought, but the issue is one which cannot now be disregarded. It is ⁶²² distinctly raised, and is the subject of an exception to the report of the commissioner and of a specification of error.

Subrogation rests upon purely equitable grounds, and it will not be enforced against superior equities. Unless the surety pays the debt in full, he is not entitled to subrogation, and, until this is done, the creditor will be left in full possession and control of the debt and the remedies for its enforcement: *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. 120; *Kyner v. Kyner*, 6 Watts, 221; *Bank of Pennsylvania v. Potius*, 10 Watts, 148; *Hoover v. Epler*, 52 Pa. St. 522; *Allegheny Nat. Bank's Appeal*, 19 Week. Not. Cas. 78. The settlement of the account between the sureties and the defendant fixed the amount of the liability of the latter and the extent of the right to indemnity, but it did not affect the right of subrogation, which will never be allowed to the prejudice and injury of the creditor.

The judgment is reversed, and the record is remitted to the court of common pleas, in order that there may be a finding upon the issue raised by the answer of the appellant.

SUBROGATION—UPON WHAT FOUNDED.—Subrogation is not founded upon contract, but is a creation of equity existing solely for accomplishing the ends of substantial justice: *Emmert v. Thompson*, 49 Minn. 386; 32 Am. St. Rep. 566; *Spaulding v. Harvey*, 129 Ind. 106; 28 Am. St. Rep. 176, and note.

SUBROGATION.—A SURETY PAYING ANY PART of a bond for purchase money, when the vendor has also reserved a lien upon the land, is subrogated to the vendor's rights under the lien: *Uzzell v. Mack*, 4 *Humph.* 319; 40 *Am. Dec.* 648.

WILSON v. OTT.

[173 PENNSYLVANIA STATE, 253.]

MISTAKE OF LAW.—The equity that affords a complete defense to an unjust claim will not always authorize or support an action for money voluntarily paid in satisfaction of it, nor will a distribution be disregarded or set aside to the prejudice of a party who has, in good faith, acted upon it.

MISTAKES OF LAW MAY, IN SOME CASES, afford good cause for relief in equity.

VENDOR AND VENDEE—FAILURE OF TITLE AS DEFENSE.—In an action for the purchase price of land, the vendee may set up as a defense a defect in, or failure of, title in whole or in part.

VENDOR AND VENDEE—MISTAKE AS TO GRANTOR'S TITLE AS DEFENSE TO FORECLOSURE.—If a grantee in a deed gives a mortgage for the value of the land granted upon other land, under a misapprehension that the grantor, as recited in the deed, owns the land in fee, while in fact he owns only a life estate therein, the grantee cannot be compelled to pay, in a suit to foreclose the mortgage, more than the value of the life estate.

MORTGAGES—ASSIGNMENT—DEFENSES—ESTOPPEL.—The assignee of a mortgage holds it subject to all equities with which it was affected in the hands of the mortgagee; and, if he claims to be a purchaser for value, he has the burden to show this affirmatively, and must also show, in order to recover, acts or declarations of the mortgagor by which he is estopped from interposing, as against such assignee, his equitable defense.

MORTGAGES—MISTAKE IN TITLE—LACHES.—If a mortgage is given in payment for land under a misapprehension as to the grantor's title, and the mistake is not discovered by the grantee until suit is brought to foreclose the mortgage, laches cannot be imputed to the mortgagor so as to bar his defense.

MORTGAGES—FORECLOSURE.—ATTORNEY'S COMMISSION on foreclosure of a mortgage is in the nature of a penalty, and its enforcement is within the discretion of the court. It cannot be enforced on a purchase-money mortgage, when the title to the greater portion of the land has failed.

J. M. Beck, O. B. Dickinson, H. M. Tracy, and W. F. Harrity,
for the appellants.

V. G. Robinson and A. L. Smith, for the appellees.

255 McCOLLUM, J. We are required to determine on this appeal whether the learned court below erred in limiting the plaintiffs' recovery to the value of the life estate the defendants acquired by the deed from Mary E. T. Ott and Mary T. Ott on the 18th of January, 1879, and in declining to grant the request

of the plaintiffs' counsel "to direct the jury to allow attorney's commission as stipulated in the mortgage." In considering the first question, we notice that while the defendants obtained by the deed the title their grantors had, they did not acquire by it the fee simple title represented in it as vested in Mary E. T. Ott. The representation to which we refer is the assertion by the grantors in their deed of a title in her which she did not have. It is said, and it may be true, that the assertion was based on a misapprehension of the legal effect of the previously recited facts, but it is, nevertheless, a circumstance entitled to some consideration in the decision of the case. The five thousand dollars for which the mortgage in suit was given was the price the defendants agreed to pay Mary E. T. Ott for a fee simple title to the property, subject only to the life estate which Mary T. Ott had in it. It appears now that Mary E. T. Ott had only a life estate in it subject to the life estate of Mary T. Ott, and that the value thereof, as ascertained by the jury, was less than one-fourth of the sum for which the mortgage was given. It is clear, therefore, that if the defendants are held liable for the whole sum, they must pay upward of four thousand dollars for what they bargained for and did not get, although the mortgagee professed to have it and to convey it ²⁵⁹ to them. The effort of the plaintiffs to recover the whole sum is, under the circumstances, so obviously unjust, that we naturally inquire whether the law will sustain them in it. They claim that the parties to the deed, at the time of the execution of it, knew, or ought to have known, that each grantor had a life estate in the property described in it, and that the fee of the same was in their grantees. They say that the recitals in it which preceded the representation or assertion to which attention has been called were notice to the grantors and grantees of the true state of the title, and their mutual understanding and belief that the fee was vested in Mary E. T. Ott was based on a mistake of law which furnishes to the party injured by it no ground for relief in equity. They contend, also, that if the facts in the case would have warranted the intervention of equity in a suit by the mortgagee, the laches of the defendants in appealing to it, and the assignment of the mortgage by her executors, as collateral security for a debt, constitute a bar to the defense now interposed.

In support of their contention that a mistake of law affords no basis for equitable relief, the plaintiffs cite *Good v. Herr*, 7 Watts & S. 253, 42 Am. Dec. 236, as the leading case on the subject in Pennsylvania. In the case cited, there was a distribution of a fund secured by recognizance, and the parties receiving it, be-

lieving that the distribution was in accordance with the law, executed acquittances for their respective shares in it. Afterward, one of them brought suit on the recognizance, claiming that the distribution was made under a mistake of law, in consequence of which he received less than he was entitled to. It was held that although his claim was well founded in fact he could not recover. The question in *Good v. Herr*, 7 Watts & S. 253, 42 Am. Dec. 236, was quite like the question in *Rogers v. Ingham*, L. R. 3 Ch. Div. 351, which the plaintiffs also cite as authority for their contention. In the case last mentioned, an executor, acting on the advice of counsel on the construction of a will, proposed to divide, in certain proportions, a fund between two legatees. One of the legatees, being dissatisfied, took the opinion of counsel, which agreed with the opinion on which the executor's proposal was based, and the fund was divided in accordance with it. Two years afterward, the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claiming ²⁶⁰ repayment. It was held that the suit could not be maintained, but the power of the court to relieve against mistakes of law, as well as against mistakes of fact, was conceded. The opinion in *Rogers v. Ingham*, L. R. 3 Ch. Div. 351, contains a reference to *Bingham v. Bingham*, 1 Ves. Sr. 126, but does not antagonize or qualify the principle on which it was decided. In that case, the plaintiff, under a mistake of law, bought and paid for his own land, but he was allowed to recover the money so paid, on the ground that he had not the consideration for which he bargained. It will be noticed that in *Good v. Herr*, 7 Watts & S. 253, 42 Am. Dec. 236, and in *Rogers v. Ingham*, L. R. 3 Ch. Div. 351, the dissatisfied distributee was seeking to recover money paid with his consent, and that there were circumstances which rendered his demand inequitable. The equity that affords a complete defense to an unjust claim will not always authorize or support an action for money voluntarily paid in satisfaction of it, nor will a distribution be disregarded or set aside to the prejudice of a party who has, in good faith, acted upon it. The other cases cited by the plaintiffs as pertinent to this branch of their contention do not appear to us as affording any material support to it, or as requiring special consideration. In *Hunt v. Rousmanier*, 8 Wheat. 174, there was a misconception by the parties of the legal effect of a power of attorney intended by them as security for a loan. It was held by the circuit court of Rhode Island that their misconception afforded no ground for relief, as it was a mistake of law, but, on appeal from that court

to the supreme court of the United States, the judgment was reversed in an opinion by Chief Justice Marshall, who said: "Although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity. . . . We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief." In *Sykes v. Chadwick*, 18 Wall. 141, it was held that the plaintiffs' release was, under the circumstances of the case, a good consideration for the promise she was seeking to enforce.

We have now referred to all the cases cited by the plaintiffs ²⁶¹ to sustain their principal contention, and none of them can be justly regarded as decisive of any question involved in the case we are considering. Two of them, as we have seen, were for the recovery of money voluntarily paid under a mistake of law, one of them was a suit for the reformation of an instrument executed precisely as the parties intended it should be, and the other was an action upon a promise supported by a valid consideration.

In 15 *American and English Encyclopedia of Law*, 744, it is said: "It will be seen by reviewing the authorities cited in the notes that the general rule that equity will not correct a mistake of law has been so greatly modified that considerable doubt seems to exist as to whether it can now be called a general rule." In an able article in 23 *American Jurist*, 146, on the subject of mistakes of law, the author says: "On the whole, in view of all the cases on the subject, of the language used in them, and the circumstances under which it is used, we cannot but regard the actual preponderance of authority as unequivocally in favor of the doctrine that mistakes of law may afford good cause for relief." The excerpt from the *Encyclopedia* presents a conclusion which we think is fairly deducible from a review of the cases to which it refers, and the excerpt from the article in the *Jurist* appears to be in substantial accord with it. As they are based on a review of the cases involving a consideration of the effect of a mistake of law, they are worthy of notice as showing the trend of judicial thought on the subject, and the reluctance of the courts to sanction gross injustice under the claim that equity will not relieve against such a mistake.

In *Peters v. Florence*, 38 Pa. St. 194, it appears to have been regarded as an open question in this state whether "equity will

or will not relieve against an act done in mistake of title growing out of ignorance of the law," but in Whelen's Appeal, 70 Pa. St. 410, the principle, that "when a party has acted under a misconception or ignorance of his title, and has executed an agreement or conveyance to his prejudice he will be relieved in equity," was expressly sanctioned. In Goettel v. Sage, 117 Pa. St. 298, the grantors and grantee believed that the former had a valid title to the land sold, and so did the latter's counsel who, on the request of his client, examined the records for the purpose of ascertaining in whom the title was vested. It was discovered, ²⁰³ afterward, that the grantors had no title to the land, and in their suit on the grantee's bond for the purchase money he was allowed to set up their mutual mistake as to the title as a defense. In Heacock v. Fly, 14 Pa. St. 540, a vendor accepted from a married woman her bond and mortgage for part of the purchase money of land conveyed to a trustee for her separate use. It was held that equity would rescind the contract and allow the vendor to recover the land on his paying to the feme covert the part of the purchase money paid by her. The parties to the transaction were alike familiar with all the facts affecting it, and they mutually supposed that the bond and mortgage were a valid security for the unpaid purchase money, but in this they were mistaken. It was said by the court that they "were led into error by the conveyancer," and that justice required "that the contract should be rescinded," but there was no better warrant for saying so in that case than there is in this. In Gross v. Leber, 47 Pa. St. 520, the defendants executed a bond as trustees in the belief that it was their legal duty to do so, but they were relieved from liability upon it on the ground that it was based on a mistake of law. There was no fraud or undue influence in either of the three cases last cited.

There is a long line of cases in Pennsylvania to the effect that, in an action for the purchase money of land, the vendee may set up as a defense to it a defect in or failure of title in whole or in part. This is such an action. The consideration of so much of the mortgage as is now in dispute was the fee simple in remainder which the vendor in her deed represented she had, and professed to convey. It now appears, as already stated, that at the time of the transaction the vendor had only a life estate in the land, subject to the life estate of Mary T. Ott in it, and that the fee, subject to these estates, was vested in the vendees. There was no dispute between the parties to the transaction and no element of compromise in it. The plaintiffs have, by the verdict, the full

value of the estate the defendants acquired by the mortgagee's deed, and their claim for more is unconscionable. As the defendants received nothing for the unpaid portion of the purchase money, it ought not to be exacted from them. In view of the decisions of this court, to which we have referred, of the well-settled rule in regard to ²⁶³ defenses in actions for the purchase money of land, and of the unwarranted assertion by the grantors in respect to the title, we cannot say that the learned court below erred in limiting the plaintiff's recovery to the value of the life estate in Mary E. T. Ott.

Nearly three years after the death of Mary E. T. Ott, the mortgage was assigned by her executors to Martha J. Wilson as collateral security for a loan of two thousand five hundred dollars, made by her, but when, to whom, or for whose benefit it was made, and whether all or any portion of it has been repaid, does not appear. The assignment was made more than a year before it was recorded, and no notice of it was given to the defendants. It is now claimed, but it is not established by agreement of the parties or by evidence, that the assignee of the mortgage is a purchaser of it for value without notice of any defense to it, and that while the mortgagors may have an equity available as a defense in a suit by the mortgagee or her executors, it cannot prevail in this action to her use. The burden of showing that she is such a purchaser lies on her, and when she has shown that she is, she must also show, in order to sustain this branch of her contention, acts or declarations of the mortgagors by which they are estopped from interposing, as against her, their equitable defense. The principle that the assignee of a mortgage holds it subject to all the equities with which it was affected in the hands of the mortgagee is so well settled and understood that a citation of the decisions which sustain it is unnecessary. It is not claimed that the defendants in this case have said or done anything which estops them from interposing the defense we have considered, but it is said they ought not to have equitable relief because of their delay in demanding it. But we think that, as there is no evidence that they knew of the actual state of the title before this suit was brought, they are not chargeable with laches which bars their defense.

This suit was brought and prosecuted for the whole amount of the mortgage. The plaintiffs, on the first trial of it, made no attempt to show the value of the life estate of Mary E. T. Ott, and, as a matter of fact, the defendants realized nothing from it because she died before the termination of the prior life estate in

the land. On the second trial, the right of the plaintiffs to have the value of the life estate was conceded, and some ²⁶⁴ evidence was given to assist the jury in ascertaining what it was worth, but the real contention, as before, related to the claim of the plaintiffs to that part of the mortgage for which there was no consideration. In view of the nature of the contest and the special circumstances of the case, we think there was no error in the refusal of the court "to direct the jury to allow attorney's commission as stipulated in the mortgage." It is now settled that such commission is in the nature of a penalty, and its enforcement is a matter within the control of the court in the exercise of its equity powers: *Daly v. Maitland*, 88 Pa. St. 384; 32 Am. Rep. 451; *Lindley v. Ross*, 137 Pa. St. 629.

The specifications of error are overruled, and the judgment is affirmed.

MISTAKE OF LAW.—MONEY PAID UNDER a mistake of law cannot be recovered: *Painter v. Polk County*, 81 Iowa, 242; 25 Am. St. Rep. 489, and note; *Alton v. First Nat. Bank*, 157 Mass. 341; 34 Am. St. Rep. 285, and note. See, also, the extended note to *Black v. Ward*, 15 Am. Rep. 171.

MISTAKE OF LAW—RELIEF FROM IN EQUITY.—Mere ignorance or mistake of law on the part of a party to a contract will not authorize a court of equity to set it aside: *Kleimann v. Gieselmann*, 114 Mo. 437; 35 Am. St. Rep. 761, and note. For a mistake of law pure and simple there is generally no relief, but relief may be afforded in equity if the circumstances are of such a nature that the adverse party is seeking to avail himself of the opportunities afforded by the mistake, and is attempting to enforce an unconscionable advantage without consideration, provided the other party is not blamable: *Lane v. Holmes*, 55 Minn. 379; 43 Am. St. Rep. 508, and note.

MORTGAGES—FAILURE OF TITLE.—If a purchaser, after paying part of the purchase price, executes a mortgage upon the land to secure notes for the remainder without notice of any outstanding equity against the land, and the mortgagee assigns such security and notes to a bank without notice to any of the parties of such equity, the notes operate as payment, and both the purchaser and the bank are protected as bona fide purchasers: *Davis v. Ward*, 109 Cal. 186; 50 Am. St. Rep. 29.

VENDOR AND PURCHASER—FAILURE OF TITLE—DEFENSE TO FORECLOSURE.—The foreclosure of a purchase-money mortgage on land cannot be avoided by the purchaser in unchallenged possession who does not allege fraud, on the ground that at the time of the purchase he was mistaken in supposing that he had bought a fee simple title, and is now informed and believes that he has purchased only a life estate: *Munro v. Long*, 35 S. C. 354; 28 Am. St. Rep. 851.

MORTGAGES—RIGHT OF ASSIGNEE OF.—An assignee of an interest in a mortgage cannot claim any other or stronger right than that of the assignor: *Central Bank v. Copeland*, 18 Md. 305; 81 Am. Dec. 597.

McCRUDEN v. JONAS.

[178 PENNSYLVANIA STATE, 507.]

NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT—PRESUMPTION.—If no place of payment is named in a note, it is presumed to be payable at the place of residence of the maker, whether such omission to name the place of payment is intentional, or the result of mere inadvertence.

PARTNERSHIP—INSOLVENCY—PRIORITY OF CREDITORS.—An insolvent partnership composed of three of the four members of another insolvent partnership, cannot, as a creditor of the latter, share equally with the latter's other creditors in the distribution of its assets.

PARTNERSHIP—INSOLVENCY—PRIORITY OF CREDITORS.—If an insolvent partnership composed of four persons gives a note to another insolvent partnership composed of three of the same persons, and the note is negotiated by the payee as collateral security for a pre-existing debt to a third person, who has knowledge of the affairs of both partnerships, the holder of the note must be postponed to the other creditors of the firm making the note.

J. Wilson, for the appellant.

J. Stadtfeld, J. A. Emery, J. Cohen, A. Israel, and E. S. Craig, for the appellee.

⁵¹⁴ **McCOLLUM, J.** The fund for distribution was created by a receiver's sale of the property of the Parisian Cloak and Suit Company. It is not sufficient to pay the debts of the company in full, and we are therefore required to consider and determine on this appeal whether Yetta Greenbourn is entitled to participate in it on the footing of the other creditors. To substantiate her claim that she is, she presents three notes, made by the Parisian Cloak and Suit Company on the 15th of April, 1893, to the order of I. Jonas & Co., from whom she received them, duly indorsed as collateral security for their pre-existing indebtedness to her. It is conceded that the notes represent a bona fide indebtedness of the makers to the payees, and that she has by virtue of them the same rights in the distribution of the fund in question that they gave to the parties to whose order they were drawn. In order to make her position in the distribution clear, it is necessary to state the material facts affecting it, and these are as follows: ⁵¹⁵ The place of business of I. Jonas & Co. was in Chicago, Illinois, and that of the Parisian Cloak and Suit Company was in Pittsburg, Pennsylvania. All the members of the firm of I. Jonas & Co. were members of the Parisian Cloak and Suit Company and liable for the debts of the latter, as well as for the debts of the former. In the latter there was but one person who was not a member of the former, and he was not intrusted with the management of the

finances of his firm nor authorized to sign bills and notes for it. These powers were vested in the other members of his firm who, as we have seen, constituted the partnership of I. Jonas & Co. William Greenbourn, the husband of Yetta Greenbourn, was a member of both firms, and after his death in October, 1891, their daughter, Mrs. Estelle Sommers, purchased the interest of his estate in each of them, and thenceforth possessed and exercised the rights and powers in the management of them that he had and exercised in his lifetime. Isador Jonas was a son in law of Mrs. Yetta Greenbourn, and, as she had a daughter and son in law in each firm, it is not surprising that she had the knowledge respecting the management and status of both firms that she evinced in her deposition. As she was a creditor of I. Jonas & Co. and held the notes of the Parisian Cloak and Suit Company as collateral security for their debt, she was interested in acquiring this knowledge, and her possession of it may have had some connection with the fact that she did not accept the notes in payment or satisfaction of the debt which the payees therein owed her. Two of the notes were expressly payable at the store of the makers in Pittsburg, and the other was impliedly so. True, the place of payment was not named in it, but the omission to name it was, under the circumstances surrounding the transaction, presumably an inadvertence. The notes were made and dated at the same time and place, with the same purpose in view, and they were promptly passed by the payees to their creditor, who knew that the place of business of the makers was in Pittsburg. It is said in volume 2, page 328, of American and English Encyclopedia of Law that, "if no place of payment is named in the note, it is understood to be the place of residence of the maker," and that "it cannot be presumed that the place of payment is the place of date, though some cases hold that, in the absence of any express provision on this point, the intent was prima facie to pay where the ⁵¹⁶ note was made. In *Oxnard v. Varnum*, 111 Pa. St. 193, 56 Am. Rep. 255, it is said that "the making and dating of a note at a particular place is not equivalent to making it payable there," but it is proper to state that the action was by the second indorsee against the first indorser, and involved the duty of the holder in regard to presentment and demand at the residence or place of business of the maker. If, however, there is a presumption that, in the absence of an express provision on the subject, the place of date is the place of payment, we agree with the learned auditor and the learned court below that it cannot prevail against the facts and circumstances connected with and

surrounding the execution and delivery of the note in question. We conclude, therefore, that Mrs. Greenbourn occupies no higher ground in the distribution than I. Jonas & Co. would have occupied had they retained the notes, and that her claim upon the fund must be passed upon in accordance with the laws of Pennsylvania, governing the distribution of the assets of an insolvent partnership.

The learned court below, in awarding to Mrs. Greenbourn the balance of the fund remaining after paying thereout the claims of the other creditors in full, gave her all that she was entitled to, and all that the parties to whose rights she succeeded could possibly have received from it. As they were liable for all the claims of the other creditors, they could not have participated in the distribution until those claims were satisfied. This is a proposition in accordance with equity and well sustained by the decisions of this court: *Erb's Appeal*, 2 Pen. & W. 296; *Himes v. Barnitz*, 8 Watts, 39; *Worrall's Appeal*, 41 Pa. St. 524; *Datesman's Appeal*, 77 Pa. St. 243. There is nothing in the act of April 14, 1838, which sustains the contention that an insolvent partnership, composed of three of the four members of another insolvent partnership, can, as a creditor of the latter, share equally with its other creditors in the distribution of its assets. This act has been severely and justly criticised in most, if not all, of the cases in which it has been considered, but it has never yet produced such results as are contended for in this case: *Tassey v. Church*, 6 Watts & S. 465; 40 Am. Dec. 575; *Pennock v. Swayne*, 6 Watts & S. 239; *Allen v. Erie City Bank*, 57 Pa. St. 129.

Decree affirmed and appeal dismissed at the costs of the appellant.

NEGOTIABLE INSTRUMENTS—PRESUMPTION AS TO PLACE OF PAYMENT.—The date and place of execution of a promissory note which appear on its face, and not by memorandum entered thereon, raise the presumption that it is payable at that place: *Bigelow v. Burnham*, 83 Iowa, 120; 32 Am. St. Rep. 294, and note. If no particular place of payment is specified in a promissory note, the law of the place where it is made determines, not only its construction, but also the obligation and duty it imposes upon the maker: *Barrett v. Dodge*, 18 R. I. 740; 27 Am. St. Rep. 777, and note.

PARTNERSHIP CREDITORS—RIGHTS AND REMEDIES OF. This subject will be found exhaustively treated in the extended notes to *Smith v. Smith*, 43 Am. St. Rep. 364-380, and *Davies v. Atkinson*, 7 Am. St. Rep. 378-380.

ALBERTSON v. LAUGHLIN.

[173 PENNSYLVANIA STATE, 525.]

GAMBLING CONTRACTS—ENFORCEMENT.—Equity does not interfere in gambling transactions, either to aid the winner to compel payment of his unpaid gains, or to enable the loser, who has paid his losses, to recover them back, whether paid in cash, or in negotiable securities.

GAMBLING CONTRACTS—RECOVERY OF NOTE.—If a negotiable note is pledged to a broker to secure him against loss in stock transactions, and is negotiated by him in payment of such loss, equity will not compel the return of the note, as against an innocent purchaser without notice, on the ground that it was pledged for a gambling debt.

NEGOTIABLE INSTRUMENTS.—The negotiable character of a note in common form is not affected by the addition of the words, "the payment of this note is secured by deed of trust of even date herewith on real estate," nor by the fact that it is made payable by its terms on or before a future day therein named.

Bill in equity to compel the surrender of two notes. The "Bass" note mentioned in the opinion was worded as follows:

"\$29,134.92.

Chicago, January 1, 1890.

"On or before three years after date, for value received, I promise to pay to the order of Lewis Albertson the principal sum of twenty-nine thousand one hundred and thirty-four & 92-100 Dollars, with interest thereon at the rate of six per cent per annum, payable yearly, to wit, on the first day of January in each year, until said principal sum is fully paid. Both principal and interest are payable at the First National Bank of Chicago.

"The several installments of interest aforesaid for said period are further evidenced by three interest notes or coupons of even date herewith.

"The payment of this Note is secured by Deed of Trust of even date herewith, on real estate in Cook County, Illinois.

"OSCAR S. BASS."

Decree dismissing the bill. Plaintiff appealed.

J. G. Johnson, W. H. Shoemaker, and W. S. Stenger, for the appellant.

T. R. Elcock and B. Gilpin, for the appellees.

525 **WILLIAMS, J.** The important facts in this case may be very briefly stated. The defendants Laughlin and McManus were stockbrokers. Albertson, the plaintiff, had been for some years one of their customers. In February, 1893, he borrowed ten thousand dollars from Laughlin, for which he gave his own note. About the same time, he turned over to Laughlin a note for twenty-nine thousand one hundred and thirty-four dollars and

ninety-two cents, which was known as the "Bass note," as collateral security for the payment of his own note and for the payment of "any losses that might be between ⁵²⁹ the said firm of Laughlin and McManus and said Lewis Albertson" in their stock transactions. Within a few days after this was done, a balance on account of losses appeared on the books of the firm against Albertson of about twenty thousand dollars. On the second day of March, 1893, the firm, with the consent of Laughlin, transferred the Bass note to David H. Lane for the sum of twenty-nine thousand dollars. The master has found that Lane was a purchaser bona fide and without notice of any equity of Albertson in the note. Laughlin and McManus made an assignment for the benefit of creditors within a few hours after the transfer of the Bass note to Lane. On the fourth day of the following August, this bill was filed against Laughlin and McManus, against Hopkins, the receiver, and against Lane, the holder of the Bass note. It alleges that the ten thousand dollars borrowed from Laughlin was obtained, with the knowledge of the lender, for use in stock gambling operations; and that the balance of twenty thousand dollars appearing against him on the books of the firm was for losses incurred in stock gambling done by him through them. These allegations, with another asserting notice to Lane of the title of the plaintiff to the Bass note, make the basis on which is grounded a prayer for a decree directing that the plaintiff's own note for the ten thousand dollars borrowed from Laughlin, and the Bass note, be delivered up to him. The delivery of the note for ten thousand dollars has not been insisted on in the argument for the appellant made in this court, but the right of the plaintiff to the Bass note, both as against Laughlin and McManus and against Lane, has been urged with great earnestness. We are unable to see, however, how we can interfere with the transactions between the plaintiff and his broker which they have already closed. If we assume the truth of every averment in the bill stating the nature of the transactions in stocks in which the losses were sustained, no ground for the interference of a chancellor is disclosed. It does not matter, so far as the legal effect of payment is concerned, whether the loser in a gambling transaction pays his losses in cash or in negotiable securities. He cannot recover what he has voluntarily paid in either case. The winner could not recover from him by an action at law if he refused to pay, nor could he recover back from the winner the money or the security paid by him to cover his losses. The law will leave both parties just where it

finds them, and will afford its help to ⁵³⁰ neither. A fortiori will a court of conscience turn away from the illegal transaction and deny its aid, either to the winner to compel payment of his unpaid gains, or to the loser who has paid his losses to enable him to recover them back. In this case, it appears by the proofs, and is found as a fact by the master, that the plaintiff provided for the payment of his losses, to the extent of the balance due upon the Bass note over his own note to Laughlin, by an agreement in writing delivered at the time the Bass note was delivered by him to Laughlin.

This security so delivered was negotiable, and has been actually negotiated by the firm for the payment of the very losses for which it was pledged to them. What we are asked to do is to compel its return because it was held by the firm for a gambling debt. This we cannot do. Having provided for the payment of his losses, and the note put in the hands of the firm for that purpose having been negotiated, as the court below have held, to one who bought for full value and without notice, the plaintiff is in the position of any other loser who has paid his losses. We agree with the court below in holding the Bass note to be negotiable, and we have been shown no sufficient reason for overruling the finding of the master, concurred in by the learned judge of the court below, that Lane is a purchaser bona fide and without notice. In this view of the case, it becomes unnecessary to enter upon an examination of the transactions between Albertson and his brokers. The master thinks they were not of a gambling character, but were purchases and sales for actual delivery.

Whether the evidence showing the purchase and sale of over a half million dollars' worth of stock in a few years, not one share of which was delivered to the plaintiff or actually paid for by him, but all of which was settled for on margins and the profit or loss alone accounted for, justifies his finding, is a question that we shall not enter upon. It is not necessary for the decision of this case. Give the plaintiff the full benefit of his position on this question, and treat the stock transactions as all illegal, a mere wager on the course of the market, and we can see no way in which a chancellor can help him to regain what he has lost. The cases of *Peters v. Grim*, 149 Pa. St. 163, 34 Am. St. Rep. 599, and *Gaw v. Bennett*, 153 Pa. St. 247, 34 Am. St. Rep. 699, hold that a purchase and sale on margin is not necessarily illegal, but they both adhere to the ⁵³¹ rule that a contract that appears to be an illegal and gambling contract is one with

which the courts will not interfere to assist either the unpaid winner or the loser who has paid his losses. Leaving the plaintiff, therefore, to stand on his own position, we can afford him no relief.

The decree is affirmed; the costs to be paid by the appellant.

WAGERS—RECOVERY OF MONEY PAID UNDER.—When a bet or wager is lost and the money or property delivered to the winner, courts will not aid in its recovery: *Allen v. Dodd*, 4 Humph. 131; 40 Am. Dec. 682, and note. Money paid on a gaming consideration cannot be recovered in equity on the ground merely that it was lost by gaming: *Downs v. Quarles*, Litt. Sel. Cas. 489; 12 Am. Dec. 337, and note. See, especially, the note to *Sondheim v. Gilbert*, 10 Am. St. Rep. 33; and see, also, the note to *Taylor v. Carlisle*, 1 Am. St. Rep. 302, 303.

NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITY AS AFFECTING.—Although a note states on its face that it is accompanied by collateral security, its negotiability is not thereby destroyed: *Valley Nat. Bank v. Crowell*, 148 Pa. St. 284; 33 Am. St. Rep. 824, and note.

DUNCAN v. PHILADELPHIA.

[178 PENNSYLVANIA STATE, 550.]

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECT IN SIDEWALK.—In the absence of actual or implied notice of the defective condition of a coalhole in a sidewalk, a city is not bound to examine it in order to ascertain its condition; nor can notice of its defective condition be implied, if the defect could not be seen without removing the cover and making an examination. In the absence of notice, the city is not liable for injury received by a traveler on the sidewalk from falling into such hole.

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS. It is the duty of a municipality to exercise reasonable supervision over its sidewalks; but as the first duty in relation to them rests upon the property owner, and that of the city is secondary only, it is not liable for defects without notice, actual or implied, of their existence.

Action to recover for injury received from falling into a coalhole in the sidewalk of a public street. Judgment for plaintiff. Defendant appealed.

J. L. Kinsey, city solicitor, and J. W. Catharine, assistant city solicitor, for the appellant.

A. S. L. Shields, for the appellee.

554 FELL, J. The under side of the iron grate which covered the coalhole into which the plaintiff fell had become so worn at the edge where it rested on a stone ledge that it slipped out of place when she stepped on it. The ledge had also become worn, increasing the danger of the displacement of the grate. These defects were not apparent, and could not have been seen by

anyone on the pavement. The grate projected half an inch above the surface of the pavement, and had occasionally been displaced by passers-by who struck it with their feet. How often this had occurred before the plaintiff's injury does not clearly appear from the testimony, but, giving full effect to all the testimony in her behalf, it had not occurred more than two or three times, and had not resulted in injury to anyone. By the defendant's fourth point the court was asked to charge that, in the absence of actual or implied notice of the condition of the hole, the city was not bound to examine it in order to ascertain its condition, and that notice of its defective condition could not be implied if the defect could not be seen without removing the cover and making an examination, and that, in the absence of notice, the city was not bound to do this. This is the fair effect of a not clearly expressed request for instructions to the jury, and it should have been affirmed.

It is the duty of a municipality to exercise a reasonable supervision over its sidewalks; but as the first duty in relation to them rests upon the property owner, and that of the city is secondary only, it is not liable for defects without notice, actual or implied, of their existence. As was said in the recent case of *Lohr v. Philipsburg*, 156 Pa. St. 246, a municipality is not obliged to seek for defects, but to be "vigilant to observe them when they become observable to an officer exercising a reasonable supervision." The instruction on the subject in the general charge was clear and accurate as far as it went, but it did not cover the point raised or remedy the error complained of. The ⁵⁵⁵ learned judge told the jury that to impose liability the city must either have had actual notice of the defect, or the defect must have been of such a character or of so long standing that the city must be presumed to have had notice, but the character of a defect of which notice will be imputed was not pointed out.

The fifth point, which is the subject of the fourth assignment of error, is defective in asking for a peremptory direction for the defendant. This could not have been affirmed, as there was testimony of actual notice. The question presented by the eighth assignment was not raised by the testimony.

The third assignment of error is sustained, and the judgment is reversed with a venire facias de novo.

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK.—A city is liable for the injuries received by a traveler who falls into a hatchway which a houseowner has been allowed to locate and maintain in a dangerous position, although the immediate cause of the accident was the negligence of the houseowner in not guarding the opening:

McClure v. Sparta, 84 Wis. 269; 36 Am. St. Rep. 924, and note. The authorities of a city must exercise ordinary care in keeping its sidewalks free from defects, and a failure to perform this duty may lay the foundation for municipal liability: **Denver v. Dean**, 10 Col. 375; 3 Am. St. Rep. 594, and note; **Sherwood v. District of Columbia**, 3 Mackey, 276; 51 Am. Rep. 776; **Johnston v. Charleston**, 3 S. C. 232; 16 Am. Rep. 721; **Gosport v. Evans**, 112 Ind. 133; 2 Am. St. Rep. 164, and note.

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—NECESSITY FOR NOTICE.—Where a city did not construct a sidewalk, a defect in which caused an accident not occasioned by any act of the city or its agents, before a recovery can be had it must be proved that the city had actual or constructive notice of such defect, and also that it was in possession of such notice a sufficient time to have remedied the defect: **Denver v. Dean**, 10 Col. 375; 3 Am. St. Rep. 594, and note. See, also, **Mayor v. Wilson**, 82 Ga. 206; 14 Am. St. Rep. 150, and note.

MEYERHOFF v. DANIELS.

[178 PENNSYLVANIA STATE, 513.]

AGENCY—MISREPRESENTATIONS BY AGENT—RESCISION OF CONTRACT.—If an agent obtains possession of the property of another by making a stipulation or condition which he is not authorized to make, the principal must either return the property, or remain subject to the condition upon which it was parted with by the former owner.

AGENCY—FALSE REPRESENTATIONS BY AGENT—RESCISSION.—If goods are obtained from the owner, through the false representations of the agent of another, the owner may rescind the contract and recover the goods from the principal of such agent, whether the latter had authority to make such representations or not.

AGENCY—FALSE REPRESENTATIONS OF AGENT—RESCISSION.—In an action to recover for goods sold to an agent in reliance upon his false representations, evidence that his principal received the goods upon credit, that the agent had an interest in the principal's business, that the representations were made with the authority of the principal and were false, and that the purchase was beyond the demands of the principal's business, is admissible.

Action to recover goods sold. Judgment for defendant. Plaintiff appealed. Error was predicated upon the refusal of the trial court to admit the evidence mentioned in the last headnote above.

J. C. Levi, for the appellant.

J. Singer, M. Herzberg, and E. Furth, for the appellee.

558 **GREEN, J.** The defendant, being examined as a witness upon cross-examination, testified that Guggenheimer was her agent for the purchase of goods for her establishment, and Guggenheimer who was also examined, testified to the same fact. The latter testified that he bought the goods in question for the defendant, and that he had authority to buy either for cash or on

credit, whichever he saw fit to do. The goods were therefore actually purchased for the defendant by her agent, they were delivered to her, and nearly all of them were found in her possession at the time the writ of replevin was issued and served. The plaintiff testified that at the time of the purchase certain representations were made to him by Guggenheimer as to the financial responsibility of the defendant, and that he stated certain reasons why she could not pay immediate cash for the goods, but that the money would be paid the following week. If these representations were made as stated by the plaintiff, the subsequent events which occurred very quickly after the sale tended strongly to prove that they were false. The goods were sold on May 29, 1894, and, on June 16th following, the defendant made a voluntary assignment for the benefit of creditors. The question of the making of the representations, and of their truth or falsity, was, as a matter of course, exclusively for the jury. The witness denied making them, but the plaintiff testified positively, and with emphasis, giving precise details, that they were made, and that it was only upon the faith of the representations that he opened the account and shipped the goods. That the defendant was responsible for the acts and declarations of her agent under whose contract of purchase she received the goods is too plain for argument, and is not at all disputed. Whether the agent had authority to make the representations in question or not is quite immaterial. The test of liability is, that the goods were received by the defendant under the contract made by the agent. In *Wheeler etc. Mfg. Co. v. Aughey*, 144 Pa. St. 398, 27 Am. St. Rep. 638, we held that, "If an agent obtains possession of the property of another by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or, if he receives it, he must be subject to the condition upon which it was parted with by the former owner." In *Jones v. National etc. Assn.*, 94 Pa. St. 215, ⁵⁵⁹ we said, Paxson, J.: "The contention on the part of the association plaintiff is, that the secretary had no authority to make the representations by which said Jones was induced to sign the note as surety; that it was, therefore, a fraud and not binding on said association; that is, the latter could repudiate the fraud and yet hold on to its fruits. This cannot be done. Common honesty and the law of the land alike forbid it. Whether the association was incorporated or unincorporated, whether the secretary was or was not authorized to make the representations to Jones, it is clear that the association cannot have the benefit of the security and at the

same time repudiate the contract by means of which they obtained it. No principle of law is better settled than that a man cannot reap the fruits of his agent's fraud: *Musser v. Hyde*, 2 Watts & S. 314; *Hunt v. Moore*, 2 Pa. St. 105; *Mundorff v. Wickersham*, 63 Pa. St. 87; 3 Am. Rep. 531; *Keough v. Leslie*, 92 Pa. St. 424. The association took this security cum onere, and the maxim, *Qui sentit commodum sentire debet et onus*, applies."

In *Sunbury Fire Ins. Co. v. Humble*, 100 Pa. St. 495, we said: "In this connection, it is proper to say that it matters little what were the powers of the agent who made the fraudulent representations by means of which the defendant was induced to take his policy, nor whether the agent himself believed them to be true. The company, having accepted the policy, is affected with any fraud upon the part of the person obtaining it. In other words, it cannot repudiate the fraud and yet retain the benefits of the contract. It takes cum onere."

In view of the foregoing authorities, and the undoubted state of the law upon this subject, we think it was not competent for the learned court below to direct a verdict for the defendant. The whole case should have gone to the jury with instructions that, if they believed that the goods in question were obtained by means of false representations made by Guggenheimer, the verdict should be in favor of the plaintiff.

We think the other assignments of error are also sustained. The case was one of fraud in obtaining the goods, and any facts which tended to support the plaintiff's allegations in that regard should have been received and heard. We think all the matters offered to be proved in the first four assignments of error should have been admitted in evidence, as, if the testimony supported the offers, it might have a material effect in determining the question of fraud and the defendant's participation therein. Upon the first five assignments of error the judgment is reversed.

Judgment reversed and new venire awarded.

AGENCY—MISREPRESENTATIONS OF AGENT—LIABILITY OF PRINCIPAL.—Where an agent procures the signature of a third person to a note payable to his principal upon certain conditions, the principal, by accepting and confirming the note, takes it subject to the conditions upon which it was obtained by his agent, whether or not the latter had authority to make such conditions: *Wheeler etc. Mfg. Co. v. Angbey*, 144 Pa. St. 398; 27 Am. St. Rep. 638, and note. If false representations are made by an agent employed to sell property as to the price paid for it by his principal, they must be regarded as made by the principal if he accepts their fruits. He cannot accept the property secured by means of such representations, and then disclaim responsibility for

the fraud through which the property was secured: *Fairchild v. McMahon*, 139 N. Y. 290; 36 Am. St. Rep. 701. See, also, the notes to *Haskell v. Starbird*, 23 Am. St. Rep. 814; *Wachter v. Phoenix Assur. Co.*, 19 Am. St. Rep. 604, and especially the note to *Fifth Avenue Bank v. Forty-second Street etc. Ry. Co.*, 33 Am. St. Rep. 720.

McKIBBEN v. DOYLE.

[178 PENNSYLVANIA STATE, 579.]

MISTAKE—RECOVERY OF MONEY PAID BY.—If one claiming to be the owner of a party-wall declines a tender of the cost price thereof made by an adjoining lotowner, and fails in an attempt to compel the latter, by legal proceedings, to pay, in addition to such cost price, the costs in another legal proceeding concerning such wall, to which he was not a party, and he afterward pays for the wall, he may recover the price paid, on the ground that it was paid under a mutual mistake of fact, and not as a compromise, or in settlement of litigation, if it is subsequently ascertained that the party claiming title, and to whom the price was paid, has no title to the wall.

MISTAKE—RECOVERY OF MONEY PAID BY.—Money erroneously paid under a mutual mistake of fact may be recovered; and the mere omission to take advantage of means of knowledge within the reach of the party paying does not prevent a recovery.

H. K. Blake and J. A. Gorman, for the appellant.

O. Rambo, for the appellees.

580 FELL, J. The defendant, Catharine Doyle, claiming to own the party-wall between her premises, No. 2009 Pepper street, and the adjoining premises, No. 2011 Pepper street, obtained an injunction restraining the owner of No. 2011 from using the wall without making compensation therefor. After the injunction had issued the lot No. 2011 with the unfinished building, was sold at sheriff's sale and purchased by Thomas J. Rose, who conveyed it to the plaintiffs. The plaintiffs, desiring to complete the building, tendered to the defendant the price of the party-wall. She declined to receive the money unless they would pay also the costs of the injunction proceeding against the former owner of the property, and she attempted by rule to make them parties to the proceeding. At the hearing of the rule to show cause, the tender was again made and declined for the same reason. The rule was discharged November 25, 1893, and on January 3, 581 1894, at the request of the defendant, she was paid in full for the wall. It was subsequently ascertained that the defendant's grantor had reserved the party-wall, and that she had no title to it or right to compensation for it, and this action was

brought to recover back the money which the plaintiff had paid her.

There is no ground for the argument that this payment was made in mistake of law, or in settlement or compromise of a doubtful right. The defendant asserted her ownership of the wall, and the plaintiffs, relying on her statement, at once agreed to pay for it, and tendered the price. She attempted to exact the payment of the costs of a legal proceeding to which they were not parties and for which they were not liable. They refused to pay the costs, and the court refused to make them parties to the proceeding. This was the only litigation to be compromised, and there was no compromise of it. They successfully resisted her unfounded demand, and the proceeding, as far as it concerned them, was ended. Recognizing their duty to pay the owner of the wall, and relying upon her assertion of ownership, they paid her. It was a pure mistake of fact. The defendant sold what she did not own. There is nothing to take the case out of the rule that money erroneously paid under a mutual mistake of fact may be recovered back. The mere omission to take advantage of means of knowledge within the reach of the party paying does not prevent a recovery: *Notes to Marriott v. Hampton*, 7 Term Rep. 269; 2 Smith's Lead. Cas. 414; *Meredith v. Haines*, 14 Week. Not. Cas. 364. It was said in the latter case: "It is not sufficient to prevent a party from recovering money paid by him under a mistake of fact that he had the means of knowledge of the facts, unless he paid intentionally, not choosing to investigate the facts."

The judgment is affirmed.

MISTAKE, MUTUAL OF FACT.—RECOVERY OF MONEY PAID UNDER: See the extended note to *Buffalo v. O'Malley*, 50 Am. Rep. 139-141. Where certain facts are assumed by both parties as the basis of a contract, and it subsequently appears that such facts did not exist, the contract is inoperative: *Fink v. Smith*, 170 Pa. St. 124; 50 Am. St. Rep. 750, and note.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

BUIST v. BRYAN.

[44 SOUTH CAROLINA, 121.]

IF A BUILDING AND LOAN ASSOCIATION GOES INTO THE HANDS OF A RECEIVER, a member who is a mortgagor, is no longer under any obligation to pay monthly dues accruing after the commencement of the receivership.

BUILDING AND LOAN ASSOCIATIONS.—A MEMBER WHO HAS BORROWED MONEY of, and executed a mortgage to, a building and loan association is, upon its going into the hands of a receiver, entitled to be credited upon his mortgage with all amounts paid as interest and all dues on his shares of stock, and if such credits equal or exceed the amount of the mortgage debt, no suit in foreclosure can be sustained.

The complaint alleged: 1. The appointment, September 9, 1892, of the plaintiff Buist as receiver of the Assistance Building and Loan Association, and his qualification as such; 2. That such association was a corporation organized and doing business under the laws of the state of South Carolina; 3. That heretofore, to wit, on or about the seventh day of November, A. D. 1883, the defendant, Daniel Bryan, duly made, executed, and delivered his bond or obligation in writing, under seal, in the full and just sum of \$2,800, wherein and whereby it was recited that whereas the above bound Daniel Bryan, having bid in an advance stock of \$1,400 on seven shares of the said association held by the said Daniel Bryan as a stockholder therein, and as collateral security has assigned to the said association the said shares, and has received for such advances in cash the sum of \$840, and that it is contemplated that the said association shall wind up when the funds and assets of the same have so accumulated as to enable each stockholder and member thereof, upon a fair division, to be paid or receive two hundred dollars of property or assets on each

and every share held by him or her. The said bond being conditioned that if the said Daniel Bryan, his heirs, executors, or administrators, shall and do well and truly pay, or cause to be paid, unto the above named 'Assistance Building and Loan Association' the monthly sum of \$14 (of which the sum of \$7 per month is for subscriptions to the said shares, and the sum of \$7 per month is for interest on the said sum actually paid over to said Daniel Bryan), to be paid before the 7th of each and every month until the said association shall wind up and determine, and, upon such winding up or determination, shall transfer and surrender the said seven shares to the said association, in satisfaction of the advance aforesaid, and shall stand to and abide by the constitution, rules, and regulations of said association, then the above obligation to be void and of none effect, or else to remain in full force and virtue; provided that this contract shall not be construed in any manner to provide for more than the highest rate of interest allowed by law for the use of any sum actually obtained from said association; 4. That on the seventh day of November, 1888, to secure the performance of the conditions of said bond or obligation, the defendant, Daniel Bryan, duly made, executed, and delivered to the said Assistance Building and Loan Association his deed, and thereby conveyed by way of mortgage to the said Assistance Building and Loan Association, its successors and assigns, the following lands and tenements in the county of Charleston, and state aforesaid, to wit . . . ; 5. That on the day of , 188 , the said mortgage was delivered to the register of mesne conveyance of said county, to be by him entered on record, and was on said date recorded in book Q., No. 18, page 270; 6. That the said Daniel Bryan has failed to pay the monthly installments due, respectively, as follows, to wit, on the seventh day of May, 1892, known as the one hundred and fifth installment, and installment due on the seventh day of June, 1892, known as the one hundred and sixth installment, and the installment due on the seventh day of July, 1892, known as the one hundred and seventh installment, and the installment due on the seventh day of August, 1892, known as the one hundred and eighth installment, and the installment due on the seventh day of September, 1892, known as the one hundred and ninth installment; and that each and all of said monthly dues or installments have been due for more than the space of three months, and that the said Daniel Bryan has neglected and refused to pay the same, whereby the condition of said bond has been broken, and this plaintiff, suing as receiver of said Assistance Building and Loan Association,

is entitled to have a foreclosure of said mortgage decreed by this honorable court, and judgment and execution for any deficiency. Wherefore, the plaintiff demands judgment: 1. That the liability of the said defendant, Daniel Bryan, under and by virtue of the said bond or obligation, be determined by this honorable court, and the amount thereof fixed and ascertained; 2. That upon the liability of the defendant therein being so determined and ascertained, that a foreclosure of the said mortgage be decreed, and that the property therein described be sold, and the proceeds applied first to the payment of the costs and expenses of these proceedings, next to the payment of any taxes which may be liens on the said premises, and then to the payment of whatever sum of money may then be due upon the said bond and mortgage so held by this plaintiff; 3. That the defendant, Daniel Bryan, may be adjudged to pay any deficiency which may exist after applying all of such sales moneys as hereinbefore prayed for, and that the plaintiff have leave to enter judgment and issue execution against the said defendant, Daniel Bryan, therefor; 4. That the defendant, Daniel Bryan, and all persons claiming under him subsequent to the commencement of this action, may be barred and foreclosed of all equity of redemption or other interest in the said mortgaged premises; 5. That the plaintiff may have such other and further relief as the nature of his case may demand and to this honorable court seem meet." A demurrer to the complaint having been overruled, the defendant appealed: "1. Because the complaint herein did not state facts sufficient to constitute a cause of action, and the circuit judge erred in overruling defendant's demurrer interposed upon that ground; 2. Because, in overruling the demurrer to the complaint, his honor in effect ruled that a receiver of an insolvent building and loan association, which has run the period of its natural life, can sue the borrowing members of said association for further payments, notwithstanding the fact that the association has ceased to be in operation, and no equivalent collections are made from the nonborrowing members of said association; 3. Because to allow the collections sued for in the complaint is to authorize the collection of an extortionate and usurious rate of interest."

Fitzsimons & Moffett, and H. E. Young, for the appellant.

Mordecai & Gadsden and B. H. Rutledge, contra.

124 GARY, J. This is an appeal from an order of the circuit judge overruling a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The complaint and exceptions Nos. 1, 2, and 3 will accompany the report of the case.

¹²⁵ The appellant contends that the complaint shows upon its face that the mortgage has been paid. In considering this question, this court must determine whether the monthly payments for subscriptions to the shares of stock should have been applied upon the mortgage. The authorities upon this question are by no means harmonious. The question has not directly been decided in this state, though there are authorities bearing upon this point. The authorities in our state have, however, determined two questions: 1. That the money advanced was a loan; 2. That where the mortgage is to secure the monthly payments of interest and dues, and the contract is declared to be usurious, the borrower is entitled to a credit, not only for the amount paid as interest, but also for the amount paid for subscription on the shares of stock, in ascertaining the amount due on the mortgage.

In the case of *Columbia etc. Assn. v. Bollinger*, 12 Rich. Eq. 126, 78 Am. Dec. 463, it appears that in December, 1854, Bollinger, who was a member of the association and holder of ten shares of the capital stock, bid off \$2,000 of the funds of the corporation at the premium of thirty-five per cent. The contract, in the beginning, allowed a discount of \$700 on an advance of \$1,300, which was called a purchase of \$2,000 of the funds of the corporation. This sum of \$2,000, and interest at six per cent was to be repaid in sums of twenty dollars at the end of each month succeeding the 14th of December, 1854, the date of the bond and mortgage. These were the provisions of the bond. Before the second Monday of December, 1854, the defendant had made thirty-two monthly payments, amounting to \$320. After the execution of the bond and mortgage, the monthly payments required by the condition thereof were duly made until November, 1856. This constituted a further sum paid of \$460. The actual payments on the loan or advance amounted to \$1,480. Bollinger set up the plea of usury, which was sustained. Chief Justice O'Neill, delivering the opinion of the court, after reciting the provision of the usury law then of force, concludes as follows: "Under this provision, the corporation will be entitled to recover the sum actually loaned, deducting the payments made. The result will be, that \$1,300 will be the principal, on which payments to the ¹²⁶ amount of \$1,480 have been made; so the corporation has been overpaid \$180. The consequence is, that the complainant's bill must be dismissed." It will thus be

seen that, in determining the amount due under the mortgage, the association was required to deduct, not only the amount of the dues paid after the execution of the mortgage, but also the amount of those paid before the execution of the mortgage.

In the case of Mechanics' etc. Assn. v. Dorsey, 15 S. C. 462, it appears that in 1878 the defendant obtained a loan of \$1,000 from the said company, and, to secure this loan, gave his bond, with mortgage of real estate, conditioned to pay to the association monthly the sum of \$17.25, itemized as follows: \$5 for monthly subscription on his share; \$5 for interest on the sum advanced to him, at the rate of six per cent per annum; and \$7.25 for the monthly premium which he contracted to give for the loan—in all, \$17.25. He obtained this sum at public sale, agreeing to give a premium of \$1.45, which premium was to be paid monthly, and amounted to \$7.25 for five shares. For this amount and for the monthly interest, as also the monthly subscription on his five shares, he gave the bond and mortgage above mentioned; the monthly payments, as therein stated, being, in the aggregate, \$17.25. The defendant failed to meet his bond, and suit was commenced to foreclose the mortgage. The defendant pleaded usury. The following appears in the decree of the circuit judge, which was affirmed on appeal to the supreme court: "It is the opinion of this court that the interest paid to the association plaintiff by the defendant, John Dorsey, should be credited upon the dues that should legally have been collected by the plaintiff, to wit, \$5.83 per month, which is the interest monthly on \$1,000, at the rate of seven per cent per annum. The amount in interest, installments, and premium paid into the association plaintiff from January, 1878, to November, 1879, by the defendant, John Dorsey, was \$174.75. The amount to which the association was entitled from the same date to November, 1879, at seven per cent per annum, was \$134.09, leaving a balance of \$40.66 in favor of John Dorsey. It is, therefore, ordered, adjudged, and decreed: 1. That the complaint be dismissed, with costs; 2. ¹²⁷ That the balance of \$40.66 be placed to the credit of the defendant, John Dorsey, on the books of the association plaintiff, who shall apply the same, at the rate of \$5.83 monthly, to the satisfaction of the defendant's dues, until the said amount of \$40.66 shall have been exhausted." The complaint in that case alleged that the defendant, at the time the action was brought, to wit, September, 1879, was in arrears nine months of subscription, interest, and premium, and that the principal sum was, therefore, due also.

Chief Justice Simpson, delivering the opinion of the court in that case, says: "We regard the question here as settled by the case of *Columbia etc. Assn. v. Bollinger*, 12 Rich. Eq. 124, 78 Am. Dec. 463, in which a very learned and able opinion of the distinguished chancellor on the circuit, Chancellor Carroll, was overruled by the supreme court. That case and this are almost identical. The charters of the two companies were nearly the same; the by-laws almost exactly alike. A stockholder in that company, as in this, borrowed in advance a certain sum of money, which he expected would ultimately be his. He borrowed at public bidding, as in this. He contracted, as here, by bond and mortgage, to pay the monthly interest. The premium, instead of being paid monthly, was deducted at the time of the contract. This was paid in cash, instead of by monthly installments. This is the only difference between the cases. Is this a difference in principle? We do not so understand it. The court in that case held the contract usurious; Judge O'Neill, with that strong conviction which characterized all of his opinions, declaring 'that there was no doubt about it'; and, but for the earnest and able decree of Chancellor Carroll, he would not have thought it necessary even to look into the authorities on the subject. The argument of Chancellor Carroll, and the opinion of the supreme court overruling it, present the two opposing views on this subject. The decree of Chancellor Carroll is based upon two prominent grounds: 1. That the dealing of the parties was a transaction between partners and in reference to partnership funds, and was not a loan. He cited *Silver v. Barnes*, 6 Bing. N. C. 180, and several English authorities. 2. That the money advanced to Bollinger was ¹²⁸ but that which he (Bollinger) would get when the corporation wound up, and if he was willing to deduct \$300—the premium—because he was getting the money in advance, there was nothing illegal in this. In that case, as has already been stated, the premium was deducted at the time the contract was made, instead of being contracted to be paid in monthly installments, as the interest was to be paid. The chancellor thought that, in this respect, it was like a party agreeing to take less for a debt than the amount actually due, and, having executed the contract, he could not afterward dispute or repudiate it. These positions, which are the only ones that can be taken with any plausibility in support of such a contract, after full consideration by the supreme court, were overruled, and the contract of Bollinger was declared usurious. We are bound by this decision." In the case of *Thompson v. Gillison*, 28 S. C. 542, the monthly stock

payments were calculated as payments on the bond, in testing the question of usury.

The authorities establish the following propositions: 1. That the appointment of a receiver terminates the contract with the mortgagor, as originally contemplated; 2. That the mortgagor, who is also a shareholder, is not liable for monthly dues accruing after the appointment of a receiver; 3. That upon the determination of his contract with the association, as originally contemplated, the mortgagor is entitled as credits on his mortgage, both for the amounts paid as interest, and also as dues on his shares of stock; 4. That where the amounts paid by the mortgagor as interest and dues aggregate a sum equal to the amount the mortgage was given to secure, a complaint for foreclosure of the mortgage will not be sustained; 5. That if the association goes into the hands of a receiver before the interest on the amount actually advanced, at the rate specified in the contract, and for the length of time the contract was in full force and effect, equals the amount of the premium, then the amount due under the mortgage is to be ascertained by calculating interest on the amount actually advanced, at the rate agreed upon, for the length of time the contract remained of force as originally entered into, and deducting from such ¹²⁰ amount all payments of interest and dues; the amount paid as interest and dues not to bear interest. In such a contract as this, the interest would be calculated at the rate of ten per cent per annum; 6. The assignment and transfer of the shares of stock by the mortgagor as collateral security for the loan, and consolidating the interest and dues in the mortgage, show that the amount paid monthly, consisting of interest and dues, is to be regarded as what is called "redemption money," and raises an implied agreement that such payment shall be credited on the mortgage.

In support of our positions on these questions, we cite the following authorities: Thompson on Building Associations, c. 8, secs. 30, 42, 50, c. 12, secs. 5, 13; Endlich on Building Associations, secs. 333, 373, 496, 498, 502; 2 Am. & Eng. Ency. of Law, 629, 642; Randall v. National etc. Protective Union, 42 Neb. 809; Brownlie v. Russell (1883), L. R. 8 App. Cas. 248. The leading authorities sustaining a contrary rule as to payments are Strohen v. Franklin etc. Assn., 115 Pa. St. 273; Rogers v. Hargo, 92 Tenn. 35; Towle v. American etc. Soc., 61 Fed. Rep. 446.

The complaint shows upon its face that the payments made by the defendant exceed the amount due under the mortgage. We

decide nothing as to the demurrer to the answer. This action of foreclosure cannot, therefore, be sustained.

It is the judgment of this court, that the judgment of the circuit court be reversed, and the complaint dismissed.

BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF MEMBERS—OBLIGATION TO PAY DUES.—The obligation to pay dues ends with the existence of the association: Extended note to *Robertson v. American Homestead Assn.*, 69 Am. Dec. 153.

McCREERY v. DAVIS.

[44 SOUTH CAROLINA, 196.]

MARRIAGE IS, by the laws of South Carolina, a civil contract, which neither the parties nor the courts can absolutely dissolve.

DIVORCE GRANTED IN ANOTHER STATE, EFFECT OF. Where a resident of South Carolina married in New York, and took his wife to the former state, in which she afterward left him, and removed to a third state, where she procured upon constructive service of process, a decree of divorce on the ground of cruelty, that not being recognized as a ground of divorce either in New York or South Carolina, the husband, never having been in the state where it was entered, such decree will be treated as void in South Carolina, and the husband as incompetent to give a perfect title to real estate unless his wife releases her claim of dower.

JUDGMENT RENDERED IN ANOTHER STATE may be attacked in this state for want of jurisdiction either of the person or the subject matter.

THE COURTS OF THIS STATE HAVE NO JURISDICTION over a person who is not a resident thereof, and who has never submitted himself to their jurisdiction.

DOWER, ESTOPPEL TO CLAIM.—A wife who has procured a decree of divorce in another state, which is regarded as void by the courts of South Carolina, is not there estopped from claiming her right of dower in the lands of her husband.

Lyles & Muller, for the appellant.

H. Cowper Patton, contra.

¹⁸⁸ POPE, J. On the third day of January, 1893, the plaintiff and defendant entered into a written agreement, ¹⁸⁹ whereby the plaintiff, for a valuable consideration, agreed to sell and convey to the defendant, free of encumbrance or defect of title of any character, two certain lots of land, situate in the county of Richland, in the state of South Carolina. When the plaintiff tendered his deeds of conveyance of said two lots of land to the defendant, the defendant refused to accept said deeds, claiming that the same were not free from encumbrance or

defect of title, in this respect, namely, that there was no renunciation, indorsed on said deed, of the dower of Rhoda Baldwin McCreery, the wife of the plaintiff; and the said defendant still refused said deeds after he had exhibited to him a certified copy of a judgment of the circuit court of Cook County, in the state of Illinois, in an action wherein the said Rhoda Baldwin McCreery was plaintiff, and the said Charles W. McCreery was defendant, rendered at the May term, 1891, of said court, and whereby the bond of matrimony theretofore existing between the said Rhoda and Charles was dissolved.

On the 3d of February, 1893, the plaintiff, Charles W. McCreery, commenced his action, by summons and complaint, against the defendant, J. Henry Davis, in the court of common pleas for Richland county, in the state of South Carolina, for a judgment requiring the said J. Henry Davis to specifically perform his contract, and that when the plaintiff, Charles W. McCreery, should deliver his deed, with full warranty, for said two lots of land to the defendant, J. Henry Davis, he should accept the same and pay the purchase money therefor to Charles W. McCreery. The defendant, in his answer, admitted the facts set up in the complaint, "except that he denies that the title offered him by the said plaintiff is free from defects or encumbrances; and he alleges that the said deeds of conveyance offered him by said plaintiff are defective in this, that the said plaintiff is, and at the time mentioned in said complaint was, a married man, and that his wife was, and is now, alive, and that said deeds of conveyance bear no renunciation of dower by his said wife." The cause, being thus at issue, came on to be heard by his honor, Judge Witherspoon, at the spring, 1893, term of the court of common pleas for Richland county, in ²⁰⁰ the state of South Carolina, on the pleadings, and on the following written agreement as to the admitted facts:

"1. That on or about the fourth day of February, 1885, the plaintiff, then, and ever since, a citizen of the city of Columbia, state of South Carolina, was lawfully married in the city of Brooklyn, in the state of New York, to one Rhoda Baldwin, then a citizen of Brooklyn, and state of New York. That very shortly thereafter, the plaintiff, with his wife, returned to the said city of Columbia, state of South Carolina, his said place of residence, where they lived together as husband and wife until on or about the seventh day of June, 1887, at which date his said wife left his house and home, and moved to the city of Chicago, Cook county, state of Illinois. That on the fourteenth day of March,

1891, the said Rhoda McCreery, plaintiff's wife, filed in the circuit court of said Cook county, state of Illinois, a court of record and general jurisdiction, her bill of complaint against the plaintiff for a divorce a vinculo matrimonii from him, in which complaint she alleged that she was an actual resident of the county of Cook, and had been for more than twenty months then last past a resident of the state of Illinois; that on the fourth day of February, 1885, she was lawfully married to the said Charles W. McCreery, and from that time until about the seventh day of June, 1887, she lived with the said Charles W. McCreery as his wife, at which time she was compelled to leave him on account of his extreme and repeated cruelty to her, and further alleging and setting forth in detail his acts of cruelty toward her, extreme and repeated cruelty being one of the causes for which divorces are granted in the statute law of said state of Illinois. That thereupon there issued out of said court, and under the seal thereof, the people's writ of summons, directed to the sheriff of said Cook county, to execute. That said summons, and due notice of the filing thereof and of the complaint, were served upon the plaintiff by publication, in strict accordance with the laws of the state of Illinois, but this plaintiff did not appear, answer, or demur to said complaint. That thereafter, to wit, at the May term, 1891, thereof, there was filed in said circuit court of Cook county a decree affirmatively finding the facts alleged in the complaint of the ²⁰¹ said Rhoda McCreery, and ordering, adjudging, and decreeing that the bond of matrimony theretofore existing between the said Rhoda McCreery and this plaintiff be dissolved, a copy of which decree is hereto attached as exhibit 'B,' and made a part of this agreement.

"2. That plaintiff was seised in fee of the premises first described in said agreement prior to the date of the said decree of divorce, and that he acquired title to the premises second described in said agreement subsequent to the date of said decree of divorce.

"3. That by the statute law of the state of Illinois (1 Starr and Curtis' Annotated Statutes, p. 904, par. 14), it is provided: 'If any husband or wife is divorced for the fault or misconduct of the other, except when the marriage was void from the beginning, he or she shall not thereby lose dower nor the benefit of any such jointure; but if such divorce shall be for his or her own fault or misconduct, such dower or jointure, and any estate granted by the laws of this state in the real or personal estate of the other, shall be forfeited.' That in volume 1, at page 896,

paragraph 1, of said Starr and Curtis' Annotated Statutes, it is provided: "That the estate of curtesy is hereby abolished, and the surviving husband or wife shall be endowed of the third part of all the lands whereof the deceased husband or wife was seised of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form."

"4. That by act of the legislature of the state of New York, passed in 1828, now section 1756 of the Code of Procedure of said state, it is provided: 'In either of the following cases, a husband or wife may maintain an action against the other party to the marriage, to procure a judgment divorcing the parties, and dissolving the marriage, by reason of the defendant's adultery: 1. Where both parties were residents of this state when the offense was committed; 2. Where the parties were married in this state; 3. Where the plaintiff was a resident of this state when the offense was committed, and is a resident thereof when the action is commenced; 4. Where the ²⁰² offense was committed within the state, and the injured party when the action is commenced is a resident of the state.'

"5. It is admitted that the deed tendered by the plaintiff did not have a renunciation of dower by Mrs. Rhoda McCreery, wife of grantor.

"'Exhibit B.—State of Illinois, Cook County. Circuit Court of Cook County, May Term, A. D. 1891. Rhoda McCreery v. Charles W. McCreery—Bill. This day came again the said complainant, by John C. Hendrix and Charles Bary, Esq., as solicitors, and it appearing to the court that said defendant has had due notice of the pendency of this suit, by publication and mailing notice, according to the statute in such case made and provided, that the default of said defendant was taken, and the complainant's bill of complaint herein taken, as confessed by said defendant. And the court having heard the testimony in open court, in support of said bill of complaint (a certificate of which evidence is filed herein), and now being fully advised in the premises, doth find that the complainant is an actual resident of Cook county, and has been a resident of the state of Illinois for over one whole year prior to the filing of the bill in this case, and that defendant has been guilty of extreme and repeated cruelty toward the complainant, as charged in the complainant's bill of complaint. On motion of said solicitors for the complainant, it is ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, and the statute in such case made and provided, doth order, adjudge, and decree that the

bond of matrimony heretofore existing between the complainant, Rhoda McCreery, and the defendant, Charles W. McCreery, be, and the same are hereby, dissolved, and the same are dissolved accordingly.' ”

Thereafter, to wit, on the thirty-first day of May, 1893, his honor, Judge Witherspoon, decreed: “Considering the marriage of Charles W. McCreery as contracted either in this state or in New York, I conclude, as matter of law, that the judgment of divorce granted in Cook county, in the state of Illinois, upon the application of plaintiff's wife, Mrs. Rhoda McCreery, does not dissolve the matrimonial relation of her husband, the plaintiff, Charles W. McCreery, as a citizen of this state. I further ²⁰² conclude, as matter of law, that the plaintiff is not entitled to compel specific performance of the agreement by the defendant, J. Henry Davis, and that plaintiff's complaint must be dismissed, with costs. The doctrine of estoppel need not be considered, as she is not a party to this action. It is ordered and adjudged that the plaintiff's complaint be dismissed, with costs.”

Thereupon, the plaintiff appealed to this court upon ten grounds, which are designed to present in its different phases the question of the duty of our courts (we mean the courts of this state) to recognize as valid the judgment of the circuit court for Cook county, in the state of Illinois, whereby Rhoda McCreery and Charles W. McCreery were declared no longer man and wife.

So far as marriage and the estate of the wife in the lands of which her husband was seised in fee during coverture, which is called dower, are concerned, as fixed under the laws of this commonwealth, they are what were fixed for each under the common law of the mother country. The doctrines of the common law pertaining to marriage and dower are too well understood to need any extended reference. The union of one man with one woman for life in matrimony is a mystery. In nature, man and woman, each for himself and herself, are endowed with those qualities that attract and attach each to the other. They were made for each other. In marriage, we speak it reverently, they gratify the propensities which are unlawful otherwise to gratify. They procreate by this union the species, and thereby perpetuate the race. Their mysterious union is the source of unalloyed pleasure, in the uplifting and development of the natures of both parties composing it. Its very design is its continuance until dissolved by death. It is a unit in social life. A combination of such units make up society. Government itself is but the creation of society, whereby life, liberty, and property are protected. The

form of such government is the choice of the units composing it, and all laws are but the expression of rules which the many units, as composing ²⁰⁴ society, may prescribe for their control. No individual human creature can attain excellence in life, in thought, in action, without an ideal before his or her eyes, at which they make effort to attain. Without this ideal, the individual may be said to drift. Society being made up of these individual human creatures, and government being their creature, these ideals become incorporated in the framework of their government. One of the ideals before the minds of the members of society is progressive development. Granted that it is never fully attained, still progress toward the goal fixed by the ideal is, in the nature of things, improvement. Now, all admit that the true ideal in marriage is such a perfect union that leads to the indestructibility of the relation of man and wife; for, in its very inception, such is the declared purpose of the parties to it, and of the society in which it occurs. Such is in exact accordance with the moral law: "And they twain shall be one flesh." England held this view for centuries, and while she held it the thirteen colonies in America were planted, each adopting this view of the mother country. Of these thirteen colonies, South Carolina was one, and, with the exception of the interval between the years 1872 and 1878, she has constantly retained this view. If others have drifted, she cannot be so charged to have done.

The appellant here contends that marriage is not a civil contract, but a status, a condition; that marriage is a *res* that accompanies the husband and wife, or either of them, wherever they, or either of them, may be domiciled. Is marriage a status, not a contract? Is it true that, although formed by a contract by one man and one woman, whereby they, each, for life become husband and wife, that when the union is complete, the man has the status of husband, and the woman the status of wife, separate and apart from the civil contract? Is it true that this status, in each, may be said to exist when separate and apart? Is it true that this status in both, or either one of them, is a *res*? Is it true that either one of them, by becoming domiciled in a state different from that in which the other is then domiciled, thereby gives a jurisdiction to the court of the state of the new domicile of the status of such husband or wife ²⁰⁵ then domiciled, by which the *res* is under the control of the courts of the new domicile, through which the *res* may be destroyed therein? Is it so that, under the constitution of the United States, and its subsequent legislation to enforce it, whereby the acts and judgments

of one state must be given, by every other state, the same force and effect had in the state where the act was passed or the judgment rendered, a judgment of the state of Illinois, rendered in an action of Rhoda, the wife, against Charles, the husband, for an absolute divorce, granting said divorce, to which action he did not appear, answer, or demur (he being then domiciled in South Carolina), must be recognized by the courts of South Carolina as valid in South Carolina, notwithstanding the state of South Carolina grants no divorces, and especially for the cause of *saevitia*, on which ground this alleged divorce was granted? Or, on the other hand, is it true that the doctrine, that once married always married until one of the parties dies, obtains so firmly in this state that if the court of any state grants a divorce to either Charles or Rhoda McCreery for any cause save that of adultery, such judgment will not be respected here? We use the qualifying words "of adultery," because divorces are recognized by the state of New York, where this marriage was solemnized, for this cause alone.

We have been delighted with the tone, the ability, and the fidelity with which each side to the controversy has presented its views. That we have been interested is true. That we have been left in some doubt, at times, is true; but that the conclusion we have reached is now entirely satisfactory to us is equally true.

These parties, Charles W. and Rhoda McCreery, were married in the state of New York, but immediately thereafter removed to and were domiciled in South Carolina, the home of the said Charles W. McCreery. We are inclined to think that this contract of marriage wears a twofold aspect or character, partaking of certain characteristics under the laws of New York, and partaking again of certain characteristics under the laws of the state of South Carolina, where it was to be performed: Story's Conflict of Laws sec. 299; 2 Kent's Commentaries, 460. But ²⁰⁶ concerning this phase of this matter, we do not feel that it will be profitable to devote any time to its discussion, for the divorce in this case, if it be a divorce, was for a cause not recognized in the state of New York or that of South Carolina. Confessedly, the contract was entered, therefore, when *saevitia* was not recognized as a ground for divorce. If Mr. Bishop, or Mr. Black, or Mr. Freeman, be correct in their respective views that marriage creates a relation between husband and wife which clothes each one of them with a status, and that this status in each one of them is entitled to be treated as a *res*, then it will be a matter of no moment where this marriage was celebrated, whether in New

York, or in South Carolina, or, for that matter, in any other country.

This view is presented most ably by Mr. Bishop in his work on Marriage, Divorce, and Separation, to which we will have occasion hereafter to refer; and such is his will power and his rugged strength in stating his proposition, together with the masterly arrangement observed in presenting them, that it is with difficulty one escapes his conclusions. We cannot but be impressed, however, with the view that he has taken too much for granted when he announces that, although marriage is entered into by the parties to it under a contract, yet that as soon as the contract is executed, at once there is breathed into the relation an import far higher than a contractual relation—in fine, that a status becomes thereby assigned to the parties, over and above and beyond that of any contract. He cites in support of his theory the fact that all contracts may be annulled by the parties who create them except marriage, under which neither party to it, nor both parties to it, can, of themselves, terminate it, and that the law alone can extinguish the contract of marriage. He masses, so to speak, the difficulties in viewing it as a contract as follows: "Marriage, as distinguished from the agreement to marry, and from the act of becoming married, is the civil status of one man and one woman legally united for life, with the rights and duties which, for the establishment of families and the multiplication and education of the species, are, or from time to time may thereafter be, assigned by the law to matrimony. . . . We know that the foregoing definition ²⁰⁷ of marriage is correct, because it accurately describes what the courts constantly decide. That marriage executed is not a contract, we know, because the parties cannot mutually destroy it; because the act of God incapacitating one to discharge its duties will not release it; because there is no accepted performance which will end it; because a minor of marriageable age can no more recede from it than an adult; because it is not dissolved by failure of the original consideration; because no suit for damages will lie for the nonfulfillment of its duties; because its duties are not derived from its terms but from the law; because legislation may annul itself at pleasure; and because none of its other elements are those of contract but all are of status."

Now, this author admits that Bigelow, J., in *Little v. Little*, 13 Gray, 264, correctly stated the proposition, that "all authorities concur in the conclusion that marriage has its origin and foundation in a purely civil contract." This is an, or rather the,

initial point. How do these authors reach the conclusion, which Dr. Bishop announces, "and though the new relation, that is, the status, retains some similitudes reminding us of its origin, the contract does in truth no longer exist, but the parties are governed by the law of husband and wife?" Is it not an assumption coined in order to give a plausible basis to the solution of an otherwise untenable position? Is it not by this means that they hope to give currency to an otherwise baffled policy, namely, to so construct a plan that thereby they may successfully invoke that portion of the federal constitution relating to the effect to be given by all the states to the acts and judgments of one state, and thus force all other states to give effect to judgments for absolute divorces? If marriage were still esteemed a civil contract, they could not hope to escape the defect of jurisdiction hereafter to be discussed. But by coining this new term, "status," and ascribing the efficacy of "res" to it, under certain principles hereafter to be referred to, it is deemed by them that the difficulty has been overcome. We will investigate these later matters hereafter. Just now, we are interested in this discovery made by Dr. Bishop in the year 1852, which seems to have become very popular with all those persons who favor divorce laws.

208 We still press the inquiry, how have these people changed what was confessedly a civil contract into a "status" or "res," apart from such civil contract? Investigation will show that it is by an assumption of such a result. When pressed for an answer, they say it cannot be changed by the parties, and, therefore, it is not a contract. What principle of law is more familiar than what there is in the law pertaining to a certain contract at the time it is made becomes a part of such contract as much so as if specifically named in the contract when made? It is a part of every contract of marriage that it is indissoluble by the parties themselves. Such being so, how need it be said that such a fact will show that the contract of marriage is not a civil contract, but a "status"? Reflection will show that this must be so from the very nature of the union of man and woman in this contract of marriage, and why the law should wisely say to an infant of marriageable age, who has become a party to it, you are as much bound as an adult. Nor does the fact that the act of God incapacitating one party to the marriage to discharge its duties will not release the other from the marriage; for such was the law when the contract was entered into. It did not need this "status" to show such result. Nor does the fact that no accepted performance will annul it; for how can there be an accepted per-

formance of a contract that is not fully performed until one of the parties thereto shall die? Nor does the fact that no action will lie in behalf of one of the parties against the other for a non-fulfillment of its duties. Such is of the very essence of the law existing when it is entered into. Nor will the alleged fact that its duties are not derived from its terms. On this point we suppose the author means, that when the marriage is solemnized or contracted, an exact inventory is not made up, or a list of the duties incident to marriage repeated in the presence of the parties. The wise God, who created us, furnished us those incentives to the union in our very physical organization when he made us male and female; no necessity existed to repeat what each already knew. Besides, in the eyes of the law, their duties existed as incidents to this union, and were incorporated in the contract when it was formed.

200 Again, they say it is not a civil contract, because the legislative power may annul the marriage at will. Governmental force has annulled many solemn contracts, and such a fact has never been held to sustain the position that contracts were not contracts on that account. It needs no extended reference to history to learn of the exercise of this governmental force. The horror of mankind at the conduct of King Henry VIII, as to divorces from his wives, is an apt illustration of this governmental force. And, lastly (now listen!), because none of its other elements are those of contract, but all are of status. In other words, the author would have us believe it is not a contract, because he says it is not a contract; it is a status, because he says it is a status! And this is a proof that an executed civil contract is no longer an executed civil contract, but, instead, has become a "status." Just here it might be well to call attention to the fact that, in the author's definition of marriage, it nowhere appears that he has considered what the Creator of the Universe announced as the cause of woman's creation: "And the Lord God said, It is not good that the man should be alone; I will make him a helpmeet for him": Genesis ii. 18. Any idea of marriage which leaves out of view the companionship of the husband and wife ignores one of the chief beauties of the union, and one of its most attractive features. It may be assumed, however, that it was so much more important to coin this "status" and originate this "res," in connection with marriage, that many things necessary to the true conception of marriage might be well overlooked by Dr. Bishop and his allies.

Before referring to the author more directly in regard to the

pernicious effect of his new doctrines, it is but just to say that in his work, so largely relied upon by the appellant here, and whose title has already been stated, and from which such heavy quotations have been made, he intimates that divorces should be confined to the cases of adultery, desertion, and saevitia. While this is true, he distinctly lays down doctrines that are at variance with Holy Writ, and seems to take pleasure in the reflection that he first coined the terms "status" and "res" as applied to marriage and divorce. Now, candor compels us to ²¹⁰ say that the good doctor occupies very dangerous ground. That instead of deriving consolation from these reflections, he might really view them with consternation and terror! If his views so announced are calculated to lead his kind to disregard the Sacred Law, then, indeed, he is in peril! There is no need to announce, for it must be patent to everyone who thinks, that one of the direct results of this pandering to divorce is sure to prove one of the most potent agencies to the poisoning of the public mind, by not only suggesting evil, but by suggesting a plausible excuse for it. When the ends of the creation of man and woman, as nature hath made them, are perverted, and man, who was created the stronger, and, therefore the protector of woman, and woman, who was created the weaker, and, therefore, the protected, are made equals, with no inducement to reverence man by woman as her temporal lord, and no incentive to man to tenderly protect and cherish woman as the weaker sex—then the bonds of society are weakened, indeed, and the restraints, that a different course would tend to increase, are lost to society.

But one of the chief difficulties in this case is this: Grant that marriage in South Carolina is a civil contract, indissoluble by any act of the parties, and, under her laws, indissoluble in her courts for any purpose, yet if Mrs. McCreery has received an absolute divorce from her marriage by the judgment from a court of general jurisdiction in the state of Illinois, and, under the constitution of the United States (U. S. Const., art. 4, sec. 1), and the act of Congress to carry the same into effect, the judgment of the Illinois court, when pleaded or offered in evidence in the courts of South Carolina, the latter state must receive the same with like force and effect that it obtains in the state of Illinois, where rendered; and that if this be so, Mrs. McCreery is entitled to no dower in the lands owned by Charles W. McCreery in South Carolina, and, therefore, the plaintiff is entitled to his decree for specific performance of the contract between himself and the defendant. This section of the constitution reads as follows: "Full faith and

credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by ²¹¹ general laws, prescribe the manner in which such acts, records, and judicial proceedings shall be proved, and the effect thereof." And the act of Congress (1 U. S. Stats. at Large, 122) provides: "The said records and proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or may be taken."

It will be at once seen that the framers of our federal constitution have, by this section, provided that while, under the law of nations, from principles of comity, the judgments of foreign countries should be respected as such in every other country when produced provided such foreign judgments accord with her domestic policy, etc., that it should be the duty of every state in this Union of states to give full force and effect to the judgments of any other state when duly authenticated. Hence, if this doctrine is sound law, holders of judgments obtained in a different state have the right to produce such judgments in the courts of this state, and it is our duty to respect them and give them the same force and effect they have in the state where rendered, as required by the constitution of the general government. We would properly and naturally look to the adjudications in the supreme court of the United States for the interpretation of this legislation, and, in doing so, we find a goodly number of cases bearing upon this matter. Among these cases are *Rose v. Himeley*, 4 Cranch, 269; *Mills v. Duryee*, 7 Cranch, 484; *Hampton v. McConnel*, 3 Wheat. 234; *McElmoyle v. Cohen*, 13 Pet. 312; *Landes v. Brant*, 10 How. 348; *Webster v. Reid*, 11 How. 437; *D'Arcy v. Ketchum*, 11 How. 165; *Harris v. Hardeman*, 14 How. 334; *Christmas v. Russell*, 5 Wall. 290; *United States v. Arredondo*, 6 Pet. 691; *Wilcox v. Jackson*, 13 Pet. 498; *Thompson v. Whitman*, 18 Wall. 457; *Hanley v. Donoghue*, 116 U. S. 4; *Cole v. Cunningham*, 133 U. S. 107. And there are other cases.

We cannot undertake to quote from all these cases. Two will suffice. In *Thompson v. Whitman*, 18 Wall. 457, Mr. Justice Bradley, who delivered the judgment of the court in effect held that "neither the constitutional provision that full faith and ²¹² credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the acts of Congress passed in pursuance thereof, prevent an inquiry into the jurisdiction of the court by which a judgment offered in evi-

dence was rendered. The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. Want of jurisdiction may be shown either as to the subject matter, or the person, or, in proceedings in rem, as to the thing": Syllabus of the case. It was also held "that the want of jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the fourth article of the constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself." And in *Hanley v. Donoghue*, 116 U. S. 4, it was said: "Judgments recovered in one state of the Union, when proved in the courts of another (state), differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable on the merits, nor impeachable for fraud in obtaining them, if rendered by a court *having competent jurisdiction of the cause and of the parties*" (italics ours).

Very naturally we ask, Did the court of the state of Illinois have jurisdiction of Charles W. McCreery when it rendered the judgment of divorce? It is conceded that at no time, either when such action was commenced, or while it was pending, or when decided, was Charles W. McCreery within the limits of the state of Illinois. He did not appear in such action, nor answer nor demur. His domicile has never been in the state of Illinois, but, on the contrary, at all times in the state of South Carolina. Jurisdiction was aptly defined in *United States v. Arredondo*, 6 Pet. 691, to be the authority of the court to take cognizance of the cause or controversy at bar. The authenticated judicial record is that of an action wherein Rhoda McCreery is styled plaintiff and Charles W. McCreery is styled defendant, and the judgment therein purports to dissolve the ²¹³ marriage of the said Rhoda and Charles. We assume that it will be admitted on all hands that if it should be contended that such judgment was one in personam, it is an absolute nullity; for, as before stated, Charles W. McCreery was not within the jurisdiction of the court, and the only plan by which the courts of Illinois, under her statutes, sought to have him within its jurisdiction, was by the publication of a notice in one of its newspapers, addressed to said Charles W. McCreery, of the pendency of the action commenced by his wife.

The principle that if the action was in personam it is a nullity

is enforced in the United States supreme court in the case of *Pennoyer v. Neff*, 95 U. S. 714. In that case, one Mitchell held a debt against Neff, and, while Neff was beyond the limits of the state of Oregon, said Mitchell brought suit against Neff to recover his debt. In that suit, notice of the pendency of the same, and requiring Neff to appear and plead, was duly published in a newspaper, as required by the statute of the state of Oregon in such cases made and provided; but Neff neither made appearance nor did he plead. Judgment was rendered against Neff, and the sheriff sold a tract of land owned by Neff in said state. Pennoyer became the purchaser at said sale, and brought his action against Neff to recover the land. In this action by Pennoyer, Neff denied the validity of Mitchell's judgment, under which the land was sold, because he was not in the state, and service was alone by publication. The supreme court of the United States decided that the court of Oregon was without jurisdiction to render such judgment, and dismissed Pennoyer's action. The supreme court of South Carolina, in the action of *Tillinghast v. Boston etc. Lumber Co. and Moore v. S. C. Forsaith Co.*, 39 S. C. 484, adopted the same view, and held that jurisdiction as to defendant out of this state could not be acquired by publication so as to make judgment in personam. And the subsequent cases of *Toms v. Richmond etc. R. R. Co.*, 40 S. C. 520, and *Gibson v. Everett*, 41 S. C. 22, have enforced such doctrine.

But now comes the difficult question, which is raised in this way: Mrs. McCreery having resided in the state of Illinois for more than twenty months before she instituted her action for ²¹⁴ divorce against Charles W. McCreery, and as, under the statute law of Illinois, service upon an absent defendant may be made by publication of the summons in some newspaper in that state, to be fixed by the court, it is contended, first, that it is always in the power of a state, through her courts, to establish the status of her own citizens, and that this was done in the case of Mrs. McCreery. Now, if marriage, by operation of law, creates the status of wife in Mrs. McCreery when she removes her domicile to that state, and such status is a *res*, then, under *Pennoyer v. Neff*, 95 U. S. 714, *Tillinghast v. Boston etc. Lumber Co.*, and *Moore v. S. C. Forsaith Co.*, 39 S. C. 484, *Toms v. Richmond etc. R. R. Co.*, 40 S. C. 520, and especially *Gibson v. Everett*, 41 S. C. 22, there would be a *res* in the state of Illinois, upon which the courts of the state of Illinois might fasten by attachment, or similar process, which would enable them to pass upon the right to

relieve Mrs. McCreery from her marital relation to Charles W. McCreery, as her husband, notwithstanding his absence and service by publication alone.

If marriage is a civil contract whereby the domicile of the husband is the domicile of the wife, and whereby the contract between them was to be located in that domicile, it is difficult to see how the absence in another state of either party to such contract from the state where was located the domicile of the marriage could be said to carry such contract to another state, even if we were to concede that an idea, a mental apprehension or metaphysical existence, could be transmuted so as to become capable of attaching to it some process of a court, whereby it might be said to be under the exclusive jurisdiction of such court. If Mrs. McCreery could carry that res in the state of Illinois, then Mr. McCreery had the same res in the state of South Carolina, at the same time. In other words, the same thing could be in two distinct places at one and the same time, of which res the courts of Illinois would have the power to control as if it were a physical entity, and of which res the courts of South Carolina would have the power, at the same moment of time, to control as if it were a physical entity. Such a conclusion would be absurd.

The justice who delivered the opinion in the case of *Pennoyer* ²¹⁵ v. Neff, 95 U. S. 714, by way of illustration merely, purely as a dictum, for that case had no earthly connection with marriage, did say in that opinion: "To prevent any misapprehension of the views expressed in this opinion, it is proper to observe that we do not mean to assert by anything we have said that a state may not authorize proceedings to determine the status of one of its citizens to a nonresident, *which would be binding within this state* [italics ours], though made without service of process or personal notice to the nonresident. The jurisdiction which every state possesses to determine the civil status and capacity of all of its inhabitants involves authority to prescribe the conditions on which proceedings that may affect them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which *the marriage relation between its own citizens shall be created and the causes for which it may be dissolved* [italics ours]. One of the parties guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is granted. The complaining party would, therefore, fail, if a divorce were sought in the state of the defendant; and if applica-

tion could not be made to the tribunals of the complainant's domicile in such cases, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress."

Now if the remarks, as dictum alone, of Mr. Justice Field, were intended to be restricted by him to such cases where the marriage contract was executed while the domicile of both parties was in that state, and where the laws of such state authorized the granting of divorces, we suppose it correctly sets forth the law that should govern in such a case. But if it is intended to announce that such a conclusion would be proper, in a case where a marriage contract was made in a state where both were domiciled, and in a state where divorce is not allowed, and where one of the parties to such contract of marriage should remove to a state where divorces are allowed, and there institute an action for divorce, causing the other party to the marriage contract to be served by publication ²¹⁶ alone, to which said latter party paid no attention, and a judgment for divorce was granted, we submit that such judgment is erroneous, so far as the same relates to the absent defendant by the decisions of the supreme court of the United States. The defendant has the right to interpose as a defense to such wrong that he has been denied due process of law, to interpose for his protection from such judgment the fourteenth amendment to the constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It was concerning this very protection under this fourteenth amendment that Mr. Justice Field, in the case of *Pennoy v. Neff*, 95 U. S. 714, said: "Since the adoption of the fourteenth amendment to the federal constitution, the validity of such judgments (where no personal service was made, or appearance entered or pleading made) may be directly questioned and their enforcement in the state restricted, on the ground *that proceedings in a court of justice to determine the personal rights and obligation of parties over whom the court has no jurisdiction, do not constitute due process of law*" [italics ours].

Charles W. McCreery and Rhoda, his wife, whether it be said their contract should be governed by the laws of the state of New York, where the marriage was solemnized, or whether in the state of South Carolina, which was the husband's domicile and where he is still domiciled, and where the marriage was to be performed, never agreed that their rights, duties, and liabilities, as husband or wife, should be determined by the state of Illinois, or that the de-

termination of these rights, duties, and liabilities might be had in an action for divorce for *saevitia*, where service upon either of them might be made by publication. And when, therefore, a judgment of this last-named state [was rendered] in an action to which Charles W. McCreery was no real party, such judgment was a nullity as to him. In the opinion of Mr. Justice Field, he further said on this point: "Whatever difficulty may be experienced in giving to these terms [due process of law] a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt, as to ²¹⁷ their meaning, when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any vitality, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state or his voluntary appearance."

Can there be any doubt but that the judgment of the court of the state of Illinois does directly impinge upon the personal rights and liabilities under his contract of marriage of Charles W. McCreery with Rhoda McCreery? By that contract, her personal presence with him was his right. It was his privilege, under his contract of marriage, to receive at her hands those ministrations incident to the marriage state. To allow this Illinois judgment to be effective as a divorce to Charles W. McCreery cannot be law! In *Hull v. Hull*, 2 Strob. Eq. 174, it was held that Gideon J. Hull having married his wife while both were domiciled in the state of Connecticut, under whose laws it was competent for either party to obtain a divorce for desertion, and in such a suit service might be made by publication, and having deserted his wife and thereafter she having procured a divorce from him a *vinculo matrimonii* in an action wherein he was served by publication, that such divorce was valid. This judgment was rendered because the marriage contract between them was said to have been made with all the provisions of the laws of Connecticut pertaining to marriage, including divorce, as part and parcel of such contract of marriage. And this was done and adjudged notwithstanding the state of South Carolina did not allow divorces.

Again, we say we refuse to recognize this judgment of the

court of the state of Illinois as valid in our state, because there was no such thing as a status or res in the conception or in the records of these parties when the marriage was made by them. But even if we were to concede, for the sake of argument, that marriage created a status or res, as contended for by the appellant ²¹⁸ we do not concede that the courts of this state are bound to give it such effect here. The utmost that could be asked at our hands would be the recognition of the doctrine, that within the limits of the state of Illinois, Mrs. McCreery was not the wife there of Charles W. McCreery. Dr. Bishop has likened his status of husband and wife to that of parent and child, guardian and ward. A close examination of the decisions of the states will show that the status accorded in our state to the child is not that necessarily accorded in other states, even where such status is established by the judgment of the courts of one state, which is duly authenticated and introduced in the courts of a different state. The industry of respondent's attorney, Mr. H. Cowper Patton, has brought to our attention these cases:

1. *Barnum v. Barnum*, 42 Md. 251. Here John B. Barnum was the child of parents living in the state of Arkansas, but who were not married at his birth. Subsequently, the legislature of the state of Arkansas was induced to pass an act legitimatizing said John D. Barnum as the child of his parents. Subsequently, there was property in the state of Maryland that under her laws would pass to the legal issue of John B. Barnum's father. Thereupon, John B. Barnum brought his action in the courts of the state of Maryland to recover this property. It was there conceded that the property could be recovered by him if he was entitled to maintain the status of a child of his father. The statute of Arkansas was relied upon for that purpose, but the court held that he was not thereby made the child of his father in Maryland. The language of the decision on this point was as follows: "This act could have no extraterritorial operation whatever, except as to any rights that may have been acquired under it in the state of Arkansas. As to such, it ought to be respected everywhere: Story on Conflict of Laws, 101, 102. But as to capacity to acquire property beyond the state passing the act, by virtue of the particular status given the party, that the legislature could not confer. Even if the act had professed to legitimate John B. Barnum, without reference to a previous marriage, it could have no operation here, ²¹⁹ and no rights involved in this case could be affected by it. This would seem to be clear both in reason and authority."

2. The case of *Smith v. Derr*, 34 Pa. St. 126, 75 Am. Dec. 641. Here the brother of the deceased testator, Daniel Derr, who lived in the state of Tennessee, was the father of an illegitimate daughter, Nancy. On his petition, Nancy was duly legitimated by a decree of the circuit court of Giles county in said state (Tennessee), where she then and still resided. And the question presented in the case just cited was, whether she had any interest in the estate of the deceased testator, who lived and died in the state of Pennsylvania. The court said: "Nancy is the illegitimate niece of the testator, born in Tennessee, and legitimated there on the petition of her father by a proceeding in court. This forgives the vice of her birth in Tennessee, but not here. . . . A capacity in Tennessee does not prove capacity here. So far as our law is concerned, legitimation by the subsequent marriage of the parties abroad, by act of a foreign legislature, or by judicial decree abroad, are all fruitless. If they are allowed to constitute inheritable capacity, then adoption might have the same effect. Then we should be without any law of inheritance, in favor of relationship in other states, except such as our neighbors should be pleased to give us."

As to the matter of guardian and ward, it is proper to say there is a status assigned to each, under the law, where such relation is established. But when the guardian attempts to assert his status as such, in a state different from that wherein his appointment was made, the latter state refuses to recognize it. The decision of the United States supreme court in the case of *Hoyt v. Sprague*, 103 U. S. 631, is in point here. In that case Mr. Justice Bradley, as the organ of the court, said: "One of the ordinary rules of comity exercised by some European states is to acknowledge the authority and power of foreign guardians—that is, guardians of minors and others appointed under the laws of their domicile in other states. But this rule of comity does not prevail to the same extent in England and the United States. . . . In regard to real estate, it is entirely disallowed, and is rarely admitted in regard ²²⁰ to personal property. Justice Story, speaking of a decision which favored the extraterritorial power in reference to personal property, says: 'It has certainly not received any sanction in America in the states acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local, and not entitling them to exercise any authority over the person or personal property of their wards in other states, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and

administrators." And let it be noticed, that in the state of Rhode Island, when the res was located in the case just referred to, and when a court, by its judgment, has acted on that res, it was decided that such judgment had no extraterritorial operation.

If, then, acts of the legislature and judgment of courts of states, pertaining to status of parent and child, guardian or ward, will not be entitled, when the said acts or judgments have been duly authenticated and presented in the courts of different states, to give such persons the same status as that obtained in the state where rendered, why should a different rule prevail touching the status of a husband or wife?

As far as the supreme court of the United States has ever gone in the matter of divorce is to assert that, for the purpose of obtaining a divorce, a wife may acquire a domicile apart from that of the husband; that divorce, when granted, does not impair the obligation of a contract; that it is in the power of a legislature in a state different from that of the domicile of the married parties to grant a divorce which is operative in the state where granted; that it is the exercise of a legitimate power when the state legislature grants a divorce, either by the legislature acting directly or by conferring a power to do so upon the courts of that state, provided the constitution of such state does not deny such power; that a divorce so granted is effective, even without the residence of both parties in the state at the time the divorce is granted: *Cheever v. Wilson*, 9 Wall. 108; *Maynard v. Hill*, 125 U. S. 190. In the first case cited, both parties, husband and wife, appeared to the action in the court of the state of Indiana, where the divorce was ²²¹ granted. In the second cited, the legislature of the territory of Washington acted on the prayer of the husband, in the absence from that territory of the wife. But the supreme court of the United States has been careful to deny that the courts of the United States government had any original jurisdiction in the matter of granting divorces. And it may be as well to say, that in both of the cases just cited, rights of property were involved under divorces which affected the rights of third parties.

Another reason which may be advanced why the conclusions of the circuit judge, in denying force and effect to this Illinois judgment of divorce, should be sustained by this court is, that the whole record may be examined to see if the court pronouncing the judgment had jurisdiction, and that even if it be admitted that divorce judgments should have accorded to them extraterritorial effect, in case the record discloses that such court based its

judgment upon the seizure of the res, this authenticated judgment is silent as to any such jurisdictional allegation. But while this is true, we prefer to meet the issue as it has been joined in the case at bar, and, therefore, we base our refusal to give force and effect to the judgment of divorce as rendered by the court of the state of Illinois, upon the grounds already indicated.

It may not be amiss to refer to our own laws on the subject of marriage and divorce. As already indicated, we admit that there is no power in any court in South Carolina to grant any divorce, other than that a mensa et thoro. While this latter divorce is a judicial barrier to any attempt to exercise the rights or enforce the duties of the parties affected by the judgment, yet the courts are only too willing to have the parties restored to their original status quo, upon good cause shown. While the remedy is a harsh one, and to a certain extent interferes with the operation of the laws of nature, still woman must be protected! After all, an unbending adhesion to the laws of the right living has a healthy effect upon the lives of others. If self-denial is thus necessitated, it should not be forgotten that many natures are perfected through its beneficent influence. True philosophy would extract good ~~222~~ from every condition. As to our law on the subject of divorce, we apprehend that the expressions used and admissions already made show that in the state of South Carolina we do not recognize the power in our courts to grant divorces a vinculo matrimonii. By article 4, section 15, of our constitution, the courts of common pleas have exclusive jurisdiction in all cases of divorce, and by article 14, section 5, divorces from the bonds of matrimony shall not be allowed, but by the judgment of a court as shall be prescribed by law. Thus the general assembly is denied the power to grant divorces directly, but is permitted to clothe the courts of common pleas with that power. This last they have refused to do, by repealing the act of 1872, which did permit the courts to grant divorces in this state for adultery. Thus we have the common law restored to us on this subject. And as before remarked, the common law is at variance with the dissolution of marriage by divorces. We might add case after case from our reports on this subject, but they would everyone confirm this doctrine.

It may be proper to say, that if the present contention had been made in the courts of the state of New York, and an effort had been made there to interpose the divorce a vinculo matrimonii granted by the court of the state of Illinois, on the ground of saevitia practiced by the husband, McCreery, upon the person

of his wife, the courts of the former state (New York) would have refused to give such judgment of divorce any effect. In the leading case of *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274, the husband had been married to Sallie West in the state of Ohio, in the year 1871, and thereafter the married couple resided at Rochester, in the state of New York. Some time afterward, the wife, Sallie West, returned to the state of Ohio, and began her action against Baker for an absolute divorce, on the ground of gross neglect of duty by the husband. The husband was domiciled in the state of New York during the pendency of such divorce proceedings in the state of Ohio, and did not appear in or plead to such action. Divorce was granted. The husband, Baker, still domiciled in the state of New York, after such judgment of divorce, married again, whereupon he was indicted in the court of New York for bigamy. ²²³ Being convicted, an appeal was taken. Thereafter, the appeal from such judgment was finally considered in the appeal court of the state of New York, and the conviction was there affirmed. The court held, among other things, in answer to the question: "Can a court in another state adjudge, to be dissolved and at an end the matrimonial relation of a citizen of this state domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that state?" The court answered this question squarely in the negative, and that, too, after reviewing the federal decisions bearing on the subject. Many citations are made of New York decisions and those of other states by Judge Folger, who pronounced the judgment of that court.

So, too, in the case of *Jones v. Jones*, 108 N. Y. 415, 2 Am. St. Rep. 447, although the court of appeals of New York upheld a divorce of a New York marriage by the courts of Texas, it was done because the husband, who was domiciled in the state of New York when the wife began her action for divorce in the courts of the state of Texas, appeared in said action and answered to the merits of the action. The appeal court of the state of New York was careful to announce in its judgment, "that the marriage relation is not a res within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding, given without the jurisdiction of said court, and, like other contracts, the contract of marriage cannot be annulled by judicial sanction without jurisdiction of

the person of the defendant": Extract from the syllabus of the case cited.

And also the case of *Williams v. Williams*, 130 N. Y. 193, 27 Am. St. Rep. 517, decided in December, 1891, is in point as illustrating the attitude of the courts of New York on this question of divorce, so far as judgment therefor rendered by the courts of a state different from that in which the domicile of the defendant was had, and to which action for divorce he neither appeared nor answered. In the case just cited, the leading facts seemed to be these: The ²²⁴ husband, after living a year or more with the wife after their marriage, demanded that the wife should give up all intercourse with her mother. This at first the wife declined to do, and he then lived apart from her. But before the husband removed to the state of Minnesota, the wife made an unconditional offer in good faith to live with her husband. This last proposition he declined, and removed to the state of Minnesota, where he commenced an action for absolute divorce on the ground of desertion. To this action the wife was made a party by publication. She was not in the state of Minnesota at any time, nor did she appear or plead to his action. Still, the judgment adjudged that the parties were no longer husband and wife. When this husband returned to the state of New York, the wife brought her action for a separation of the parties from bed and board forever, on the ground of abandonment. The husband attempted to set up in his answer his judgment for absolute divorce obtained in the courts of the state of Minnesota. But the court declined to recognize such a divorce as valid, and granted the wife's prayer for a legal separation for life. In the opinion of the court in the case just cited, the court admitted that every state may adjudge the status of one resident therein toward a nonresident, and that so long as such judgment is confined in its operation to the territorial limits of that state, other states must acquiesce; but it tenaciously adhered to the position announced in *Jones v. Jones*, 108 N. Y. 415, 2 Am. St. Rep. 447, that "the marriage relation is not a res within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted or actual notice of the proceedings given, without the jurisdiction of the court where the proceeding is pending."

We have thus taken the pains to consult the decision of the courts of the state of New York for the purpose of showing, that even if the marriage could be regarded as a New York marriage, the divorce here in question could not be regarded as valid. Having been

admitted that the courts of New York are only allowed by the laws of that state to grant absolute divorces for adultery, and the alleged judgment of the courts ²²⁵ of the state of Illinois having granted the same on account of cruelty of the husband to the wife, it will be easily seen that Mrs. McCreery's contract of marriage did not have, as a part thereof, any right to divorce, except for adultery. But it might have been contended that, at the time she entered into such contract of marriage within the state of New York, that state recognized as valid any judgment of divorce granted by other states than New York. This refuge is denied her, for we have seen such is not the case, in the event such a judgment of absolute divorce was granted by the courts of any other state in an action therefor to which the husband was not a party.

But the appellant suggests that divorces must be recognized in this state under the section of our general statutes which reads as follows: "All marriage contracted while either of the parties has a former wife or husband living shall be void; provided, that this section shall not extend to a person whose husband or wife shall be absent for the space of seven years, the one not knowing the other to be living during that time; nor any person who shall be divorced, or whose first marriage shall be declared void by the sentence of a competent court." Upon examination we found that that statute was adopted from the mother country when it was passed in the year 1712. We have no adjudications in our courts construing the statute, and yet we find that, in the mother country, the matter of divorce was never allowed under her laws until the year 1857. We do not propose to pursue the question to any extent. It cannot be considered that the divorce referred to in our statutes could be other than a valid divorce—a divorce legal in its operation. As the states of New York and South Carolina recognize no divorces valid for the cause of cruelty of the husband to the wife, as is the present case at bar, it follows necessarily that no possible advantage can accrue to the appellant under this old statute.

Lastly, the appellant suggests that the plaintiff's titles tendered to the defendant are good and sufficient, notwithstanding the dower of Mrs. McCreery has not been renounced, and notwithstanding the judgment of divorce of the Illinois courts is void, because she would be estopped from ²²⁶ making claim to dower. We do not care to base our views on this branch of the case upon the ground set out in the circuit decree, namely, that Mrs. McCreery is not a party to this case. In courts of equity, when

questions of enforcing demand for specific performance of contracts are considered, we are not by any means prepared to say that the presence of a party, who may possibly possess some right affecting the title tendered, is always necessary, before the court will proceed to pass upon such contract. Certainly, in the case at bar, by the agreed statement of facts, it is admitted that this decree of divorce obtained in Illinois especially reserved the question of Mrs. McCreery's right of dower. Apart from this, however, under our laws, we know of no way to defeat a woman's right of dower that has once attached, unless it be under that section of our general statutes, 1903, which provides, if a wife elopes with another than her husband, and continues with her advouter, and is not reconciled thereafter with her husband, she shall forfeit her dower in his lands. Under our law, "marriage is a valuable consideration; some have considered it the highest known in law. None would say it was a lower consideration than money."

There is nothing unreasonable in this. The great value of "the consideration consists in this, that the wife surrenders her person and her self-dominion to the husband, and enters into an indissoluble engagement with him, foregoing all other prospects in life; and, if the consideration for which she stipulates fails, she cannot be restored to the status in quo. She can have no remedy or relief": *Rivers v. Thayer*, 7 Rich. Eq. 144. In *Wilson v. McConnell*, 9 Rich. Eq. 513, the court used this language: "But this claim is met by a corresponding equity on the part of the widow, who is entitled (under her marriage) to the position of a purchaser for valuable consideration against all but existing liens"—liens that existed before the marriage. So in *Brooks v. McMeekin*, 37 S. C. 303, this court held: "We are, therefore, enabled to declare it to be the law, as derived from our own decisions, that in this commonwealth marriage is a valuable consideration paid by the wife for those rights and estates that, by our laws, are accorded the wife as a wife." ²²⁷ It is true, at present, this right of dower of Mrs. McCreery in the lands of her husband, the plaintiff, is inchoate, yet it is a substantial right of property, and not a lien: *Shell v. Duncan*, 31 S. C. 547. It must be remembered that this action of Mrs. McCreery in the courts of Illinois related only to the present and future relation of herself to her husband; it did not seek any action of the court as to the past, for she admitted she had been his lawful wife from 1885 to the date of her alleged judgment of divorce from him. We have held that this

divorce is void in this state. It seems to us, therefore, that the plaintiff can derive no benefit from the alleged estoppel.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

JURISDICTION OVER CITIZENS OF OTHER STATES.—Jurisdiction to render a personal judgment cannot be obtained against a defendant who does not reside, and is not within, the state, and upon whom process is not served except by the publication thereof: *Renier v. Hurlbut*, 81 Wis. 24; 29 Am. St. Rep. 850, and note.

JUDGMENT OF SISTER STATE—ATTACK ON FOR WANT OF JURISDICTION.—A judgment of a court of a sister state without any service of process and without appearance is void in this state: *Crumlish v. Central Imp. Co.*, 38 W. Va. 390; 45 Am. St. Rep. 872, and note. No presumption in favor of the validity of a judgment of another state exists, where it appears from the record that the defendant was a non-resident, and it does not affirmatively appear that service of process was made on him in that state: *Rand v. Hanson*, 154 Mass. 87; 26 Am. St. Rep. 210. See, also, the extended note to *Falls v. Wright*, 29 Am. St. Rep. 80.

DIVORCE—JURISDICTION OF COURTS OF ANOTHER STATE TO GRANT.—The jurisdiction of a court of another state of the subject of divorce is a special authority not recognized by the common law, and its existence must be shown, and it must appear to have been strictly pursued: *Kelley v. Kelley*, 161 Mass. 111; 42 Am. St. Rep. 389, and note. This subject is fully discussed in the notes to the following cases: *Watkins v. Watkins*, 21 Am. St. Rep. 219; *Jones v. Jones*, 2 Am. St. Rep. 453; *Harteau v. Harteau*, 25 Am. Dec. 377; *Dorsey v. Dorsey*, 32 Am. Dec. 771; *Tolen v. Tolen*, 21 Am. Dec. 752.

DOWER—EFFECT OF DIVORCE ON.—A decree of divorce from the bonds of matrimony bars the wife's claim to dower: *Wood v. Wood*, 50 Ark. 441; 43 Am. St. Rep. 42, and note.

JONES v. CITY OF CAMDEN.

[44 SOUTH CAROLINA, 319.]

MUNICIPAL BONDS cannot be avoided on the ground that the building for the erection of which they were issued was not erected solely for municipal purposes, where the building was, in fact, erected to supply the needs of the municipality, though portions not necessary for public purposes were appropriated to other uses, from which a small income was derived, not sufficient to meet the insurance on the building and the interest on the moneys expended in its erection.

IF MUNICIPAL BONDS are authorized to be issued for the purpose of procuring a suitable site, and the erection thereon of a suitable building for a town hall, in such manner as to the town council may seem expedient and for the best interest of the town, the bonds cannot be avoided in the hands of innocent purchasers on the ground that their proceeds were misapplied by the erection of a building for purposes not contemplated by the statute.

MUNICIPAL BONDS VALID WHEN ISSUED are not rendered void by the misapplication of the moneys received from their sale.

J. T. Hay, for the petitioner.

W. D. Trantham, contra.

³²¹ McIVER, J. This is a petition, addressed to this court in the exercise of its original jurisdiction, praying that the defendants may be enjoined from issuing and selling or offering for sale, certain municipal bonds of said city, to the amount of ten thousand dollars, mentioned in the petition. Upon the hearing of the petition, the usual rule to show cause was issued and served upon the defendants, requiring them to show cause why the injunction prayed for should not be granted. The defendants answered, setting forth, substantially, the following facts, which are uncontroverted: 1: That the bonded debt of the city of Camden amounts to the sum of fifteen thousand dollars, which was incurred in the purchase of a lot, and in the erection thereon of a new town hall, with money raised by the issue of bonds authorized by the act approved December 24, 1884 (18 Stats. 818), and the ordinance of the town (now city) of Camden, ratified the 15th of April, 1885; 2. That the said building, though it contains a store on the first floor, from the rents of which the corporation derives some revenue, and a large hall on the second floor, which is sometimes used by dramatic and other companies, who pay a small sum of money for the privilege of using it, was projected and erected for municipal purposes, and not for profit and speculation, the entire income therefrom being insufficient to pay the insurance on the building and the interest on the money expended in its erection; 3. That besides the store and hall, the building contains the city offices; and the large hall, which is popularly called the "opera house," is used by the people of Camden, without charge, for holding their mass meetings, public school exhibitions, industrial fairs, and, at times, for divine worship; 4. That of the bonds so issued, the one-half thereof which matured on the 15th of March, 1890, have been refunded by authority of the act of December 23, 1889, (20 Stats. 542), and the ordinance of said town, ³²² ratified the 5th of March, 1890; 5. That by virtue of the act of December 21, 1894 (21 Stats. 1027), and the ordinance of the city of Camden, ratified the 27th of March, 1895, the city council are authorized and empowered to issue and dispose of bonds of the said city, to the amount of ten thousand dollars, bearing interest at the rate of five per centum per annum, payable semiannually, and to become payable in twenty years from the issuance thereof; which said bonds, to the extent of seven thousand five hundred dollars, if so much be necessary, shall be used in refunding so much of what are known as "the town hall or opera house bonds" as mature on the 15th of March, 1895, and to the extent of two thousand five hun-

dred dollars if so much be necessary, for the purpose of raising funds with which to pay so much as may remain unpaid of what is known as "the pavement debt" of the said city; 6. That by the words "town hall or opera house bonds," as used in the act of December 21, 1894, and in the ordinance of March 27, 1895, the bonds which were issued for the purpose of building a new town hall, under the authority of the act of December 24, 1884, are meant, as the said building has since become popularly known as the "town hall or opera house"; 7. That the debt known as the "pavement debt" of the city of Camden was incurred in laying sidewalks on Broad street, the principal thoroughfare of said city.

The validity of the bonds in question seem to be assailed upon two grounds: 1. Because the building for the erection of which these bonds were originally issued was not erected solely for municipal purposes, but for the purpose, in part at least, of profit or speculation; and the case of *Mauldin v. City Council*, 33 S. C. 1, is relied upon to support this contention. So far from there being any evidence that one of the purposes in erecting the building was profit or speculation, that allegation in the petition is distinctly denied in the answer, and there is no evidence to controvert such denial. Besides, it seems to us that it is plain that the main purpose for which the building was erected was to supply the needs of the municipal corporation, and the fact that portions of the building not now necessary for public purposes are appropriated to other purposes, from which a ³²³ small income is derived, not sufficient to meet the insurance of the building and the interest on the money expended in its erection, does not deprive it of its character as a public building erected and used for municipal purposes.

In addition to this, the bonds originally issued under the authority of the act of 1884, above referred to, were authorized to be used for the purpose of procuring "a suitable site in the town of Camden, South Carolina, and the erection thereon of a suitable building for a town hall, in such manner as to the said town council may seem most expedient and for the best interest of said town"; and if the municipal authorities, after issuing and selling said bonds, concluded that it would be for the best interests of the town so to erect the building as that such portions of it as would not at all times be needed for public purposes could be used as a source of income to the town, surely the purchases of such bonds could not be affected by such misapplication (if, indeed, there was any misapprehension, of the proceeds of the sales

of the bonds; and, of course those who furnished the money to take up, or renew, or extend such valid obligations of the corporation could not be affected by any misapplication of the proceeds of the sale of the bonds. Purchasers of the bonds of a municipal corporation are only bound to inquire whether the power to issue such bonds has been conferred, and they are not bound to see to the application of the proceeds: See Bond Debt Cases, 12 S. C. 200. If, therefore, the bonds originally issued were valid obligations of the municipal corporation, as we think they unquestionably were, then bonds issued to pay or renew such valid obligations were alike valid, because issued for a corporate purpose, viz., to pay or retire a valid debt of the corporation.

The second ground upon which the validity of the bonds in question is assailed is, that the debt known as the "pavement debt" should be provided for out of the current income of the city, and not by the issue of bonds of the corporation. Inasmuch as the express power to issue bonds to pay that debt was conferred by the act above referred to, we are at a loss to perceive any foundation for the position taken by counsel for plaintiff. The authority which he cites from ³²⁴ Dillon on Municipal Corporations applies only to cases in which it is claimed that the municipal corporation has implied authority to borrow money by issuing its bonds, and can have no application to a case like the present, where the power has been expressly conferred by act of the legislature. The only question is, whether the debt authorized is for a corporate purpose; and there can be no doubt that a debt contracted for the purpose of constructing, repairing, or improving the streets or sidewalks of a municipality is a debt contracted for a corporate purpose.

It seems to us clear that there is no valid ground for objection to the bonds in question; and, in accordance with these views, an order was granted at the hearing, declaring these bonds valid obligations of the city of Camden, refusing the injunction asked for, and dismissing the petition.

Municipal Bonds in the Hands of Bona Fide Holders.*

Municipal bonds negotiable in form are a class of security, the amount of which is so great and so rapidly increasing, that they deserve especial consideration, to the end that the public, which is constantly

*** REFERENCE TO MONOGRAPHIC NOTES.**

Municipal bonds and defenses thereto: Note to 98 Am. Dec. 664-691.

Implied power of municipal corporations to borrow money: Note to 80 Am. Dec. 190-194.

Power of the Legislature to validate invalid contracts of, and to impose liabilities upon, municipal corporations: Note to 80 Am. Dec. 731-735.

Indebtedness, municipal, what is within the meaning of prohibitions against: Note to 44 Am. St. Rep. 229-245.

called upon to deal in them, may understand when it may implicitly rely upon their validity. The subject has, it is true, already received our attention in this series, but we wish to investigate it further, principally for the purpose of ascertaining the circumstances under which a bona fide purchaser is, and those in which he is not, entitled to protection, though there may be some vice which, if known to him, might have prevented him from enforcing the bonds against the municipality by which they purport to have been issued.

Negotiability.—In one state a stand was made against municipal bonds issued in aid of railway corporations, and they were declared not to be commercial paper, even in the hands of innocent and remote purchasers, but to be subject to the equities existing against them when in the hands of the persons to whom they were originally issued. The court so deciding frankly admitted that it stood alone, and that all other courts, whether American or English, were against it. The stand which it made was sought to be justified on the ground that bonds of this character had been issued under the influence of popular excitement and by public officers "moulded to the purposes of speculators": *Diamond v. Lawrence County*, 37 Pa. St. 353; 78 Am. Dec. 429. This extreme view was, however, taken only against bonds issued in aid of railways, a class which the opinion of the court truly declared to be exceptional in character, temporary in purpose, and likely soon to disappear. In all other states, municipal bonds negotiable in form have been conceded the attributes of negotiability, and their purchasers have been protected against secret equities and from being prejudiced by such mere irregularities in their issue as do not make them absolutely void: *State v. Kiowa County*, 39 Kan. 657; 7 Am. St. Rep. 569; *Insurance Co. v. Bruce*, 105 U. S. 323; *North v. Platte County*, 29 Neb. 447; 26 Am. St. Rep. 395.

Irregularities, what are.—The doctrine of the cases being that a municipal negotiable bond cannot be avoided in the hands of a bona fide holder for mere irregularities, it becomes extremely important to know what is an irregularity within the meaning of these decisions. It may, perhaps, properly be described as a fraudulent, mistaken, or erroneous exercise of an existing power. The issuing of such bonds is necessarily intrusted to officers of the municipality, and, while acting within the scope of their powers, they must doubtless be regarded as agents of the municipality rather than of a purchaser or holder of the bonds. He therefore is not affected by, or chargeable with, knowledge possessed by them and not communicated to him. If they act fraudulently, they, while so acting, are none the less agents of the municipality, or, at least, not agents of the bondholders, so that the latter are chargeable with knowledge of the fraud, or exposed to loss because of it: *Meyer v. Brown*, 65 Cal. 583; *Pompton v. Cooper Union*, 101 U. S. 196. Thus, in a leading case in the supreme court of the United States, it was said: "The case shows that the plaintiff below was the bona fide owner of the coupons sued upon. Questions of form merely, or irregularity, or fraud, or misconduct, on the part of the agents of the town, cannot, therefore, be considered. Whether the supervisor of the town signed the bonds during the midnight hours, whether he delivered them at about daylight on the morning of April 2, 1873, and whether he immediately left the town to avoid the service of an injunction, are matters

not chargeable to the owner of the bonds. The supervisor was not his agent, but the agent of the town, and if there has been misconduct on his part, the town, rather than a stranger, must bear the consequences. There must be authority in the town to issue the bonds by the statutes of the state. If this cannot be found, the holder must fail; if it exists, he is entitled to recover": *East Lincoln v. Davenport*, 94 U. S. 801. To the same effect, see *Harper County v. Rose*, 140 U. S. 71; *Lytle v. Lansing*, 147 U. S. 59; *Cairo v. Zane*, 149 U. S. 122; *Suffolk Sav. Bank v. Boston*, 149 Mass. 364; *Sherman County v. Simons*, 109 U. S. 735.

Lis Pendens.—Municipal bonds are, like other negotiable instruments, exempt from the operation of the law of *lis pendens*, in so far, at least, that a purchaser of them during the pendency of a suit of which he has no notice does not acquire title subject to the final decree in such suit: *American Life Ins. Co. v. Bruce*, 105 U. S. 328; *Enfield v. Jordan*, 119 U. S. 680; *County of Warren v. Marcy*, 97 U. S. 96. It is otherwise when he has actual notice of the pendency of the suit at or before the date of his purchase: *Scotland County v. Hill*, 132 U. S. 107, 114.

Burden of Proof.—If bonds are void as between the municipality and the person to whom they are issued, though valid as in favor of bona fide holders, it is incumbent on a holder of them as in case of other negotiable instruments procured by fraud, to assume the burden of proving either that he or his predecessor in interest was a bona fide purchaser for a valuable consideration, and made payment therefor before receiving notice of the vice on account of which they are assailed; and if he knows the municipality is contesting its liability on them, it is his duty to make inquiries, and his failure to do so will be deemed a closing of his eyes to information, and will deprive him of the character of a bona fide purchaser: *Stewart v. Lansing*, 104 U. S. 505; *Lytle v. Lansing*, 147 U. S. 59; *Orleans v. Platt*, 99 U. S. 676.

If negotiable bonds have once been in the ownership of a bona fide purchaser under such circumstances that he was entitled to enforce them, his transfer thereof to another purchaser clothes the latter with all the immunities of a bona fide purchaser, though before making his purchase he had full notice of the facts entitling the municipality to avoid them had they never been in the hands of a bona fide holder: *Scotland County v. Hill*, 132 U. S. 116; *Douglas County v. Bolles*, 94 U. S. 104; *Cromwell v. County of Sac*, 94 U. S. 351; *Verbeck v. Scott*, 71 Wis. 59.

Valid Law Authorising is Essential.—As the authorities with substantial unanimity concede that a bona fide purchaser of a municipal bond is entitled to enforce it, notwithstanding irregularities at or preceding its issue, if there was power to issue it when it was in fact issued, it becomes material to inquire when such power exists, for a purchaser cannot secure immunity from attack upon his bonds by his belief that there was power to issue them, nor from his failure to discover the absence of such power. The first prerequisite to the power to issue a municipal bond is the existence of a law authorizing it. It is not sufficient that what purports to be a statute appears in the public archives. It must not so conflict with the constitution, state or national, that the judiciary must deny it effect: *Norton v. Shelby County*, 118 U. S. 426; *Lake County v. Graham*, 130 U. S. 674. Furthermore, it must have been enacted in a manner permitted by the state constitution. If, to

be a valid enactment, certain precedent steps are necessary to be taken, it is the duty of the person about to become a bondholder in reliance upon it to inquire whether they were taken, for, without them, it is not a law, and "there can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of the parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in this case": *Ottawa v. Perkins*, 94 U. S. 260. It must also appear that the statute under which bonds have been issued was in effect not only at the time of their issuing, but also at the time of the taking of any steps necessary to such issuing. *State v. Settle Rock etc. Ry. Co.*, 31 Ark. 701; *Phelps v. Alfred Bank*, 13 Wis. 432; 80 Am. Dec. 746; *Berliner v. Waterloo*, 14 Wis. 378. Therefore a municipality may successfully resist a proceeding to compel it to pay interest upon bonds purporting to be issued by it, by proving that the election authorizing such bonds to issue was held before the statute under which it was held and they were issued had taken effect: *Santa Cruz etc. Co. v. Kron*, 74 Cal. 222. Though the statute was constitutionally enacted, and, when enacted, was not subject to constitutional objection, inquiries must further be made to ascertain whether it yet remains in force and free from constitutional objection. If, before proceedings were taken under it to authorize the issuing of bonds, it had been repealed, or some constitutional limitation had been adopted with which the statute was necessarily in conflict, so that further proceedings under it were forbidden, the purchaser cannot excuse himself by showing ignorance of any of these facts, and bonds issued after the statute had for any of these reasons become obsolete, are void, even in the hands of bona fide purchasers: *Wade v. La Molle*, 112 Ill. 79.

Must be Issued by a Municipality and Officers De Jure or De Facto.—It is the duty of one who purchases or otherwise acquires title to what purports to be a municipal bond to ascertain at his peril whether it was issued by a municipality, and it cannot have been so issued unless there was at least a municipality de facto represented by officers de jure or de facto. To consider at length what is a de facto municipal organization, and who may safely be dealt with as de facto officers thereof, would require a monographic note upon a subject but incidentally involved in the one here under discussion, and we must content ourselves with a mere reference to the notes in this series upon the subject: *Note to Hildreth v. McIntire*, 19 Am. Dec. 63-69, and a statement of the conclusions announced in the few decisions which have applied the general rules controlling this topic to controversies respecting the validity of municipal bonds. It is undoubtedly true that the municipality purporting to issue bonds must be at least a municipality de facto, and that the officers who act for it, while they need not necessarily be officers de jure, must have held and exercised the functions of their respective offices under such circumstances as to entitle them to respect as officers de facto: *Coler v. Cleburne*, 131 U. S. 162; and, where there

could not, under the law in force at the time the bonds were issued, have been officers *de jure*, there could not have been officers *de facto*, and therefore that bonds issued by persons assuming to be officers of a municipality must be absolutely void, if the offices which they assumed to fill did not exist: *Norton v. Shelby County*, 118 U. S. 426. This statement may, perhaps, be inapplicable when the offices in question were apparently created by a statute which had been generally recognized as valid for a considerable length of time, and official functions have been exercised under it, in which case the officers acting may be regarded as officers *de facto* until the unconstitutionality of the statute has been judicially declared: *Note to Kelly v. Bemis*, 64 Am. Dec. 54. If the municipality is alleged to exist in pursuance of some general or special statute directly incorporating it, all persons must take notice of the law upon the subject, and must satisfy themselves at their peril whether the statute relied upon has been enacted, whether the corporation in question falls within its provisions, and, if so, whether such statute has been repealed or otherwise deprived of its original force. In many instances, municipalities, or what claim to be such, have been organized, or attempted to be organized, under general laws, by virtue of which certain proceedings were authorized to be taken for the purpose of creating a municipality, and some of these proceedings may have been omitted, or may not have taken place at the time or under the circumstances required by law. It is, however, a general rule that the right to exercise such official or municipal functions cannot be assailed in a collateral proceeding, but only at the instance of the government, represented by the attorney general, and hence we should not expect the courts, in suits to enforce municipal bonds in the hands of bona fide holders, to pursue inquiries and pronounce judgments appropriate only to proceedings in *quo warranto*.

There is, indeed, one decision in which an attack upon the incorporation of a town was permitted in order to defeat bonds apparently issued by it, but the action of the court was founded upon a statute, which, by declaring that after the doing of certain acts the incorporation should not be collaterally assailed, thereby implied that, until such acts were done, a collateral assault was permissible, and might be effective: *Ruohs v. Athens*, 91 Tenn. 20; 30 Am. St. Rep. 858.

Manifestly, persons dealing with municipal bonds cannot be expected to prosecute inquiries for the purpose of determining whether *de facto* municipalities or *de facto* officers hold without title, or by a title which the sovereign may, by appropriate proceedings, assail and overturn, and the instances in which such bonds have been avoided by proving irregularities in the organization of the municipality, or defects in the title of an officer, must be very rare, and cannot, upon principle, be conceded to exist at all, unless, as in the case last cited, the statute exacted the doing of something to be evidenced by some matter of public record, and such record does not exist. Mere irregularities in the organization of a municipality will, therefore, not be inquired into in actions upon such bonds, nor can they be avoided by proving that the persons who, as officers *de facto*, issued them, or did some other act essential to their validity, were not officers *de jure*: *Ralls Co. v. Douglass*, 105 U. S. 728; *State v. Adams County School Dist.*, 13 Neb. 78, 466. This rule may properly be applied, even when the statute organizing the municipality is unconstitutional, if its want of constitutionality

cannot be ascertained from inspecting it, and is made manifest only by a decision of some court of competent jurisdiction based upon extrinsic evidence respecting an issue of fact: *School Dist. v. State*, 29 Kan. 57.

In some instances, attempts have been made to avoid municipal bonds upon the ground that the corporation to or in favor of which they purport to have been issued had not, as a matter of fact, been organized at the date of such issuing, but these attempts have proved uniformly unsuccessful: *Macon County v. Shores*, 97 U. S. 272; *Davies v. Huidekoper*, 98 U. S. 98. A somewhat different question is presented when bonds directed to be issued to one corporation are in fact issued to another. This is especially true if they are issued by a clerk possessing no general authority to bind the municipality, and the law under which he and other officers acted was one authorizing subscriptions to be made to the stock of a railway company, provided such subscription was previously sanctioned by a majority of the qualified voters at an election called for the expression of their wishes, the statute further providing that the notice calling for the election should specify the company in which stock was proposed to be subscribed. In such case, there is no authority to subscribe for stock of, nor to issue bonds to, a corporation different from that specified in the notice of election, and bonds issued to another corporation may be treated as void, though in the hands of a purchaser without notice. It was his duty to ascertain whether the law had been so far followed by the public officials as to justify them to issue the bonds. "The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder": *Marsh v. Fulton County*, 10 Wall. 676.

What would be the rights and remedies of bondholders if quo warranto should be prosecuted against the municipality, and should result in a judgment in favor of the people, is a question which, so far as we are aware, has not been presented for decision. We fear it would leave them without any means of redress, other than an appeal to the legislature, to make some enactment in their favor, imposing taxes upon the people and property within the limits of the defunct municipality. Such appears to be the result when its existence is terminated by a repeal of its charter; for there is then no municipality to proceed against, nor can bondholders obtain satisfaction out of what were municipal assets by suits in equity, nor by actions at law, nor by any other proceeding in the courts: *Meriwether v. Garrett*, 102 U. S. 472; *Barkley v. Commissioners*, 93 U. S. 258.

Implied Authority to Borrow Money.—After ascertaining that there is a municipality, the existence of which cannot be questioned, at least collaterally, and that it has officers de jure or de facto competent to act in its behalf, the next inquiry naturally is, whether it has authority to issue bonds. The issuing of bonds is usually, if not uniformly, preceded by, or coincident with, the borrowing of money, and therefore, if there is no authority to borrow money, there can rarely or never be any to issue bonds. The authority to borrow money or to issue bonds may doubtless be conferred incidentally, as well as expressly, but is not inferable from the mere existence of a municipal corporation. These corporations exercise a delegated authority which must appear in their charters, or in other statute law, and we think there is no real dissent from the proposition that the power on their part to borrow money must be conferred by such statute or charter. There is doubtless much differ-

ence of opinion respecting their implied power, or, rather, with respect to the circumstances in which, in the exercise of powers directly or confessedly conferred upon them to do acts, they may borrow money, on the theory that, without so doing, they cannot exercise with efficiency the powers so confided to them. In our judgment, when municipalities are vested with power to raise moneys by the imposition or collection of taxes, they should look to the exercise of that power to provide them with the means necessary to accomplish the objects which they are authorized to accomplish, but which cannot be attained without the expenditure of moneys. We give our assent to those decisions which construe municipal charters somewhat strictly, and deny the right of municipalities to borrow money except when the authority is expressly conferred, or when it is essential to the exercise of authority so conferred: *Hawkins v. Carroll County*, 50 Miss. 762; *Minot v. West Roxbury*, 112 Mass. 1; 17 Am. Rep. 52; *Hackettstown v. Swackhamer*, 37 N. J. L. 191; *Mayor v. Ray*, 19 Wall. 468; *Starin v. Genoa*, 23 N. Y. 439; *Wells v. Salina*, 119 N. Y. 280; *Wells v. Supervisors*, 102 U. S. 625. To hold otherwise would be to confer the authority to borrow money in all cases in which it is not expressly withheld, or in which it does not clearly appear that moneys required for the exercise of the powers of the corporation and the accomplishment of purposes which it may lawfully seek should be raised by taxation only. This subject we have heretofore considered at some length in the note to *Bank of Chillicote v. Chillicote*, 30 Am. Dec. 190-194; and we have there regarded the cases as being susceptible of division into two distinct classes, in one of which are included those municipalities whose charters have conferred upon them only ordinary corporate powers, and in the other of which powers have been conferred of a character such that their purposes cannot be fulfilled by the exercise of the ordinary means of raising revenue. In the former class it is clear, under the cases already cited, that there is no implied power to borrow money. In the cases of the second class, the existence of this power must generally be sustained, but there may naturally be a difference of opinion as to whether a case falls within the one class or the other, for, in the absence of direct legislative expression upon the subject, it will often be difficult to determine whether a municipality was expected to accomplish an object requiring the expenditure of a large sum of money without resorting to any other means of raising it than by the exercise of the taxing power. In a leading case, it appeared that the municipality was given power "to erect and repair public buildings for the benefit of said town, and make and publish laws and ordinances in writing, and the same from time to time alter or repeal, as to them shall seem necessary for the internal safety and convenience of the town and the inhabitants thereof." The town was also given capacity to purchase, receive, possess, or convey any real or personal estate for the use "of said town, providing the clear annual income shall not exceed four thousand dollars," and it was also given power to lay a tax within its limits, to be assessed in the manner in its charter specified. By an amendment of its charter, the town was also given the "power to pass and publish all such laws and ordinances as to them shall appear necessary for regulating the streets, alleys, and highways, and for cleansing, raising, grading, turnpiking, or otherwise keeping the same in repair," and also "to pass laws and ordinances relative to the good government of the town." It was held

that "if, in effectuating any of these objects, it became necessary to borrow money, the corporation might with propriety do it"; that while ultimate payment must be made from taxation, the power existed to borrow money for use in purchasing real estate, or in doing the other acts which the town was, by its charter, authorized to do, on the theory, as we infer, that if the town were restricted to raising money by taxation only, it might be longer delayed in the accomplishment of municipal purposes than was compatible with the welfare of the citizens of the municipality: *Bank of Chillicote v. Chillicote*, 7 Ohio St. 231; 30 Am. Dec. 185. So, in the case of *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721, it was held that a city had authority to borrow money and issue bonds therefor, in the absence of any restriction, as incidental to the exercise of the general powers conferred by the charter to purchase fire apparatus and cemetery grounds, and to establish markets, and to do many other things in the doing of which money was essential. Several other cases might be cited maintaining the broad proposition that whenever a municipality is authorized to exercise a power which cannot be efficiently pursued without the expenditure of large sums of money, it is within the discretion of its legislative body to authorize the raising of such money by borrowing it, and by issuing to the lenders bonds or such other evidences of debt as may be acceptable to them. In answer to the objection that this power is a dangerous one, it is said that this is true of all power, and that the conferring upon the municipality of the power for the carrying out of which the borrowing of money may be necessary, or extremely desirable, invests the municipal authorities with a discretion to borrow money or not as to them may seem best for the public welfare: *Williamsport v. Commonwealth*, 84 Pa. St. 487; 24 Am. Rep. 208; *Galena v. Corwith*, 48 Ill. 423; 95 Am. Dec. 557; *Mullarky v. Cedar Falls*, 19 Iowa, 21. These cases, as we have already suggested, in our judgment, carry the implied powers of municipalities too far. Opposed to them are the decision in *Gause v. Clarksville*, 5 Dill. 165, that the power to erect and repair wharves and to open streets does not include the power to borrow money and issue bonds for its payment; in *Wilson v. Shreveport*, 29 La. Ann. 673, that authority on the part of a mayor to sign all notes and other obligations binding the corporation, and, on the part of the municipality, to acquire, hold, farm, lease, or convey any property, real or personal, and to erect public wharves and buildings, does not support the issuing of bonds to pay for stock in a gaslight company; in *Police Jury v. Britton*, 15 Wall. 566, that authority to appoint a levee inspector whose duty it shall be to direct and superintend the construction and repair of levees, and on the part of the municipality to survey levees, and award work so required to the lowest bidder, and for work so finished to issue warrants payable to the contractor, does not include authority to issue bonds for work done; and in *Wells v. Salina*, 119 N. Y. 280, that authority on the part of the town to make contracts and to purchase and hold such personal property as may be necessary to exercise its corporate or administrative powers, and to direct the institution or defense of suits at law or in equity in all controversies between such town and corporations, individuals, and other towns, and to direct such sums to be raised in such town for prosecuting and defending such suits as they may deem necessary, does not include the power to issue promissory notes to defray the expenses of an action brought against the town for

the purpose of enforcing certain bonds claimed to have been issued by it. In this case, the general rule upon the subject is thus broadly stated: "The power to raise money for municipal purposes, it is believed, never means a power to borrow money unless there is other language qualifying or extending its meaning."

Instead of borrowing money to pay for something which it is authorized to purchase, or to do work which it is authorized to have done, a municipality may purchase such property or have such work done upon credit, and there appears to be more authority to sustain its action in so doing than there is for a direct borrowing of money: *Clarke v. School Dist.*, 3 R. I. 199; *Sturtevant v. Alton*, 3 McLean, 393; *Ketchum v. Buffalo*, 14 N. Y. 356; *Douglass v. Virginia City*, 5 Nev. 147; *Second Nat. Bank v. Danville*, 60 Ind. 504.

Implied Power to Issue Negotiable Obligations.—The existence of the power to purchase property or have work done upon credit, or to borrow money, does not necessarily carry with it the power to issue bonds or other negotiable instruments. There are many cases which, while they concede the power of municipalities to create debts, and even to borrow money, maintain that it, in the absence of express statutory authority, extends no farther than the giving of some evidence of such indebtedness. The issuing of a negotiable instrument differs from the issuing of mere evidence of indebtedness in this very substantial respect: the former, in the hands of bona fide holders, are payable absolutely, and are not subject to any setoff nor to equities existing between the original parties, and, in many instances, are also exempt from all defenses whatever, while the latter do no more than to make out a case prima facie against the maker, and are subject to the same defenses in the hands of a bona fide holder as if yet held by the person to whom they were issued. Many courts, included in which are those of the very highest character and importance, assert that the power of a municipality to issue negotiable instruments must be expressly conferred, or, at least, that it cannot be implied from the power to create indebtedness or to borrow money: *Wall v. County of Monroe*, 103 U. S. 78; *Police Jury v. Britton*, 15 Wall. 566; *Milan Taxpayers v. Tennessee etc. Ry. Co.*, 11 Lea, 329; *Colburn v. Railroad*, 94 Tenn. 43; *Claiborne County v. Brooks*, 111 U. S. 400; *Newgass v. New Orleans*, 42 La. Ann. 163; 21 Am. St. Rep. 368; *Clark v. Des Moines*, 19 Iowa, 199; 87 Am. Dec. 423. On the other hand are decisions, scarcely less numerous and equally emphatic, which fairly imply that the power to issue bonds in payment of any existing obligation is inherent in municipalities, and cannot be denied, except when its exercise is prohibited by statute either directly or by necessary implication, and that as between it and its creditors, every municipality may give them such evidence of indebtedness, whether negotiable or not, as shall be mutually satisfactory: *Galena v. Corwith*, 48 Ill. 423; 95 Am. Dec. 557; *Williamsport v. Commonwealth*, 84 Pa. St. 487; 24 Am. Rep. 208; *Rushville etc. Co. v. Rushville*, 121 Ind. 206; 16 Am. St. Rep. 388. In Illinois, the decisions upon this subject are much modified, if not necessarily overruled, by a more recent adjudication, affirming in substance that the power to issue negotiable interest bearing obligations cannot be exercised by a municipality unless expressly granted "or necessarily implied in order to carry into effect a granted power": *County of Harden v. McFarlan*, 82 Ill. 138, 141. If, however, a municipality has issued negotiable bonds which, with cer-

tain coupons thereon, remain unpaid, and it is authorized to compromise and settle such outstanding indebtedness, and to issue obligations to the holders thereof containing such stipulations as to interest and time and place of payment as might be agreed upon, power is conferred to make such obligations in the form of negotiable bonds: Carter County v. Sinton, 120 U. S. 525.

Notice of the Law Must be Taken.—The great doubts existing as to whether there is any implied power on the part of a municipality to borrow money, and, if so, whether it also includes the power to issue negotiable bonds, justifies, or rather requires, all prudent investors to decline to loan money to, or to deal in bonds of, a municipality unless there is some statute directly conferring the requisite authority and prescribing the circumstances under which it is to be exercised, except it be in states whose courts have already determined that it is sufficient to rely upon an implied grant of power. When a law is found either constituting part of the charter of a municipality or of some general law of the state, and which controls the question, it is especially important that such law be scrutinized with care, for the reason that every person is conclusively presumed to be familiar with its provisions, and no one can claim exemption from them. If, from an examination of the law, it appears that the bonds in question were not authorized to be issued at all, or though authorized to be issued under some circumstances, those circumstances had not arisen or had ceased to exist, or that the contract or promise contained therein was not the contract or promise which the municipality was authorized to make, or that the purpose for which the bonds were issued was not an authorized purpose, no person can entitle himself to protection or base his claims to the enforcement of his bonds upon the ground that he is a bona fide holder thereof without actual knowledge of the controlling statute, and that he acted upon the assumption that the municipal officials would not have issued the bonds in question except in pursuance of an existing law. The authority for the issuing of every municipal obligation must be found in some law, and if any bond, or what purports to be a bond, has come into existence not authorized by law, there cannot, as to it, be any bona fide holder or purchaser, for all persons are charged with knowledge of the law, and hence with notice that such bond is void: Thomas v. Lansing, 14 Fed. Rep. 618; Coffin v. Indianapolis, 59 Fed. Rep. 221; Lewis v. Shreveport, 108 U. S. 282; Barnett v. Denison, 145 U. S. 135; Sutro v. Pettit, 74 Cal. 332; 5 Am. St. Rep. 442; Sutro v. Rhodes, 92 Cal. 117; Lake County v. Graham, 130 U. S. 674; Bissell v. Kankakee, 64 Ill. 249; 16 Am. Rep. 554; Gaddis v. Richland County, 92 Ill. 119; Aurora v. West 22 Ind. 88; 85 Am. Dec. 413; Pugh v. Moore, 44 La. Ann. 209; Herwig v. Richardson, 44 La. Ann. 703. But a bond is not necessarily unauthorized by law because some of the things which the law required to be done were not done in the mode or at the time specified in the statute, nor because the terms and conditions of the bonds are not precisely those warranted thereby. There may, as we have already suggested, be certain departures from statutory requirements, which the courts will determine to be irregularities merely, and there may, as we shall hereafter show, be other departures, which, though in essential matters, the municipality may not urge, because some person or tribunal expressly or impliedly authorized to make inquiries and to decide has, in effect, determined that the conditions precedent to the issuing of the

bond have been complied with, and has therefore made further inquiry not permissible as against a bona fide holder who has relied upon such determination.

Notice of Facts Appearing Upon the Face of the Bonds.—There are other matters outside of the provisions of the statute under which a bond is claimed to have been issued of which all persons must take notice. The most unquestionable of these is of the contents of, and indorsements upon, the bonds themselves, and if they state a fact, or make such a reference that inquiry respecting it becomes a duty, the holder of a bond who has not performed this duty, or has not familiarized himself with the contents of the bond, is not entitled to be exempt from the consequences of such fact on the ground that he is a bona fide holder without actual notice thereof. The bonds may refer to the authority upon which they were issued and that authority, upon being examined, may be found inadequate, and the acts therein stated to be done may, upon an examination of the law, be found legally impossible, because the law furnished no sanction for the doing of them. Thus, if bonds purport to be issued in payment of a subscription made to a railway corporation by virtue of a vote of the majority of the electors, and there is no law under which such election could have been held, the bonds are absolutely void, and all purchasers have notice of that fact, because they must know that no election could have been held by which the bonds could have been authorized: *Barnes v. Lacon*, 84 Ill. 461; *McClure v. Township of Oxford*, 94 U. S. 429. So if bonds purport to be issued under a designated act, and to bear interest with exchange on New York, this stipulation for exchange cannot be enforced, because all persons must take notice that the statute referred to did not warrant it: *Mygatt v. Green Bay*, 1 Biss. 292. Bonds must also be treated as void if they show on their face that the election at which they were voted, though required to be preceded by a thirty days' notice, took place within eighteen days after the taking effect of the statute authorizing it to be held, and that the bonds were issued within twenty-five days after such taking effect: *George v. Oxford Tp.*, 16 Kan. 72. If bonds recite that they were issued under an act authorizing a subscription to be made by a municipality to the capital stock of a designated corporation, but such bonds have been issued to a corporation bearing a different name, and the circumstances are such as not to warrant their issuance to the latter corporation, they are void, no matter into whose hands they have come, because the statute recited proves that their issue to the corporation named could not have been authorized: *Harshman v. Bates County*, 92 U. S. 569; *County of Bates v. Winters*, 97 U. S. 83. If a bond recites that it is issued under an ordinance, the date of which is specified, it becomes the duty of all persons who purchase or otherwise invest in such bonds to inquire respecting such ordinance, for, if such inquiry, if pursued, would have revealed that the ordinance did not exist, or that it had not been published in the manner required by law to make it operative, then the bonds are invalid, though in the hands of purchasers for value without actual notice: *National Bank v. Granada*, 54 Fed. Rep. 100. (If a bond purports to be issued in conformity with a resolution or ordinance of a municipality, all persons are referred to, and charged with notice of, the resolution or ordinance, and no one can recover on the bonds if their issuing was not justified by the authority recited: *Louisiana State Bank v. New Orleans etc. Co.*, 3 La. Ann. 297.)

Notice Must be Taken of the Public Records.—The existence of conditions precedent authorizing the issuance of bonds is usually required to be set forth upon some public record, which contains, in effect, a history of the whole transaction, showing the resolve upon the part of the proper municipal authorities to issue the bonds, the purpose for which they were to be issued, the time and mode of payment, the interest thereon, and the time and mode of its payment, and, generally, the date and amount of bonds issued. An examination of such record is a duty on the part of investors, and, in the absence of statutes expressly or impliedly excusing the discharge of such duty, a purchaser or other holder of a municipal obligation will rarely be permitted to plead ignorance of any fact which such examination would have disclosed, nor to claim that he relied upon the existence of essential facts which ought to have appeared upon such record, but which it does not affirm: *Sutro v. Rhodes*, 92 Cal. 117; *Anthony v. Jasper*, 101 U. S. 697; *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442; *Portsmouth Sav. Bank v. Ashley*, 91 Mich. 470; 30 Am. St. Rep. 511. A somewhat familiar illustration of this rule is presented by those adjudications involving municipal bonds issued after a municipality had incurred indebtedness equal or exceeding what it was authorized to incur by law. The amount of municipal indebtedness is generally capable of ascertainment by an examination of the municipal records, and on this account, as well as for other reasons, a holder of municipal bonds in excess of sums for which the municipality was allowed to issue them cannot recover thereon, on the ground that he is a bona fide holder thereof: *Orvis v. Park Commrs.*, 88 Iowa, 674; 45 Am. St. Rep. 252; *Anderson v. Orient etc. Co.*, 88 Iowa, 579; *First Nat. Bank v. Township of Doon*, 86 Iowa, 330; 41 Am. St. Rep. 489; *Beard v. Hopkinsville*, 95 Ky. 239; 44 Am. St. Rep. 222, and note 229-242; *Lake County v. Graham*, 130 U. S. 674; *Lake County v. Rollins*, 130 U. S. 662; *Gutta Percha etc. Mfg. Co. v. Ogalalla*, 40 Neb. 775; 42 Am. St. Rep. 696; *Francis v. Howard County*, 50 Fed. Rep. 44; *Citizens' Bank v. Terrill*, 78 Tex. 450. If a city is authorized to issue bonds at such times as its board of directors may by resolution direct, the object of the statute manifestly is to provide that the authority shall appear on the minutes of the board, and bonds issued without such resolution are void, and the holder cannot successfully claim to be an innocent purchaser, because any examination made by him of such minutes would have disclosed that no authority there appeared for the issuing of the bonds: *McCoy v. Briant*, 53 Cal. 247. Under a statute declaring that before a negotiable bond shall obtain validity or be negotiated, it shall be presented to the state auditor, who shall register it and certify by indorsement that all conditions of the law and of the contract under which it was ordered to be issued have been complied with, all bonds necessarily show of themselves whether such registration and certification have been made, and, in their absence, no bond can be enforced: *Anthony v. County of Jasper*, 101 U. S. 693. So, if the law provides that no debt shall be created by any city unless at the same time provision is made to assess and collect annually a sum sufficient to pay the interest thereon, and to create a sinking fund for the ultimate redemption of the bonds, an examination of the municipal records must show whether such provision has been made, and, if it has not, the bonds are void: *Citizens' Bank v. Terrill*, 78 Tex. 450;

Rainsburgh Borough v. Fyan, 127 Pa. St. 74. A like result must follow when a state requires the proper municipal authorities to prepare a statement of the existing indebtedness of the municipality and the amount to be incurred, verified by oath, and filed with the clerk of a designated court before any bond shall be delivered, and bonds which are, notwithstanding, delivered without making and filing such statement: *Rainsburgh v. Fyan*, 127 Pa. St. 74. If a statute requires as a condition precedent to the issuing of bonds that the written assent of two-thirds of the resident taxpayers appearing upon the last assessment-roll shall be filed in the office of the county clerk, the enforcement of bonds may be defeated by proving that such assent was not filed, and, perhaps, in any proceeding for the enforcement of such bonds, the burden of proof upon this subject must be assumed by their holder: *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 461. Without entering further into details upon this subject, we are justified in stating the general rule to be, that a person subscribing for, or otherwise dealing in, municipal bonds is conclusively presumed to have notice of the existence or nonexistence of facts appearing upon the public records of the municipality, and constituting part of the history of the proceedings taken to authorize their issuance, and also, at least, of so much of the history thus disclosed as reveals the purpose of the bonds and the amount which has been disposed of: *Bissell v. Kankakee*, 64 Ill. 249; 16 Am. Rep. 554; *Clark v. Des Moines*, 19 Iowa, 201; 87 Am. Dec. 423; *Backman v. Charleston*, 42 N. H. 125. Exceptions to this rule may arise when the statutory or other law controlling the bonds in question has expressly or impliedly made the recitals in the bonds, or the mere fact of their issuing, conclusive evidence in favor of bona fide holders thereof, either of some or all the necessary conditions precedent, or has in some other mode exonerated the holder of the bonds from the duty of inspecting the public records containing their history. Dealers in bonds are not required to examine all the public records, or, in other words, after finding there the existence of facts sufficient to support the bonds, they need not inquire further to ascertain whether something has not occurred on account of which the bonds may be impeached or their meaning varied. Therefore, they are not chargeable with knowledge of a contract entered into between the treasurer of a municipality and bankers, who agreed to offer, and did offer, the bonds for public subscription, and procured them to be subscribed for, under a condition not contained in the bonds that a specified proportion of them might be redeemed annually. In so deciding the court said: "Any purchaser of the bonds in question, if he examined the records of the city, would see that the city treasurer had full authority to issue the bonds in the form in which they were issued. We do not think he was bound, in the exercise of reasonable diligence, to go farther and look for an independent private agreement, which is unusual and which he had no reason to suppose exists. The fact that such agreement exists and is entered on the records of the committee on finance cannot justly be held to be constructive notice to him": *Suffolk Sav. Bank v. Boston*, 149 Mass. 364.

Protection by Public Records.—If a bondholder may be charged with notice of matter appearing upon the public records or upon the bonds themselves, he may also, in many instances, obtain protection from those records and from the recitals of the bonds. This must be true in

so far as the records are made by officers authorized to make them and to enter therein the history of the facts preceding the issue of the bonds. A municipality is, therefore, estopped from disputing as against bona fide holders of its bonds, the truth of facts stated in those public records and material to the issuing of such bonds: *Harter v. Kernochan*, 103 U. S. 562; *Louisville v. Savings Bank*, 104 U. S. 469; *Jefferson County v. Lewis*, 20 Fla. 980. A bondholder may also rely upon the failure of the record to disclose facts on account of which bonds are subject to attack. Thus, if an examination of the record discloses circumstances and conditions justifying and authorizing the issuing of the bonds, they cannot be impeached in the hands of a bona fide holder because of other matters not disclosed by such record, and which, if existing, ought to have been stated therein: *State v. Fayette County Commrs.*, 37 Ohio St. 526; *Lexington v. Butler*, 14 Wall. 282, 296; *De Voss v. Richmond*, 18 Gratt. 338; 98 Am. Dec. 648.

The Effect of Recitals in Bonds necessarily depends on the authority to make such recitals, for, if authorized, they may undoubtedly be treated as part of the municipal records, the truth of which it is estopped from disputing to the prejudice of bona fide holders of its bonds. "Purchasers of such securities have the right to rely upon all facts asserted or appearing upon the face of the bonds, made by any person or body authorized by law to pass upon or determine the facts"; and these facts so appearing, it is not material that they do not otherwise appear upon the records of the municipality." "It matters not, therefore, that the record kept by the board did not show the order of the board to execute the bonds. The title of a bona fide holder of a bond cannot be defeated by the neglect to enter the order in cases where the face of the bond upon which he has a right to rely recites the fact that such order was made": *Gibbs v. Colfax School Dist.*, 88 Mich. 334; 26 Am. St. Rep. 295. Bonds which recite a compliance with the law or which, without direct recital, necessarily import such compliance, if issued by officers whose duty it was to ascertain whether such compliance had taken place, are, in general, binding upon the municipality, which will not be permitted, as against bona fide holders of its bonds, to contradict such direct or implied recital, either by proving that the purpose for which the bonds issued was different from that stated therein, or that conditions precedent, the existence of which they thus affirm, did not exist: *Guernsey v. Burlington*, 4 Dill. 372; *Third Nat. Bank v. Seneca Falls*, 15 Fed. Rep. 783; *Clay County v. Society for Savings*, 104 U. S. 579; *Ottawa v. National Bank*, 105 U. S. 342; *Hackett v. Ottawa*, 99 U. S. 86; *Mercer v. Hackett*, 1 Wall. 93; *Pendleton County v. Amy*, 13 Wall. 305; *Menasha v. Hazard*, 102 U. S. 81; *Commissioners of Knox County v. Aspinwall*, 21 How. 545; *Coloma v. Eaves*, 92 U. S. 491; *Walnut v. Wade*, 103 U. S. 683; *Commissioners v. Bolles*, 94 U. S. 104; *Bank of Rome v. Rome*, 19 N. Y. 20; 75 Am. Dec. 272; *Commissioners of Knox County v. Nichols*, 14 Ohio St. 260; *Humboldt Tp. v. Long*, 92 U. S. 642; *Davis v. Kendalville*, 5 Biss. 230; *Nicolag v. St. Clair County*, 3 Dill. 163; *Huidekoper v. Buchanan County*, 3 Dill. 175; *Pollard v. Pleasant Hill*, 3 Dill. 195; *Flag v. Palmyra*, 33 Mo. 440; *Chaffee County v. Porter*, 142 U. S. 355. The recitals of which we speak, and by virtue of which the holder of bonds was protected in the cases cited, were not always, nor usually, direct statements of any particular fact, but were generally assertions either that the bonds in which they

appeared were issued in conformity to some statute designated therein, or that all the conditions and acts required by that statute existed or had been performed.

Whether recitals in municipal bonds may be deprived of their protective force by contradictory statements in the public records of the municipality is a question upon which we think the adjudications have not been wholly consistent. In *Davis v. Kendalville*, 5 Biss. 280, where the bonds contained a recital sufficient to show that they had been properly issued, it was said: "A party is not presumed to have notice of everything which takes place before the issuing of bonds, and it is not enough to show that the proceedings of the city council were spread upon the records of the city. The averment ought to be that the plaintiff had actual knowledge of the matters which might constitute a defense." In *Humboldt Tp. v. Long*, 92 U. S. 642, *Marcy v. Township of Oswego*, 92 U. S. 637, it was held that bonds reciting a compliance with the statute could not be defeated by proof that the elections authorizing them were held within less than thirty days after the order calling them, nor that at the time of voting and issuing the bonds the taxable value of the property of the township was not an amount sufficient to authorize the voting and issuing of the whole series, though surely these were facts which an examination of the public records must have disclosed. In *Chaffee County v. Potter*, 142 U. S. 355, there was an express recital in the bonds that the limit of issue prescribed by the state constitution had not been passed. Had the bondholder seen the whole issue of the bonds, he must have known that statement to have been false, but there was nothing in any single bond to disclose this falsity, and there is no statement in the record of the case or in the opinion of the court from which any conclusion can be drawn as to what would have been revealed by an examination of the public records of the municipality had one been made respecting the aggregate indebtedness or the total amount of the bonds; and the municipality was held to be estopped from urging that the bond in question had been issued after it had incurred all the indebtedness which it was permitted to incur by the constitution of the state. In *Sutliff v. Lake County*, 147 U. S. 230, 235, however, it was shown that the officers of the county were required to publish and enter upon the public records semi-annual statements of the amount of its debts, and that the bonds, without containing any express recital of the amount of such debts, declared that all the provisions of the law had been fully complied with. It was, therefore, not necessary to overrule *Chaffee County v. Potter*, 142 U. S. 355, and the court stated that the case at bar did not fall within that case. The opinion of the court nevertheless contains this sentence, which may fairly imply that an express recital upon this subject in the bond may be overcome, even as against innocent purchasers, by a statement upon the public records of a fact which the law expressly requires to be there set forth. This sentence is as follows: "But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of everyone, there can be no implication that it was intended to leave that matter to be determined and concluded contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds." In *Nesbit v. Riverside etc. Dist.*, 144 U. S. 610, the defense presented was, that the constitution of the state forbade any municipality to become indebted beyond a specified percentage of the taxable

property therein, and that the bonds in question were in excess of the prohibited limit. They contained no direct recital upon this subject, but merely disclosed that they were issued under a designated statute and in conformity with a resolution of the board of trustees, and a copy of the statute referred to was printed on the back of each bond. It was held in this, as it has been held in other cases, that a holder of bonds "was certainly bound to take notice, not only of the statutory limitation of municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property." When a statute, as construed by the court, did not authorize a county to issue bonds until a year after its organization was completed, and it in fact issued them within a less time, reciting the act under which they were issued, and that all acts, conditions, and things required to be done precedent to, and in the issuing of, bonds, had been properly done in regular and due form, as required by law, it was held that, as the date of the organization of the county could easily have been ascertained, and, when ascertained, it would have appeared therefrom and from an inspection of the bonds that they were issued before the county had authority to issue them, they were necessarily void, and there could therefore be no bona fide holder or purchaser of them: *Coffin v. Kearney County*, 57 Fed. Rep. 137. Perhaps the following statement of the rule where there is a conflict between the recitals of the bonds and the facts disclosed by the public records will not do violence to any of the adjudications upon the subject. Such recitals are adequate for the protection of innocent purchasers, and exonerate them from any examination of the public records, except when the law denies the officers the power to act under specific contingencies and requires statements to be made and entered upon some public record, or otherwise refers to a record, from an inspection of which a bondholder must receive notice that the contingency on which the bond cannot be issued has arisen. The requirement of an inspection of the records of a municipality or of the state doubtless is a very serious impairment of the negotiable quality of municipal obligations, because they are necessarily offered for sale and sold at points remote from such records, and where their examination is not possible, and copies of them cannot be obtained without very considerable delay and expense. On the other hand, to deny effect to such records and to permit municipal bonds, by recitals, express or implied, to make statements conclusively binding on the municipality would be to enable its agents to evade statutory and constitutional prohibitions, and involve their principal in obligations against which it had been protected by the higher law as represented in municipal charters, in general laws, and in constitutional restrictions.

Recitals and Statements Which do not Protect.—We have already suggested that before an entry in the public records or a recital in a bond, whether express or implied, can be conclusive evidence against a municipality, it must appear that the entry or recital was made by some officer, board, or tribunal authorized to make it. To this limitation upon the general rule we think there is no question, but there may be many cases in which different courts would draw different conclusions as to whether the person making the entry or statement was authorized to make it, and his authority may depend on whether the law has made him the accredited historian of the acts, the existence of which

he has affirmed by his entry on the public records, or whether he is vested with authority to determine the questions which, by his recital in the bonds, he has professed to decide. One exception maintained in the preceding paragraph relates to those cases in which, by an examination of some public record which the law requires to be kept, every person could ascertain for himself the truth or falsity of the fact recited, and it was there shown that the officers of the municipality were not deemed to have power to make recitals contradictory to those recorded, nor to estop the municipality thereby. Hence, where the board of supervisors of a town were forbidden to issue bonds unless upon the written assent of two thirds of the resident taxpayers of the town as appearing on the next preceding assessment-roll of such town, it was held that the assent of such taxpayers was indispensable, though the statute further provided that with the assent of such taxpayers should be filed the affidavit of the supervisors, or of any two of them, to the effect that the persons whose written assents were thereto attached and filed constituted two-thirds of the resident taxpayers of the town appearing on such assessment-roll, and such verified statement was in fact filed in the proper office: *Starin v. Genoa*, 23 N. Y. 444; *Gould v. Sterling*, 23 N. Y. 439.

These decisions are very extreme in character, and do not meet our approval, nor do we think them reconcilable with the opinion of the court in the later case of *Alvord v. Bank of Syracuse* 98 N. Y. 608. We therefore cite them only in support of the rule that, unless the courts consider that the person making the recital or the statement was empowered to do so, it cannot be relied upon. Indeed, in some of these decisions, the declaration is made that officers, by assuming the existence of conditions precedent, can never dispense with them. This we concede to be true, if the statute has not imposed upon the officer or board affirming the existence of a condition precedent the duty of inquiring and determining, and of expressly or impliedly affirming, its existence, and there are cases which go beyond this concession, and permit an innocent holder of bonds to be made a victim of declarations, recitals, and other acts of municipal officers made within the apparent scope of their authority, and upon which it is reasonable to presume the law intended the public to rely: *Veeder v. Lima*, 19 Wis. 280; *Treadwell v. Commissioners*, 11 Ohio St. 183. In the absence of a statement or recital made by the board or officer authorized to make it, it follows from the general rule that all persons must take notice of the law and of the powers of officers and agents whose authority is conferred by law that bonds must be declared void, even as against innocent holders, if any essential condition precedent does not exist: *Clark v. Des Moines*, 19 Iowa, 201; 87 Am. Dec. 423; *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562. It is clear that a recital by an officer not authorized to make any recital at all or by one who, although authorized to make some statement, is not authorized to make the one in question, cannot operate to the protection of any person, and that the same consequence must follow from any misstatement of the law made by him, because the law is presumed to be known by all men: *Eagle v. Kohn*, 84 Ill. 292; *German Sav. Bank v. Franklin County*, 128 U. S. 526; *Citizens' etc. Assn. v. Perry County*, 156 U. S. 692; *Gaddis v. Richland County*, 92 Ill. 119; *Lippincott v. Pans*, 92 Ill. 24; *Spitzer v. Blanchard*, 82 Mich. 234; *Dixon v. Field*, 111 U. S. 83; *Davies County v. Dickenson*, 117 U. S. 657.

Even though an officer is authorized to make some statement or recital, his language must be closely scrutinized to see whether what he in fact says amounts to such an affirmation as will protect a bondholder. This is especially true when the statute contains some prohibition, as where it declares that bonds shall not issue except upon some specified contingency. To exclude a defense based upon the nonexistence of such contingency, the recital ought, at least, to clearly affirm its existence. Hence, a statement in each of an issue of bonds that the amount of the bond is part of a subscription to the stock of a railway authorized by certain statutes, naming them, cannot be relied upon as an affirmation that the bonds have been authorized by an election at which two-thirds of the qualified electors of the municipality voted in favor of them: *Carroll County v. Smith*, 111 U. S. 556; and a statement in a bond that it is executed and issued to meet current expenses of the county in case of a deficit in the county funds cannot be relied upon as an affirmation that such deficit has already arisen: *Lewis v. Comanche County*, 35 Fed. Rep. 343.

Conditions Precedent—General Tests.—As heretofore suggested, it may often be difficult to determine what is a condition precedent, or, in other words, to reach a correct conclusion as to whether some act or omission which ought not to have occurred necessarily negatives the authority to issue the bonds in question. It is clear, however, that if the statute by virtue of which the bonds were issued declares that they shall not be binding unless certain conditions precedent have been complied with (*Citizens' Sav. etc. Assn. v. Perry County*, 156 U. S. 692), or that they shall be issued only after a certain step has been taken, or contains a prohibition against the issuing of bonds except in specified circumstances, then every contingency which has thus been specified is a condition precedent. In all of such cases, there is a direct expression of the legislative will or a necessary implication that the matter or act for which the law has stipulated is not desirable merely, but is absolutely indispensable. There are many other instances in which, though the law speaks with less emphasis, it has undoubtedly created conditions precedent without which no bonds can be valid, except, indeed, where it has given authority to some officer or board to make inquiries and determine the existence of a condition, and has, in effect, estopped the municipality from disputing the determination.

Preliminary Petitions.—Very often the initial proceeding looking to the authorization of an issue of bonds is some petition which is required to be presented to a designated person, officer, or tribunal, and to be signed by a specified number or proportion of the taxpayers or other persons assumed to be interested in the object which is sought to be promoted by the issuing of the bonds, or whose property may be subjected to taxation for the purpose of discharging the obligations which may be imposed by them. If by an inspection of some public record, persons about to subscribe for, or otherwise deal in, bonds proposed to be issued can ascertain whether the petition is signed by the requisite number of persons, there is no particular hardship in requiring them to satisfy themselves upon the subject at the peril of losing the amount of their investment if they do not make proper inquiry, or err in the conclusions they draw from it. But in many cases it is not possible to test the allegations of the petition by any public record, and the purchaser must accept the bonds at the risk of having such allegations disproved in any subsequent litigation, or, on the other hand, the officers to whom the

petition is presented and who act upon it must be regarded as invested with authority to determine whether it is adequately signed. Of course, there is no doubt that the legislature may expressly confer that authority on such officers and make the fact that upon their receiving a petition purporting to be properly signed they proceeded to issue the bonds conclusive evidence upon the subject, and preclude any further contest on the part of the municipality, especially against bona fide holders of its bonds; but there is much doubt as to what language should be regarded as conferring this power, and there have been decisions in which innocent bondholders have been compelled to suffer because of the determination against them of an issue of fact respecting the signature to the petition. A statute of California provided that whenever the owners of a majority of the frontage of property described in such statute as such owners are, or shall be, named in the last preceding assessment-roll for state, city, and county taxes, shall petition the mayor of the city in writing for the opening of an avenue, the board of public works shall proceed to organize by the election of a president, and after such organization, that board and other officials were required to take proceedings for the widening of the avenue, for the assessment of damages, and for the issuing of bonds for their payment. A petition was presented which, on its face, purported to be signed by the necessary majority, and such proceedings were afterward taken as resulted in the issuing of bonds and their sale to innocent purchasers. In litigation arising out of this proceeding, the defendants were permitted to prove, and did prove, that a considerable part of the frontage was signed for by persons who were, or purported to be, executors, administrators, or agents of the owners, and to whom, therefore, the property was not assessed upon the last assessment-roll, and another portion was signed for by persons whose names were not on such roll. Still other parts of the property were owned by cotenants, and were not signed for by all of them whose names appeared upon the roll. Part of the property also belonged to a corporation, and though its name appeared to be signed to the petition by its president and secretary, it developed at the trial that they had no authority from the corporation to affix its signature to such petitions. After subtracting the frontage thus improperly signed, the remainder did not constitute a majority of the frontage of the lands described in the act. It was insisted in various arguments of the case that, as this petition was directed to the mayor, and as certain other officers were thereupon authorized to proceed, if it were signed by the requisite number of persons, the fact that they did so proceed amounted to a determination by a quasi judicial tribunal, upon which the bondholders might rely in support of their bonds. But all the courts to which the question was presented uniformly decided that such was not the case: *Mulligan v. Smith*, 59 Cal. 206; *Kahn v. Supervisors*, 79 Cal. 388; *Liebman v. San Francisco*, 11 Saw. 147. In so far as these decisions held that it was the duty of the bondholders to ascertain from an inspection of the assessment-rolls referred to in the act whether the persons purporting to sign the petition were the owners, as represented upon such roll, of a majority of the frontage of the property described in the district, they are in harmony with other decisions referred to in preceding paragraphs of this note. There were, nevertheless, matters of fact in connection with the petition which could not be determined either from an inspection of it or of the assessment-roll or of both, such

as, whether the signatures to the petition were genuine, or, when they purported to be affixed by agents, whether such agents were duly authorized, and perhaps, upon these issues, it would have been no strained construction of the statute to have held that the duty of inquiry was upon the board or person to whom the petition was presented, and who, if it were signed by a majority of the owners in frontage of the property, was required to institute and carry out the further proceedings contemplated by the statute. There are cases, however, holding that though some officer is authorized to determine this question, his determination must be express, rather than implied. Thus in *Rich v. Mentz*, 19 Fed. Rep. 725, wherein it appeared that a petition was required to be presented to the county judge, and to show to his satisfaction that the petitioners were a majority of the taxpayers, not including those taxed for dogs and highway taxes only, and that it was his duty to proceed and take proof as to the allegations of the petition, and if he found that the required majority of taxpayers had consented, to so adjudge, it was held that the bonds were void because it did not expressly appear that he had made an adjudication upon the subject. In *Chicago etc. Ry. Co. v. Chase County Commrs.*, 43 Kan. 760, it appeared that the statute required as the initial proceeding that a petition should be presented to the county board, signed by two-fifths of the resident taxpayers of the county, asking such board to order an election for the purpose of determining whether certain bonds should be issued. It was held that if this petition was not in fact signed by the requisite number of taxpayers, it rendered the election and all subsequent proceedings absolutely void. Under a statute of the state of New York, it was provided that whenever a majority of the taxpayers of any municipality in the state, whose names appeared on the last preceding tax list or assessment-roll as owning or representing a majority of the taxable property within the corporate limits, should make application to the county judge of the county in which the corporation was situated by petition, verified by one of the petitioners, setting forth that they were such majority of the taxpayers, and that they desired that the municipality should create and issue bonds to an amount named in the petition, it should be the duty of the judge to order that a notice be forthwith published in some newspaper in the county, setting forth that on the day named therein he would proceed to take proof of the facts set forth in the petition as to the number of taxpayers shown therein and as to the amount of taxable property represented by them, and that it should be the duty of such judge, if it should appear satisfactorily to him that such petitioners represented a majority of the taxpayers as shown on such assessment-roll, to so adjudge and determine, and cause the same to be entered of record, and that such judgment and the record thereof should have the same force and effect as other judgments and records of courts of record in the state. The petition was presented to a judge of the county, and he gave notice of the time and place of hearing as prescribed in the statute, and, after a hearing, he adjudged and determined that the petitioners did represent a majority of the taxpayers of the town as shown by the last preceding list or assessment-roll, and caused such determination to be entered of record. It was afterward sought to avoid the bonds on the ground that some of the petitioners had affixed to their signatures a condition, so that the petition upon their part was conditional, and it was claimed that their signatures should therefore

be disregarded, and that, if so disregarded, the remaining signatures to the petition were not sufficient to comply with the directions of the statute. The court dissenting from a determination made by the state court upon the subject in *Craig v. Andes*, 93 N. Y. 405, was of the opinion that the annexing of the condition was not material, but, whether this were true or not, the adjudication made by the county judge was conclusive in favor of the bondholders: *Andes v. Ely*, 158 U. S. 312. This case was unusually free from doubt, because it was based upon a statute which disclosed a clear delegation of authority to the county, judge to inquire, and to conclusively determine, whether or not the petition had been sufficiently signed, and it would have been very strange, indeed, had any court held that his decision could be overthrown by a collateral attack.

In our judgment, the power to make a determination of this character, when not expressly conferred, may be implied from the nature of the duties delegated to a board or officer. With respect to judgments of courts of limited jurisdiction, as well as with respect to determinations of persons and tribunals who have, strictly speaking, no judicial functions, but who are, nevertheless, called upon to make determinations of facts, the general rule is, that when any of such persons or tribunals is required to determine some fact upon which some judgment or action is to be based, then the determination of the fact is judicial, and has the like force as if such determination had been imposed as a duty on the judiciary: *People v. Hager*, 52 Cal. 183; *Dean v. Davis*, 51 Cal. 406; *Chenery v. Inhabitants of Holden*, 16 Gray, 125; *Howe v. Newbegen*, 34 Me. 15; *German Reformed Church v. Seibert*, 3 Pa. St. 282; *Black and White Smith's Soc. v. Vandyke*, 2 Whart. 309; 30 Am. Dec. 263. "When, in special proceedings in courts, or before officers of limited jurisdiction, they are required to ascertain a particular fact, or to appoint persons to act in such proceedings having particular qualifications, or occupying some peculiar relations to the parties or subject matter, such acts, when done, are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose; and, if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be": *Porter v. Purdy*, 29 N. Y. 110; 86 Am. Dec. 283. We believe this principle to be applicable not only to petitions of the character here under consideration, but also to various other proceedings where it is apparent that an examination respecting some matter of fact should be made by some officer or agent of the municipality before proceeding farther, and he has so proceeded, and there is no accessible public record tending to show that he had proceeded in the absence of facts upon which alone his subsequent proceedings could be authorized. This view is sustained by *Ricketts v. Spraker*, 77 Ind. 371, in which case improvements had been made, and bonds issued to raise moneys with which to pay therefor. A tax having been levied for the purpose of meeting bonds, its collection was sought to be enjoined by landowners who urged that the original petition was not, as the statute required, signed by a majority of the property owners. The representatives of the bondholders on their part replied that the petition, as presented to the commissioners, purported to be signed by the requisite number of landowners, and that the commissioners adjudged it to be so signed. The supreme court of the state said that this report "brought the case fully within the rule that

when an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its judgment therein cannot be collaterally assailed." The leading case upon this subject is that of *Commissioners v. Aspinwall*, 21 How. 539. The facts in that case disclosed that it was the duty of the county commissioners to subscribe for a certain railroad, and to issue bonds "if a majority of the qualified voters at any annual election should vote for the same." The commissioners did issue bonds, and, in an action on coupons annexed thereto, the defense was interposed that no proper election had been held, and, in support of the right to make such defense, it was claimed that the county commissioners had not been given any authority to decide this question so as to preclude this defense. The court said: "This view would seem to be decisive against the authority on the part of the board to issue the bonds, were it not for the question that underlies it; and that is, Who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond, or coupon attached, or by the board of commissioners as a duty imposed upon it before making the subscription? The court is of opinion that the question belonged to this board. The act makes it the duty of the sheriff to give the notices of the election for the day mentioned, and then declares, if a majority of the votes given shall be in favor of the subscription, the county board shall subscribe the stock. The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose." The following cases are based upon, and in harmony with, the language just quoted: *Jefferson County v. Lewis*, 20 Fla. 980; *Gibbs v. School Dist.*, 88 Mich. 334; 26 Am. St. Rep. 295; *Coloma v. Eaves*, 92 U. S. 434; *Commissioners of Lawrence County v. Hall*, 70 Ind. 469; *Commissioners of Knox County v. Nichols*, 14 Ohio St. 260; *Bissell v. Jeffersonville*, 24 How. 287. The early cases in the state of New York we cannot regard as being otherwise than in conflict with the decisions last cited. They seemed to maintain that when a petition signed by a certain portion of the taxpayers was the initial proceeding in the issuing of bonds, that the defense could always be made that such petition, though appearing to be properly signed, was not in fact signed by the requisite number of taxpayers: *Oraig v. Andes*, 93 N. Y. 405; *Starlin v. Genoa*, 23 N. Y. 444; *Gould v. Sterling*, 23 N. Y. 282. The reasoning of a later case in the same state goes very far toward undermining the doctrine of the earlier cases. It is true that the action was in equity to cancel bonds, and complainant might well have been denied relief therefrom solely upon the ground of his inexcusable laches in making his application to a court of equity. The court did not, however, wholly rest its judgment upon such laches. On the contrary, it referred to the fact that the securities given had the characteristics of commercial paper, and therefore that the holders were brought within the rules of protection devised for the safety of innocent holders of such paper. The act under consideration provided that upon the application of twelve freeholders and residents of the town, the board of town officers should appoint a commissioner to subscribe in

the corporate name of the town to the capital stock of a specified railroad company, and should issue bonds for the payment thereof. It made the power to issue such bonds dependent upon the consent in writing of a majority of the taxpayers in numbers and amount appearing upon the assessment-roll of the town for a designated year, and that the consent of such taxpayers be proved or acknowledged in the same manner as signatures of conveyances of real estate, and be filed and recorded in the office of the county clerk of the county, and that the fact that a majority of the taxpayers have so consented shall be proved by the affidavit of one of the assessors of the town indorsed or annexed to such consent in writing, and filed and recorded with such consent in the office of the county clerk, and that the original consent and affidavit, or certified copies thereof, should be legal evidence of the facts contained therein, and should be admitted as such in any court of the state, and that whenever the consent in writing aforesaid shall have been filed in the proper county, the commissioners should make subscription, and issue the bonds. Consents and other papers were filed regular and sufficient upon their face, but it was insisted that as a matter of fact they were not signed by the requisite number of taxpayers, and therefore that there had been no authority to issue the bonds in question. The court said: "We have thus reached the question whether, as against the defendants, the needed fact of consent was established under the record introduced. Our construction of the act of 1868 requires us to so hold, and to assimilate the case to that of ordinary commercial paper, applying the decisions of our own and of other courts which have established the rule in such cases." . . . "Our construction of the exceptional statute in the present case places the bonds issued by the town of Salina upon the same footing as other municipal bonds in the decisions of the federal courts, and makes applicable the reasoning and authority of those decisions. Admitting that there may be innocent holders, and conceding their right to protection in that character, those decisions declare it a settled rule of law that, when a public functionary is clothed with the duty of deciding such a question as whether the necessary number of taxpayers have consented to the bonding, his determination, in the absence of fraud or collusion, is final": *Alvord v. Syracuse Band*, 98 N. Y. 609.

Elections as Conditions Precedent.—Another condition precedent to the issuing of municipal bonds which statutes often prescribe is, that the question of their issuing must be submitted to the electors of the municipality, and that a majority, or some other specified portion thereof, must vote in favor of such issuing. Whether an election has been held or not is a matter which bondholders can ascertain with ease and certainty, and there is no impropriety or hardship in adjudging that when an election is required by a statute it is a condition precedent, and that bonds issued without holding it are void, unless some officer has been given authority to determine whether an election has been held, and has expressly or impliedly made such determination, and bonds have been issued and purchased in reliance upon it: *Lewis v. County of Bourbon*, 12 Kan. 186; *Missouri River etc. Ry. Co. v. County of Miami*, 12 Kan. 230; *Steinles v. Franklin County*, 48 Mo. 167; 8 Am. Rep. 87; *Colburn v. Chattanooga etc. Ry. Co.*, 94 Tenn. 43. Though the language appears on its face to be permissive merely, it will be construed as mandatory, and its declaration that the question may be submitted to the voters will be held to create a condition precedent, in the

absence of which no authority can exist for the issuing of the bonds: *Leavenworth etc. Ry. v. Platte County*, 42 Mo. 171. The requirement of an election necessarily means a legal election, though it is not indispensable that everything which ought to be done in and about the holding of an election shall be done. With respect to elections, there may be various improper acts or omissions which will be treated as irregularities, and not as rendering the election void: *State v. Kiowa County*, 39 Kan. 657; 7 Am. St. Rep. 569; especially when, notwithstanding their existence, it is clear that the question has been fairly submitted to, and understandingly voted upon by, the electors who chose to participate therein.

Election Must be Authorized and Called.—One of the Essentials of a Valid Election is, that it shall be called by some competent authority, or, at least, that it does not take place voluntarily, without any existing law to authorize it, for, if it be held without authority of law, it is, in legal effect, no election: *Barnes v. Lacon*, 84 Ill. 461, nor, in the absence of a law authorizing it, can an election acquire any force from the fact that it was called by, and held under, the supervision of some municipal officials who believed they were authorized to call and to hold it: *State v. Babcock*, 23 Neb. 802. If the law authorizing an election does not fix the time and place of holding it, it must generally be called by functionaries designated by law, and an election called by any other person or authority is void, and therefore, where the statute imposes the duty of calling an election upon the president and trustees of a municipality, the town clerk cannot act without their authority, and, if he presumes to do so, his acts and the consequent resulting election are invalid: *Jacksonville etc. Ry. Co. v. Town of Verden*, 104 Ill. 339. It was held that an election called by the county clerk when it should have been called by the board of supervisors was a nullity, and could not support bonds issued in pursuance of it: *Marshall County v. Cook*, 38 Ill. 44; 87 Am. Dec. 282. Where, however, there is authority of law for the calling of an election, and certain municipal officers purporting to act thereunder issue a call for such election, which is acquiesced in, not only by holding an election thereunder, but by declaring the result, and issuing bonds to bona fide purchasers, it seems unreasonable to require them to determine whether the persons so acting were officers de jure or de facto only, and whether, if either, the acts which they did fall within the scope of their official duties: *Supervisors v. Schenck*, 5 Wall. 773. Though the statute seems to require the order for the calling of an election to be by an ordinance of the municipality, a resolution of the city council may doubtless accomplish all the purposes of an ordinance, and, if acted upon, may support an election: *Alma v. Guaranty Sav. Bank*, 60 Fed. Rep. 203.

Notice of Election.—When it has been determined by some competent authority that an election is to be held, and the time and place thereof are not fixed by any statute of which the voters must take notice, it is proper that they should be informed of the proposed election by some published notice thereof. Such a notice is generally required by the statute, which further, in addition to exacting a specification of the time and place of the election, exacts a statement of its object sufficient to enable the voters to intelligently deliberate and act thereon. The notice given must in all essential particulars comply with the statute, and the contents of the notice and the manner of submitting the question

to the electors must not be such as to embarrass them in the expression of their will.) Thus it is not proper, under a statute authorizing the submission to the people of the question of making a subscription to a railway company, to submit to them at the same time two propositions, for the making of a separate subscription to two different corporations, because such a submission does not give the voters any opportunity to vote separately upon each question: *Supervisors of Fulton County v. Mississippi etc. Ry. Co.* 21 Ill. 337, 373; *Peoria etc. Ry. Co. v. County of Tazewell*, 22 Ill. 147. So it is not proper to make a submission in the alternative, as, for instance, where the commissioners of a county submit to the voters the question, Shall bonds be issued to the L. & L. Ry. Co. or to the B. V. & N. Co., for fifty-three thousand dollars: *State v. Roggen*, 22 Neb. 118; *Jones v. Hurlburt*, 13 Neb. 125. If the statute authorizes the submission to the voters of a county of the question whether the board of county commissioners shall be authorized to subscribe to the capital stock of a railway corporation, the submission to them of the question merely whether the subscription shall be made to aid in the construction of a railway, designating its terminus and general course, but without naming the corporation to which the subscription shall be made, is not within the scope of the statute, and an affirmative vote thereon gives no power to issue the bonds of the county to any corporation whatever: *Missouri River etc. Co. v. County of Miami*, 12 Kan. 230; *Lewis v. County of Bourbon*, 12 Kan. 286.

Where There is an Entire Omission to Give Notice of an Election, it is for that reason void: *State v. School Dist.*, 10 Neb. 544. There are decisions which seem to conflict with this view, and to hold that the omission to give notice of an election is an irregularity merely: *Greeley v. Jacksonville*, 17 Fla. 174. They are not defensible upon principle, except, as we have already intimated, when the statute has expressly or impliedly given some board or officer authority to determine whether this condition of the statute has been complied with, and he has expressly or by necessary implication determined in favor of such compliance, and there have been subscriptions for, or purchases of, the bonds in reliance upon such determination.

Substantial Elements of the Notice.—There ought not only to be a notice, but the statute should be substantially complied with by the stating in the notice the facts which the statute has required to be made known to the voters. If the statute commands the notice for calling an election to state the purpose for which the indebtedness is to be incurred, the number and character of the bonds to be issued, and the rate of interest to be paid, the issuing of bonds bearing interest at the rate of four per cent per annum, payable semi-annually, is not authorized under a notice of election specifying the rate of interest to be four per cent annually. It may be that if, under these circumstances, bonds were issued to bona fide holders, they would not be held void in their hands, but it is certain that if the question is raised prior to the negotiation of the bonds, the city must be denied the right to issue them: *Skinner v. Santa Rosa*, 107 Cal. 464.

The notice is generally required to specify the purpose to promote which the bonds are proposed to be issued. In designating this purpose, it is not essential to go into minute details. It is sufficient to state its general character, provided always there is nothing in the

statement tending to substantially mislead the voters: *People v. Countz*, 89 Cal. 15.)

Another essential requirement is the statement of the amount of the indebtedness to be created or the bonds to be issued. (This requirement seems to be of a substantial matter, and any omission, either in falsely stating the amount proposed, or in so stating it that the whole truth is not apparent, would seem to have the same effect as omitting the notice altogether. There has, indeed, been one decision declaring that the entire omission to state the amount of bonds to be issued, though such omission appeared from the public records, was an irregularity merely, and not sufficient to defeat the bonds in the hands of bona fide holders, if we may assume that there can be such holders when a defect of this character clearly appears from an inspection of accessible public documents relating to the bond issue: *State v. Saline County Court*, 48 Mo. 390; 8 Am. Rep. 108. There is no doubt that an omission of this character constitutes a sufficient answer to an application to compel the issuing of bonds: *People v. Baker*, 83 Cal. 149; *State v. Salinas County*, 45 Mo. 242; and we think it is equally an answer to any proceedings for their enforcement after issuing: *Mercer County v. Pittsburgh etc. Ry.*, 27 Pa. St. 389; unless circumstances subsequently occurring estop the municipality from interposing this defense.

The statute may also require the notice to state the amount of the tax levy necessary to meet the interest and the proportion of principal which will annually become due on the bonds. If so, a notice disclosing the whole amount of bonds to be issued, the rate of interest which they will bear, and the proportion of them which must be redeemed from year to year is a substantial compliance with the statute, because the sum which must annually be provided to meet these liabilities can be ascertained as a matter of calculation from the facts stated: *San Luis Obispo v. Haskin*, 91 Cal. 549.

Officers of Election.—That an election was presided over by one officer when it should have been presided over by another was held in Illinois to annul it, and to leave the bonds issued pursuant to the authority supposed to be conferred by it without any support whatever, though they had come into the hands of bona fide purchasers: *Lippincott v. Pana*, 92 Ill. 24; but when the same question arising upon the same issue of bonds was subsequently presented to the supreme court of the United States, it refused to be bound by this decision, and enforced the bonds in the hands of bona fide purchasers: *Pana v. Bowler*, 107 U. S. 529. There can be no doubt that the judgment of the federal court upon this subject was equitable, and we believe that there is little doubt that it was justified both by principle and by authority: *Fidelity Trust etc. Co. v. Morganfield*, 96 Ky. 563; *Trustees v. Garvey*, 80 Ky. 159.

An Irregularity in Canvassing the Votes on the second, instead of the third, day after the election is also one not at all likely to have prejudiced any voter, and therefore it cannot affect the validity of the bonds: *Claybrook v. Rockingham County Commrs.*, 114 N. C. 453.

Majority of Votes Cast is Sufficient.—In determining whether the proposition to issue bonds has been carried or not, it is generally proper to take into consideration only those persons who have taken pains to vote upon the question. It has, indeed, in some instances been held that such a proposition was not carried unless a majority of all persons entitled to vote thereon have voted in favor of it: *Duke v. Brown*, 96 N. C.

127; *Markham v. Manning*, 96 N. C. 132; *Hawkins v. Carroll County*, 50 Miss. 735. This is, however, an unreasonable ruling, unless the statute requires all the voters to be considered without respect to whether they chose to vote or not. The general rule upon this subject, as we understand it, is, that persons who do not vote must be deemed to be indifferent as to the result, and to leave it to the determination of those who feel sufficient interest to express their will, and therefore, if a majority of those voting cast their ballots in favor of the issuing of the bonds, the proposition to issue them must be declared carried: *Madison County v. Priestly*, 42 Fed. Rep. 817; *Carroll County v. Smith*, 111 U. S. 556; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *County of Cass v. Johnston*, 95 U. S. 369; *People v. Warfield*, 20 Ill. 159; *Taylor v. Taylor*, 10 Minn. 107; *contra*, see *State v. Wenklemer*, 35 Mo. 103.

Elections—Recitals Precluding Denial of.—A municipality may be precluded from denying that its bonds were authorized at a legal election in the same manner that it may be precluded from denying that a proper and sufficiently signed petition was presented as an initial proceeding for authorizing a bond issued, to wit, by a determination, express or implied, of some officer or board empowered to decide the question. It has, indeed, been contended that the holding of an election was a condition precedent to the authority of such officer or board to act, and that proof that no election was held, or that it was unauthorized, left him or it without any power to make any finding upon this subject, whether express or implied, and therefore that an express statement in a bond that it was authorized by vote of the majority of the voters at a general election held for that purpose in pursuance of law may be contradicted to the prejudice of bondholders who made their investment in reliance upon it: *Williams v. Roberts*, 88 Ill. 11; *Lippincott v. Pana*, 92 Ill. 24; *Board of Education v. Taft*, 7 Ill. App. 571. The mere statement in a bond that it is issued pursuant to law does not necessarily affirm the existence of any matter of fact, and therefore does not preclude a municipality from proving that an election was a condition precedent to the authority to issue any bond on its behalf, and that such election was not held, or, if held, was unauthorized: *Katzenberger v. Aberdeen*, 121 U. S. 172. If, however, a bond contains an express statement with reference to the fact, and an unequivocal affirmance that an election was held, and that a majority of the voters voted in favor of issuing the bond, such statement is binding upon the municipality, if the officers issuing the bond were authorized to make any statement upon the subject, and that it is not necessary that such power be expressly conferred. It is sufficient that the statute under which the bonds were issued appears not only to provide for the election, but also for means by which it shall be determined before the subscription is made or the bonds issued whether or not they have been voted for at such election, and the construction of the statute as meaning that this question shall be left open, to be decided for the first time after the bonds have been issued and paid for, and the equities of bona fide holders have attached to them, is unreasonable. "Such an interpretation ought not to be given to a statute, if it can reasonably be avoided"; *Coloma v. Eaves*, 92 U. S. 484; *County of Warren v. Marcy*, 97 U. S. 96.

Ordinance or Order Directing Bond Issue.—When the issue of bonds is not dependent upon some petition or vote of taxpayers or others, and is

not required by some statute, it is commonly dependent upon the action of the legislative body of the municipality directing such issue, and sometimes the statute, while it leaves in such body the discretion to issue such bonds, requires it to do some act manifesting its assent in some designated mode, or to take some proceeding looking to the ultimate payment of the bonds, and these requirements, on the part of the municipality or its legislative body, may be conditions precedent, the absence of which is fatal to the bonds, except in those cases in which, for some reason, the municipality is estopped from denying their validity. The action of the municipal body must be expressed in some competent form, and if it is exercised in an ordinance, and the statute provides that no ordinance shall become operative until it has been published for the time and in the manner prescribed in the statute, bonds issued without the publication of the ordinance purporting to authorize them are, in effect, issued in the absence of any law to support them, and are therefore void: *National Bank of Commerce v. Granada*, 48 Fed. Rep. 278.

Omission to Provide Means of Payment.—A very common provision upon this subject is, that the resolution or ordinance authorizing the issuance of bonds shall provide for the levy and collection of taxes sufficient to discharge the interest as it falls due, and to pay some designated portion of the principal, either annually or at other stated periods. Where this statutory provision exists, bonds issued without complying with it have been held to be void: *Quaker City Nat. Bank v. Nolan County*, 59 Fed. Rep. 660; *Knox v. Baton Rouge*, 36 La. Ann. 427; *Blenham v. Parish of Carroll*, 28 La. Ann. 343.

The Purpose for Which Bonds may be Issued is usually designated in the statute, and there may be doubt whether it is a purpose in aid of which power can be conferred to issue bonds binding upon the municipality or its taxpayers. There is a difference of opinion between courts and judges as to the power which the legislature has over municipal corporations, and the extent which it may authorize or compel them to assume indebtedness, or pay out moneys in the promotion of an object which is not wholly of a public or municipal character, and is, therefore, partly, at least, of a private nature, and intended to be of special advantage to individuals or private corporations. We cannot here enter into an examination of this subject, and must content ourselves with referring the reader to note to *Hasbrouck v. Milwaukee*, 80 Am. Dec. 731-735; note to *Mt. Hope Cemetery v. Boston*, 35 Am. St. Rep. 529-540. If the purpose is an unauthorized one, either because the legislature has no power to authorize it, or because, though having such power, it has not exercised it, and such purpose appears on the face of the bond, or upon the public records, the bond is invalid: *Board of Education v. Blodgett*, 155 Ill. 441; 46 Am. St. Rep. 348; *Hewitt v. Board of Education*, 94 Ill. 528; *German-American Bank v. Brenham*, 35 Fed. Rep. 185; *Commercial Bank v. Iola*, 2 Dill. 352; *National Bank v. Iola*, 9 Kan. 689; *Brinkworth v. Grable*, 45 Neb. 647; *Osborne v. County of Adams*, 106 U. S. 181. After bonds are issued, a municipality may be estopped from questioning their purpose, as where the statute required the bond to state such purpose on its face, in which event the municipality is not at liberty to defeat them by proving that the purpose was other than that so stated: *Hackett v. Ottawa*, 99 U. S. 86; *Ottawa v. National*

Bank, 105 U. S. 342. Where such a statute is in force, but is not complied with, the bonds merely referring to certain ordinances, a purchaser is not protected if the purpose was illegal, though its illegality does not appear from an inspection of the ordinance. "It is certainly a reasonable requirement that the bonds issued shall express on their face the purpose for which they were issued. In any event, it was a requirement of which the purchaser was bound to take notice, and if it appears upon their face that they were issued for an illegal purpose, they would be void. If they were issued without any purpose appearing at all upon their face, the purchaser took the risk of their being issued for an illegal purpose, and if that proved to be the case, they are as void in his hands as if he had received them with express notice of their illegality. Ordinarily, the recital of the fact that the bonds were issued in pursuance of a certain ordinance would be notice that they were issued for a purpose specified in such ordinance, and the city would be estopped to show the fact to be otherwise. But where the statute requires such purpose to be stated upon the face of the bonds, it is no answer to say that the ordinance authorized them for a legal purpose, if, in fact, they were issued without consideration, and for a different purpose": *Barnett v. Denison*, 145 U. S. 136.

(The Form and contents of bonds are often prescribed by statute. Where such is not the case, it is sufficient that they express with substantial accuracy to the contract to be evidenced by them, and which has been authorized by statute, or by orders and proceedings taken in pursuance thereof. We apprehend that any departure from a form prescribed by statute is but a mere irregularity, not destructive of the rights or remedies of bona fide holders, unless it is in some matter of substance, and makes the bond as issued different from the bond as authorized. Thus, a mistake in reciting the statute under they were issued appearing upon the face of the bonds cannot affect their validity: Commissioners of Johnson County v. January, 94 U. S. 202; Atchison Board of Education v. De Kay, 148 U. S. 591.)

Dating.—Like most other written instruments, municipal bonds usually bear some date, and as they are rarely all issued at the same time, this date may not be as to all of them the true date of their delivery. If the statute requires them to bear the date of their issue, it is not violated by giving an entire issue the same date, though many of the bonds are not sold, and therefore do not become interest bearing obligations, until long afterward: *Yesler v. Seattle*, 1 Wash. 308. The date of bonds is not conclusive of their being issued at that time, even though they are in the hands of bona fide holders. Other facts appearing on the face of a bond may charge all persons acquiring title to it with notice that it was not truly dated, as where it is signed by an official who did not become such until several months after its date: *Anthony v. County of Jasper*, 101 U. S. 693. In another case, evidence was received, as against a bona fide holder, to prove that bonds were issued and signed subsequently to their date and after the officers whose names were subscribed had in fact gone out of office: *Coler v. Oleburne*, 131 U. S. 162. In this case, however, the municipal records, if examined, would have shown the true date of the signing and issuing of the bonds, and that the officers who signed them had before such signing ceased to be officers of the municipality.

The Promise Contained in a Bond may Differ from that which it was authorized to contain, in which event, the question will naturally be

presented as to whether the bond must be treated as void or merely as containing the promise which it ought to have contained. If the promise is merely in excess of what it should be, it appears to be void only as to such excess. Hence if it bears a larger rate of interest than the law permits, it is enforceable to the extent of the interest legally permissible: *Parkinson v. Parker*, 85 Pa. St. 313; *Lewis v. Clarendon*, 5 Dill. 329.

A Change in the Denomination of bonds was held to be no more than an irregularity. The statute required the ordinance authorizing the bond issue to state the number and character of the bonds to be issued, and such ordinance specified the number as fifty and the denomination of each to be five hundred dollars. After the question had been submitted to the voters, the board of trustees of the municipality determined to change, and did change, the issue to forty bonds of five hundred dollars each and twenty bonds of two hundred and fifty dollars each. Respecting this change the court said: "The amount of the bonds or the indebtedness to be incurred for the specified purpose was not changed. Those directions which are not of the essence of the thing to be done, and by a failure to obey which the rights of those interested will not be prejudiced, are not to be regarded as mandatory. The change did not affect the validity of the bonds, and, as no greater burden has been imposed upon the taxpayers, the appellant cannot complain": *Derby v. Modesto*, 104 Cal. 515. (If, however, a statute authorizes bonds to be issued of a certain denomination and bearing a certain rate of interest, a municipality is not authorized to issue bonds for a greater denomination and an increased interest, and such bonds if issued are void, and a court of equity will decree that they be delivered up for cancellation without first requiring the repayment of the moneys paid for them: *Milan Taxpayers v. Tennessee etc. Ry. Co.*, 11 Lea, 329.)

(The Time of Payment fixed by law or ordinance or by the proposition submitted to the electors cannot be varied by the officers issuing the bond, and if in the bonds as actually issued such time is varied, either by requiring payment at an earlier date, or by postponing it to a later date than that authorized, such bonds appear to be absolutely void: *Brenham v. German-American Bank*, 144 U. S. 173; *Norton v. Dyersburgh*, 127 U. S. 160; *Woodruff v. Okolona*, 57 Miss. 806; *Barnum v. Okolona*, 148 U. S. 393; *People's Bank v. Barnes County School Dist.*, 3 N. Dak. 496; *McMullen v. Ingham Circuit Judge*, 102 Mich. 608. There are, however, decisions treating the provisions of the statute respecting the time of payment of bonds as directory merely, and sustaining such bonds in the hands of bona fide holders though made payable at a time other than that sanctioned by the statute: *Singer Mfg. Co. v. Elizabeth*, 42 N. J. L. 249; *Township of Rock Creek v. Strong*, 96 U. S. 271.

The Place of Payment of municipal bonds, unless the statute otherwise provides, is the county treasury: *Friend v. Pittsburgh*, 131 Pa. St. 305; 17 Am. St. Rep. 811; *Skinker v. Butler County*, 112 Mo. 332; though there are decisions asserting that when authority is given to a municipality to issue bonds at an interest designated, and to be payable at not more than twenty years from their date, and containing no other limitation upon their form or contents, that it is within the power of the municipal authorities to give the bonds such form as will enable a loan to be made to the best advantage, and, to that end, to designate a

place of payment other than the county treasury, even though it be outside of the county: *Skinker v. Butler County*, 112 Mo. 332; *Maddox v. Graham*, 2 Met. (Ky.) 56, 80; *Evansville Railroad v. Evansville*, 15 Ind. 413. We are inclined to doubt the correctness of these decisions, but, even in those states in which it is established that no authority exists on the part of municipal officers to make bonds payable elsewhere than at the office of the municipal treasury, bonds containing a provision requiring their payment elsewhere are conceded to be valid, the part designating an improper place of payment being disregarded: *Mygatt v. Green Bay*, 1 Biss. 292; *Sherlock v. Winnetka*, 68 Ill. 530; *Johnson v. Stark County*, 24 Ill. 75.

Signing.—The statutes usually provide what officers shall sign a bond on the part of the municipality. We cannot here give space for the purpose of considering what is a sufficient signing within the provisions of these different statutes. The directions upon the subject appear, however, to be mandatory, and to the effect that, if a bond is directed to be signed by a particular officer, his signature is indispensable, and the municipality cannot authorize the bonds to be issued without such signature; and, further, if they are so issued, it is not precluded, even though the bonds have reached the hands of bona fide purchasers, from contesting their validity: *Bissell v. Spring Valley*, 110 U. S. 162; *Coler v. Oleburne*, 131 U. S. 162; *Anthony v. County of Jasper*, 101 U. S. 693; *State v. Roggen*, 22 Neb. 118. This rule probably does not require that the officer's signature be affixed with his own hand. His name may be signed for him by another in his immediate presence and by his direction: *Montgomery v. St. Mary's Township*, 43 Fed. Rep. 362.

Money in Which may be Made Payable.—Whether municipal bonds may be made payable in any particular kind of money is a question which can hardly be said to be settled at the present time. Under the statute of Mississippi authorizing the issuance of levee bonds, repayable in money, enacted at the time when gold was not in general use as money, it was decided that bonds made payable in gold coin were void: *Woodruff v. Mississippi*, 66 Miss. 298. On the other hand, in at least two instances in which municipalities were given authority to issue and sell negotiable bonds, it was held that this included the power to make such bonds payable in such money as the municipal authorities should determine to be most expedient, and, therefore, that a provision in such bonds, making them payable in gold coin of the United States of America of the present standard of weight and fineness, was sustainable: *Moore v. Walla Walla*, 60 Fed. Rep. 961; *Judson v. Bessemer*, 87 Ala. 240. Under a statute of California the board of trustees of a municipality submitted to its electors a proposal to issue bonds, payable in gold coin or lawful money of the United States, and, after the electors had voted in favor of issuing such bonds, an ordinance was passed changing them, so as to make them payable in gold coin of the United States of the present standard of weight and fineness. An application was made by a taxpayer to enjoin the issuing of these bonds, one ground of which application was, that the municipal council had no power to issue them. The attention of the court was called to the fact that the statute of the state, as originally enacted, authorized the issuing of bonds, payable "in gold coin of the present standard of weight and fineness," but that it had subsequently been amended, so as to authorize such bonds to be made payable "in gold coin or lawful money of the United States."

The opinion of the court was, that this last amendment was intended to restrict the power of the municipality, and, therefore, that the use of the words, "of the present standard of weight and fineness," was unauthorized: *Skinner v. Santa Rosa*, 107 Cal. 464.

Sealing.—The effect of the omission of corporate seals from contracts is treated in the note to *Green County v. Blodgett*, 50 Am. St. Rep. 150-158, and the opinion is there expressed that, except as to those contracts which, when executed by a private person, must be attested by his seal, corporations may contract without using their corporate seals. While we were there treating of private corporations, we believe the rule to be equally applicable to municipalities. The statute governing the execution and issuing of bonds may expressly require them to be executed under the corporate seal, or by certain specified officers under their hands and seals. It has been decided that a direction of this latter character was mandatory, or rather, that, as the power was statutory, it could be exercised only in the manner prescribed by statute, and, therefore, that bonds issued without the seals of certain commissioners were void: *Avery v. Springport*, 14 Blatchf. 272. This is giving too great an importance to a mere matter of form. The omission of a seal, whether of the corporation or of one of its officers, though its use is required by statute, will not be permitted to obstruct the enforcement of municipal bonds in the hands of bona fide holders thereof: *San Antonio v. Mehaffy*, 96 U. S. 312; *Draper v. Springport*, 104 U. S. 501; *Bernards v. Stebbins*, 109 U. S. 341.

Directions of the Statute Respecting the Time and Mode of Issuing municipal bonds are rarely regarded as mandatory, and a departure from them will not invalidate such bonds in the hands of bona fide holders, unless it is in a matter of substance, and had operated, or must be presumed to operate, to the prejudice of the municipality or its taxpayers: *Carriger v. Morristown*, 1 Lea, 243; *Cook v. Beatrice*, 32 Neb. 80; *Heard v. Calhoun School Dist.*, 45 Mo. App. 660; *Cherry Creek v. Becker*, 123 N. Y. 161. The premature organization of a sanitary board elected by the people of the district cannot invalidate its acts after the members thereof have received their commissions, and their acts thereafter as officers of such board in signing the bonds issued by it cannot be inquired into in a collateral proceeding brought by a taxpayer to test the validity of the organization of the district, the legality of the bonds, and the validity of a tax levied by the board upon property in the district: *Woodward v. Fruitvale Sanitary Dist.*, 99 Cal. 554. Under a statute providing for the erection in each county of a courthouse and jail, and that for this purpose the county courts might "issue bonds of their respective counties in such form, for such time, and in such sums as they may deem expedient," the county court entered an order that a certain number of bonds of a certain denomination each should be issued to a contractor, but did not prescribe their form or time of payment. Negotiable bonds having thereafter been issued, under the seal of the court, signed by the presiding judge and attested by the clerk, and fixing the interest and time of payment, they were held to be within the terms of the order, and valid: *Catron v. La Fayette County*, 106 Mo. 659.

If a statute providing that a township voting to aid a railway corporation shall, within sixty days after the question to aid is determined, issue its bonds for the amount so determined, the authority to issue such bonds

does not terminate at the end of sixty days, and bonds thereafter delivered are not for that reason void. "The word 'shall,' as used in the statute, undoubtedly gives the township officers the whole of the sixty days to get the bonds out, but it certainly does not imply that if they failed to do it voluntarily within the time, they cannot be compelled to do so afterward. And if they can be compelled to do so, it necessarily follows that they should do it voluntarily. We have not been referred to any decision of the courts of Michigan to the contrary, and, construing the statute for ourselves, we think that valid bonds may be issued after the time. This being so, the antedating does not invalidate the bonds": *Chickaming v. Carpenter*, 106 U. S. 663. The premature issuing of bonds does not invalidate them, if their issuing is not tainted with fraud or irregularity in the purpose of their issue. In such a case, it is clear that if the bonds prematurely issued were declared void, or directed to be delivered up for cancellation, it would be the duty of the municipality to issue others to take their place. Therefore, their enforcement will not be enjoined: *Thompson-Houston Electric Co. v. Newton*, 42 Fed. Rep. 723; nor can the prematurity of their issuing be made available in an action at law brought thereon by a bona fide holder: *First Nat. Bank v. Concord*, 50 Vt. 257.

Mere Variances in Describing the Payees of bonds or the corporation in whose favor they are issued are not material. Therefore, though the statute provides for the issuing of bonds payable to the president and directors of a corporation, bonds made payable to the corporation or bearer are valid. "The statutory requirement in this particular is only directory. The defect is one of form, and not of substance. The irregularity was committed by the servants of the county, and the county is estopped to take advantage of it": *Calhoun County v. Galbraith*, 99 U. S. 214. Under a vote of bonds to the Del Norte & Summit Wagon Road Company, a bond issued to the Del Norte and Summit Wagon Toll Road Company is valid, there being but one corporation, and its true name being that designated in the bonds: *Haag v. Rio Grande County Commrs.*, 34 Fed. Rep. 778.

Fraudulent or Unauthorized Delivery of Bonds.—Statutes very frequently provide that bonds shall be sold in a designated manner, or specify a minimum price therefor, or contain provisions to the effect that the bonds shall not be delivered except under specified conditions, and then the question may arise whether such bonds, appearing on their face to be executed by the persons and in the manner prescribed by law, can be avoided in the hands of innocent purchasers, because the statute has not been complied with, or their delivery had not been authorized at the time it took place. We think the answer to this question must be that such holders are not chargeable with, nor affected by, fraud or irregularities of this nature: *Sherlock v. Winnetka*, 68 Ill. 530; *Hunt v. Memphis Gaslight Company*, 95 Tenn. 136. It has, indeed, been held that the power to issue bonds was not conferred by a resolution of the municipal council authorizing its president and clerk to sign such bonds, and that "until authority was given by the council, the president had no more power to dispose of them than a stranger to the proceedings; and a disposition of them by the president would not confer upon the holder any greater right to enforce payment than though they were stolen from the village treasury": *Portsmouth Sav. Bank v. Ashley*, 21

Mich. 670; 30 Am. St. Rep. 511. Perhaps this case is sustainable upon the ground that an examination of the public records would have shown that no person or officer had been authorized to issue or deliver the bonds in question. If, however, the bonds get into the possession of a municipal agent who has authority to negotiate them, his fraudulent acts in so doing cannot constitute any defense in favor of the municipality against persons not chargeable with notice of them. This rule was applied when the corporation treasurer, charged with the duty of negotiating bonds, absconded with them, and fraudulently put them in circulation for his own benefit; *Copper v. Jersey City*, 44 N. J. L. 634. Sometimes the statute provides for some certification or registration of bonds, and makes this certification or registration the last act of their issuing: *Douglass v. Lincoln County*, 2 McCrary, 449. Where such is the case, a *bona fide* holder of them may rely upon it as conclusive evidence in his favor of the authority to issue them, and, as against it, the municipality cannot insist that they were fraudulently put in circulation, unless it can also charge the holder with notice of the fraud: *Cairo v. Zane*, 149 U. S. 122; *Lewis v. Barbour County*, 105 U. S. 739.

Application of Proceeds.—It follows from the principle just stated, to wit, that bondholders are not chargeable with frauds and irregularities of the municipal agents of which they have no notice, express or implied, that no misappropriation by such agents of the proceeds realized from a sale of municipal bonds, nor any wasting, embezzling, or other fraudulent or unauthorized use or disposition of moneys or other property received in consideration of such bonds, can impair their effect while in the hands of bona fide holders thereof: *Cummins v. Doon Dist. Tp.*, 42 Fed. Rep. 644; *Anderson v. Beal*, 113 U. S. 227; *Cairo v. Zane*, 149 U. S. 122.

Overissue.—The amount of bonds which a municipality may issue is often fixed by statute or by constitutional limitation, and, when that limit is reached, the power to issue terminates, and any further issuing is as ineffective to charge the municipality as if it had never had any power to issue bonds. The limitation upon the municipal authority may be found in statutes prescribing the amount of bonds which may be issued for some specific purpose, or in general statutory or constitutional prohibitions against indebtedness being created beyond a specified amount, or in excess of a designated percentage of the value of taxable property. The mode of imposing the prohibition is immaterial, provided it is by some law open to the inspection of all persons. They must take notice of such law, and also of the amount of municipal indebtedness, at least when such amount can be ascertained from any public record or registry. They must also satisfy themselves of the value of the taxable property, when it can be ascertained from the assessments or other public records. If bonds are issued to a greater amount than allowable by law, they will be sustained up to the amount so allowed, but beyond that they are void, whether in the hands of bona fide holders or not: *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442; *Sutro v. Rhodes*, 92 Cal. 117; *Saleno v. Neosho*, 127 Mo. 627; 48 Am. St. Rep. 653; *Smith v. Broderick*, 107 Cal. 644; 48 Am. St. Rep. 167; *First Nat. Bank v. District Tp.*, 86 Iowa, 330; 41 Am. St. Rep. 489; *Anderson v. Orient Fire Ins. Co.*, 88 Iowa, 579; *Brown v. Atchison*, 39 Kan. 37; 7 Am. St. Rep. 515; *Spitzer v. Blanchard*, 82 Mich. 234; *Finlayson v. Vaughn*, 54 Minn.

331; *State v. Babcock*, 20 Neb. 522; *Citizens' Bank v. Terrell*, 78 Tex. 450; *Nolan County v. State*, 83 Tex. 182; *De Mattos v. New Whatcom*, 4 Wash. 127; *Nesbit v. Riverside School Dist.*, 25 Fed. Rep. 635; *Francis v. Howard County*, 50 Fed. Rep. 44; *United States v. Oicero*, 50 Fed. Rep. 147; *Daviness County v. Dickinson*, 117 U. S. 657; *Doon Tp. v. Cummins*, 142 U. S. 366; *Nesbit v. Riverside Dist.*, 144 U. S. 610; *Sutliff v. Lake County Commrs.*, 147 U. S. 230; see note to *Beard v. Hopkinstown*, 44 Am. St. Rep. 229-243.

Estoppel Against Denying Validity of Bonds.—There are many cases which speak in general terms of an equitable estoppel arising against a municipality and its citizens and taxpayers, precluding them, as against bona fide holders, from denying the validity of its bonds. The use of the term "equitable estoppel" in controversies in which municipalities are parties is apt to be misleading, and to give the impression that they are subject to the law of estoppel to the same extent and in the same sense as are natural persons and private corporations. If a municipality or any of its citizens should resort to a suit in equity to enjoin or cancel municipal bonds, no doubt it or they would be subject to the general rule that, he who seeks equity should do equity, and, furthermore, that he should proceed with reasonable diligence. Thus, where bonds were valid on their face, and the preliminary proceedings were apparently regular, and the only alleged vice in them was that a petition which purported and appeared to be signed by a majority of the taxpayers was not in fact so signed, and the court was inclined to think that a fair construction of the statute was that the due signing of the petition was a proper subject for the determination of the municipal officers, and, therefore, could not be raised in a collateral proceeding as against bona fide holders of bonds; and it added: "When to this necessary construction of the act it is added that the plaintiffs are applying to a court of equity, where inexcusable laches is always a reason in its discretion for withholding its aid, after they have slept upon their rights for ten years, after failing to enjoin the issue of the bonds, after twenty-one interest coupons have been paid without a murmur or dissent, and after the proceeds, have been fairly expended upon the very road intended, and the expected benefits have been realized, it becomes very clear that the case is not one in which a court of equity should assert its extraordinary power to cancel the bonds issued by the town in the hands of innocent holders whom the statute professed and intended to sedulously protect": *Alvord v. Syracuse Bank*, 98 N. Y. 609. In another case in which an action had been brought by a property owner against municipal officials, to enjoin them from levying and collecting taxes to pay interest upon certain bonds, and also to obtain a judgment declaring such bonds to be void and taxes levied to provide for their payment not a lien upon the plaintiff's property, the court referred to the fact that the bonds in question had been issued and sold in 1873, for the purpose of realizing moneys with which to construct a county courthouse, and that the moneys had been used for such purpose, and that interest had been paid upon the bonds for some nine years prior to the commencement of the suit. The court said, that "an examination of the record convinces us that the plaintiff is in no condition to claim equitable relief"; and, further, that "it is a well-established rule in equity that if a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to

equitable relief. Under this rule, it was decided that an injunction should not be granted to restrain the payments of money illegally voted by a town, if the petitioners have been guilty of laches, and knowingly have permitted others to incur liability in good faith, relying upon such appropriation for reimbursement": *Commissioners of Morris County v. Hinchman*, 31 Kan. 729, 736. Doubtless many other cases may be found to support the view that a complainant in equity may be denied equitable relief against bondholders on the ground of laches or upon other equitable considerations. But even in suits in equity seeking relief from municipal bonds, the payment of one or more installments of interest does not establish such laches as to defeat the complainant, unless it appears that at the time of such payment the invalidity of the bonds was known to the larger portion of the taxpayers, so as to charge them with acquiescence and laches in not contesting instead of making payment: *Ashuelot Nat. Bank v. School Dist.*, 41 Fed. Rep. 514; *Ments v. Cook*, 108 N. Y. 504.

In many instances in which courts have spoken of municipalities as being estopped to resist the payment of bonds, they have meant only that recitals and statements had been made, either in such bonds or in public records upon which bondholders had a right to rely, under such circumstances that they must be deemed the statements and recitals of the municipalities in whose behalf they were made, and that such municipalities should not be permitted to dispute them: *Bonham v. Needles*, 103 U. S. 648; *Harter v. Kernochan*, 103 U. S. 562; *Borah v. Wilson*, 140 U. S. 47; *Providence v. Halsey*, 117 U. S. 336; *Nolan County v. State*, 83 Tex. 182; *Chaffee County v. Potter*, 142 U. S. 355; *Gibbs v. School Dist.*, 88 Mich. 334; 26 Am. St. Rep. 295. Other cases speaking of municipalities being precluded by equitable estoppel from resisting the enforcement of the bonds will, on examination, be found to be based upon the fact that in the issue of the bonds in question there were certain irregularities as to the mode of executing an existing power, but not such an absence of the power that the bonds were at any time void: *Eminence v. Grasser*, 81 Ky. 52; *Atchison v. De Kay*, 148 U. S. 591.

If a natural person or a private corporation should receive the proceeds of bonds purporting to be issued by him or it, or should otherwise knowingly receive an advantage from such issue, any defect in the issue or fraud in the procurement of the bonds would be waived, and the person or corporation would be bound to the same extent as if the bonds contained no vice at the time of their issuing or delivery. There are, indeed, cases which speak as though this rule might be generally applicable to municipalities. Thus it was said in *Trustees of Keithburgh v. Frick*, 34 Ill. 405: "Whether, then, the bonds were issued in and by virtue of the second section of the act of 1857 or of the seventeenth section, we think the corporation is estopped from now setting up any irregularity in their issue, inasmuch as they have repeatedly recognized their validity by paying them out, levying taxes, and paying the interest on them for a series of years." In the case of *Pendleton County v. Amy*, 13 Wall. 297, the county resisted the enforcement of the bonds on the ground that they were authorized to be issued only after the proposition for their issuing had been submitted to a popular vote, and it was insisted that such submission had not been made. The court said: "The county received in

exchange for the bonds a certificate of stock of the railway company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange, and assert against a purchaser of the bonds for value that though the legislature empowered it to make them, and put them upon the market upon certain conditions, they were issued in disregard of the conditions? We think they cannot, and therefore that the third plea cannot be sustained." Before using this language, however, the court had referred to the case of Commissioners of Knox County v. Aspinwall, 21 How. 539, and other cases which held, in effect, that officers who are authorized to act only on certain conditions should be presumed to be vested with power to determine whether such conditions had been complied with, and that it should further be conclusively presumed from their having acted upon the assumption of the existence of the conditions precedent that such conditions actually existed, and while the court mentioned considerations in the nature of an equitable estoppel, we think its decision was really intended to be founded upon the principle of the Aspinwall case to which we have already referred. Bonds are void in the hands of bona fide holders only when they were issued without authority. When they are so issued, they cannot be the obligations of the municipality, for the reason that it had, under the circumstances, no power to execute or deliver them. When there is an absence of such power we do not understand how it can be indirectly conferred through the operation of the doctrine of equitable estoppel, and we believe that doctrine can be applied in support of municipal bonds only in resistance of equitable proceedings to cancel or to enjoin their enforcement, or in those cases, whether at law or in equity, wherein the irregularity referred to is not one involving the power to execute the bonds in question: *Weismer v. Douglas*, 64 N. Y. 91; 21 Am. Rep. 586; *Sutliff v. Lake County*, 47 Fed. Rep. 106; *Post v. Pulaski County*, 49 Fed. Rep. 628; *Merrill v. Monticello*, 138 U. S. 673; *National Bank v. Granada*, 44 Fed. Rep. 262; *Aroma v. State Auditor*, 15 Fed. Rep. 843. In the case of *State v. Van Horn*, 7 Ohio St. 331, it was held that where the tax was resisted on the ground that the election authorizing the bond issue took place before the location of the road to promote which the bonds were issued, whereas it was claimed such election could not take place until after such location, the court held that the taxpayers, by permitting the issue of the bonds without protest and without taking any proceedings to enjoin them, and by afterward, for the period of three or four years, paying interest, had estopped themselves from making any contest to their legality. The court said: "They had an opportunity, before innocent third persons could be injured or committed to the acts of their public agents, to enjoin their proceedings, and protect themselves; they did not secure that protection; but now, when they have received all the fruits of the contracts of their agents from third persons who have acted upon their recognition of the authority of their agents, they ask the privilege of denying this recognition, and thus escape from their obligation. It is too late for them to do so, as against innocent third persons. They are concluded, not simply by the acts of their public agents, but by their own. It is true, that when public officers exceed the powers vested in them by general laws, their acts are no longer official, but void; and this principle would be applicable to the case before us, if the trustees

had derived their sole authority to make the contract under consideration from the law, without any interposition, sanction, or authority from the taxpayers of the township." It appears to us that this language legitimately supports the inference that the failure to enjoin bonds issued pursuant to an illegal and unauthorized election renders such election unnecessary. It is a very extreme, and we think altogether unreasonable, view, that the failure to object to the nonexistence of an election, or to its taking place under circumstances rendering it inoperative, may, by lapse of time, become equivalent in legal effect to a regular and valid election. This view, however, is fully confirmed by *Barrett v. County Court of Schnyler County*, 44 Mo. 197. One of the objections presented in resistance to an application for a writ of mandate to compel the levying of taxes to pay bonds, was that at the time of the subscription to the stock for which the bonds were issued was made, there had been no election held to ascertain the sense of the taxpayers of the county. It was said by the court that this objection was not pressed in the argument, and that it was admitted that the duly authorized agents of the municipality voted upon the stock subscribed for at the regular meetings of the corporation for more than twelve years after the bonds were issued. The court held that the issuing of the bonds was a ratification of the subscription warranting the purchaser of them in assuming that an election, if required by law, had been duly held, and that the conditions of the subscription had either been complied with or waived.

Ratification of Invalid Bonds.—Bonds, though originally void and unenforceable, may have been ratified by legislative authority, provided it is competent to produce that result. We have treated, in note to *Hastbrouck v. Milwaukee*, 80 Am. Dec. 731-735, of the power of the legislature to validate invalid contracts of, or to impose liability upon, municipal corporations, and the propositions there stated and the authorities there cited will be found as applicable to municipal bonds as to other municipal contracts. The general rule upon the subject is, that the legislature may compel municipal corporations to recognize and to pay debts not binding in strict law, and which, for technical reasons, could not be enforced in equity, but which, nevertheless, are just and equitable in their character and supported by moral obligation, but it cannot compel the payment of a claim which the municipality is not under a moral or legal obligation to pay: *Lycoming v. Union*, 16 Pa. St. 166; 53 Am. Dec. 575; *Beals v. Amador County*, 35 Cal. 625. If bonds have been issued, and the municipality has received the proceeds of them, but they are invalid because of some act or omission, and the legislature originally had power to authorize their issuing, notwithstanding such act or omission, it may, by subsequent legislation, validate them, and thus make them enforceable against the municipality and its citizens and taxpayers. It may, therefore, cure irregularities in the proceedings prior to the issuing of the bonds: *McMillen v. County Judge*, 6 Iowa, 391; *Outler v. Supervisors*, 56 Miss. 115; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; but it is not limited to irregularities merely. It may validate bonds issued without authority, or, in other words, bonds which the municipality had no power to issue at the time they were executed. Speaking of bonds issued by a county when, under the constitution and laws in force at the time, it had no power to issue them without express legislative authority, the court said: "Inasmuch as the only question of the original issue of these bonds

was want of legislative sanction for such issue, it would seem to follow necessarily that this express recognition of them operated as a confirmation, and healed any informality there may have been in the original issue, and that they are now valid obligations of the county": *Duke v. County of Williamsburgh*, 21 S. C. 414. Many other cases may be found in harmony with this. Some of the state constitutions adopted at a comparatively recent period contain limitations upon the legislative power in this respect, but, in the absence of such constitutional limitations, there is now little doubt of the authority of the legislature to ratify bonds issued by municipalities in all cases in which it might have authorized such issue under the same circumstances by precedent legislation: *Grenada County v. Brogden*, 112 U. S. 261; *Ritchie v. Franklin County*, 22 Wall. 67; *Knapp v. Grant*, 27 Wis. 147; *Basz v. Columbus*, 30 Ga. 845; *Campbell v. Kenosha*, 5 Wall. 194; *Beliot v. Morgan*, 7 Wall. 619; *New Orleans v. Clark*, 95 U. S. 644; *Thompson v. Perrine*, 103 U. S. 806; *Steines v. Franklin County*, 48 Mo. 167; 8 Am. Rep. 87; *Deyo v. Oteo County*, 37 Fed. Rep. 246. In Illinois the courts hold that the constitution of the state will not permit the legislature to validate void bonds or other contracts so as to impose a liability upon a municipality without its consent: *Choisser v. People*, 140 Ill. 21; *Gaddis v. Richland County*, 92 Ill. 119. Various state courts, without justifying their decision upon any direct constitutional limitation, have yet reached the conclusion that if bonds are void when issued, because there was no power to issue them, a municipality cannot be compelled by subsequent legislation to assume liability for them, and, therefore, that such bonds cannot be ratified except by the assent of the municipality: *Shawnee County v. Carter*, 2 Kan. 115; *Horton v. Thompson*, 71 N. Y. 513; *Hasbrouck v. Milwaukee*, 13 Wis. 38; 80 Am. Dec. 718; *State v. Tappan*, 29 Wis. 664; 9 Am. Rep. 622; *Post v. Pulaski County*, 49 Fed. Rep. 628. The legislature, where it possesses the power to validate or ratify bonds, may, instead of directly exercising that power, delegate its exercise to the municipal authorities, and, if so, their action within the authority thus delegated is binding on the municipality and its taxpayers, and may result in the validating of the bonds: *Hannibal etc. Ry. Co. v. Marion County*, 36 Mo. 294; *Bissell v. Jeffersonville*, 24 How. 295.

The ratification of bonds by the municipal authorities themselves is sometimes spoken of in the decisions. What we have said upon the subject of equitable estoppel is applicable to those cases in which void bonds are claimed to have been ratified and validated by the municipal authorities, either expressly or by implication. If the authorities had no power to issue the bonds in the first instance, we cannot understand how they can have power to ratify them: *Marsh v. Fulton*, 10 Wall. 676. If, on the other hand, the irregularities in the issuing of the bonds did not destroy the power to issue them, there is no need of their ratification, at least after they have reached the hands of bona fide holders: *Decorah First Nat. Bank v. Doon Tp.*, 86 Iowa, 330; 41 Am. St. Rep. 489; *Doon Tp. v. Cummins*, 142 U. S. 366; *Citizens' Bank v. Terrell*, 78 Tex. 450; *Kelley v. Milan*, 127 U. S. 139.

Actions for Money Paid for Void Bonds.—If a bona fide holder of bonds pays for them, and the money so paid by him reaches the municipal treasury, or is applied to municipal purposes, though he has no remedy under the bonds themselves, he is not in all cases without redress. He cannot treat the officers or agents of the municipality to whom he has

paid such money as receiving it without consideration, and recover a personal judgment against them therefor, especially where he was as well informed of the facts as they, and knew the money would be expended by them for a supposed public purpose, and it has been so expended: *Powell v. Heisler*, 45 Minn. 549. He may, however, recover of the municipality if it was authorized to borrow money, though not under the circumstances authorized to issue bonds therefor, or, if the moneys have been used in the discharge of valid municipal obligations, in which event the liability to him may be regarded as taking the place of that discharged, and he, as being a creditor of the municipality, taking the place of the creditors whose demands have been satisfied through the moneys received from him: *Rainsburg v. Fyan*, 127 Pa. St. 74; *Louisiana v. Wood*, 102 U. S. 294; *Wood v. Louisiana*, 5 Dill. 122; *Gause v. Clarksville*, 5 Dill. 165. This is on the ground that the municipality, having received the money by mistake or without consideration, and having no right to retain it, is under a legal obligation to restore it to the person from whom it was received. This principle cannot be permitted to so operate as to impose upon a municipality a liability which it was forbidden to assume. Therefore, if through the borrowing of money or the sale of bonds it has undertaken to assume an indebtedness in excess of that for which it was permitted to become liable, the lender or bondholder cannot maintain an action for the moneys so advanced or paid by him, unless it be one to recover such moneys while they remain undisposed of and accessible; and though such moneys have been expended in the construction of public works, which remain the property of the municipality, the bondholder cannot have a lien declared to exist in his favor upon such works for the repayment of the moneys coming from him through his purchase of bonds and subsequently invested with other moneys in such works: *Litchfield v. Ballou*, 114 U. S. 190.

STATE v. GAYMON.

[44 SOUTH CAROLINA, 333.]

JURY TRIAL—PERSONAL KNOWLEDGE OF JURORS.—
THE JURORS ARE not entitled to find their verdict on their personal knowledge of the defendant's mental condition, he being on trial for perjury, and his condition being a material fact in issue.

M. C. Galluchat, for the appellant.

Joseph F. Rhame, acting solicitor, contra.

334 **GARY, J.** The defendant was convicted of perjury at the June, 1894, term of the court of general sessions for Clarendon county, and thereon made a motion before the presiding judge for a new trial, which was refused. He was then sentenced to one year at hard labor in the state penitentiary. The appeal to this court is based upon two exceptions, which will be incorporated in the report of the case, and raise the single point, whether his

honor, Judge Norton, erred in charging the jury that they must not allow their personal knowledge of defendant's mental condition to enter into their judgment in arriving at a verdict.

The question as to the mental condition of the defendant was not a collateral circumstance, but a material fact in issue, upon which the jury was called upon to pass. Under these circumstances, it would be extremely dangerous to allow the jury to find a verdict upon facts first communicated to them by jurors in the juryroom. Such a verdict would be contrary to that part of their oath where they swear to give a true verdict according to the evidence. The practice for which the appellant contends would deprive a party to the cause of the very important right of cross-examination. This is not a case involving the right of a juror to state facts in the juryroom, touching the credibility of a witness, as was the ³³⁵ case of *McKain v. Love*, 2 Hill (S. C.) 506, 27 Am. Dec. 401, in which the distinction herein stated was pointed out by the court, which used the following language: "The oath usually administered to the jurors in the common pleas, well and truly to try the issue joined between the parties 'and a true verdict give according to the evidence,' contains a very correct summary of the law on this subject. The jury are bound to give their verdict according to the evidence, and what is or is not competent evidence belongs to the court, and not to the jury to determine. Generally speaking, therefore, a verdict founded on facts first disclosed in the juryroom would be bad, although the facts are known to one of the jury; because it is unfair not to give the party against whom they operate an opportunity of repelling or explaining them. In an anonymous case in 3 Salk. 405, it is said, that if a juror known, of his own knowledge, anything material to the matter in issue, the fair way is to tell the court, so that he may be sworn as a witness": See, also, *State v. Jones*, 29 S. C. 201.

It is the judgment of this court, that the judgment of the court below be affirmed.

TRIAL—APPLICATION OF JUROR'S KNOWLEDGE IN REACHING VERDICT.—A juror having knowledge of facts not in evidence has no right to consider them in making up a verdict. Before he can do so, he should be sworn and testify to the facts precisely as any other witness: *Ottawa Gas etc. Co. v. Graham*, 28 Ill. 73; 81 Am. Dec. 263, and extended note. Common knowledge and common experience are parts of the trial of every civil issue without special proof, and the jurors are authorized to draw inferences from such knowledge and experience: *Gunn v. Ohio River R. R. Co.*, 36 W. Va. 165; 33 Am. St. Rep. 842.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

STRONG v. KALK.

[91 WISCONSIN, 29.]

ASSIGNMENT FOR BENEFIT OF CREDITORS.—To constitute an assignment for the benefit of creditors, there must be a trustee, creditors, and a cestui que trust, who can compel an enforcement of the trust, though it is not necessary that a trustee should be named as such, in the instrument, or be specifically named at all, at the time of the transaction, if it is definitely agreed that there shall be a trustee, in fact, to hold property and administer it as such. Nor is it essential that all, in order to be bound, should be parties to the transaction at the outset. They will be equally bound if, with knowledge of the facts, they become parties afterward. Neither is it essential that the transfer should be made directly to the trustee. If made directly to creditors, covering all the insolvent's property, coupled with an agreement that all such property shall be immediately turned over to one of the creditors, or some third party, to act as trustee for all, that is sufficient.

ASSIGNMENT FOR BENEFIT OF CREDITORS—VOID CHATTEL MORTGAGES.—If an insolvent debtor, wishing to prefer certain creditors, who are relatives and friends, gives them a chattel mortgage, covering all his property, coupled with an agreement that one of such creditors shall immediately take possession of such property, as agent and trustee for all, and sell it, and distribute the proceeds among them, pro rata, until all are paid, and two other creditors afterward take chattel mortgages on the same property, with full knowledge of all the facts, and become parties to the arrangement first made, with the understanding that their claims shall be paid after those of the other mortgages, all parties to this arrangement knowing that the mortgagor is hopelessly insolvent, and that he is indebted to a large amount outside of the claims secured; the transaction amounts to an assignment for the benefit of creditors, in violation of the statute on the subject of assignments for the benefit of creditors, and prohibiting preferences in such assignments; and the chattel mortgages are therefore void.

Action to recover money. Jacob Imig, one of the defendants, was, on October 6, 1892, indebted in severalty to fourteen of his relatives or personal friends, in sums aggregating nine thousand nine hundred and thirty six dollars. He had other creditors, also,

including Strong and another, the plaintiffs. The amount of his indebtedness largely exceeded the value of his entire property. He was absolutely insolvent, and, with full knowledge of such insolvency on the part of the said fourteen creditors, or of the person or persons who acted for them in the transaction, a chattel mortgage was made by him to such creditors to secure their several claims. The mortgage covered all his property, consisting of a stock of boots and shoes and some book accounts. It was agreed, when the mortgage was given, between the mortgagor and the mortgagees present, and those absent, through the person authorized, or who assumed to act for them, that one of such mortgagees should take immediate possession of the property for the benefit of all and apply it under the terms of the mortgage; the purpose being to pay the several claims in full, if the proceeds should be sufficient for that purpose, otherwise pro rata, and, if there was more than enough, then that the other creditors should have the balance. Several of the mortgagees were neither present nor had any knowledge of the transaction. Henry W. Kalk, one of the fourteen creditors, and one of the mortgagees, immediately after the execution of the mortgage, took possession of the property as trustee for the creditors named therein. Immediately after the execution of the mortgage, the defendant Jacob Imig gave to Charles L. Zschetzsche a second mortgage, and to Niles T. Stickney a third mortgage, on the same property. These persons were creditors, and they took their security with full knowledge of the debtor's insolvency, and of the facts in regard to prior mortgages. Each constituted Kalk his agent to handle the property in trust for him, subject to the rights of prior mortgagees. The plaintiffs and appellants were creditors to the amount of thirteen hundred and twenty-three dollars and twenty-five cents, and sued to recover the amount due them. They garnished all of the mortgagees, and recovered judgment against the principal defendant for fourteen hundred and fifty-two dollars and seventy-six cents; but judgment was rendered in favor of the garnishees for costs. This appeal was taken from the judgment in the garnishment proceedings.

G. G. Sedgwick and J. S. Anderson, for the appellants.

D. T. Phalen, Simon Gillen, A. C. Prescott, and Felix Benfey, for the respondents.

²² MARSHALL, J. A careful study of this case fails to disclose any reversible error, unless the court erred in failing to find that the mortgages given by the defendant Imig, together

with the verbal agreement made between the parties at the time in connection with circumstances then existing, constitute an assignment for the benefit of creditors, within the authority of *Winner v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 257, *Maxwell v. Simonston*, 81 Wis. 635, *Fuller v. McHenry*, 83 Wis. 573, and *Northern Nat. Bank v. Weed*, 86 Wis. 212.

The statement of facts preceding this opinion presents a case where an insolvent debtor, wishing to prefer fourteen of his creditors, who were relatives and friends, gave them a chattel mortgage covering all his property, coupled with an agreement, made at the time, that one of such creditors should immediately take possession of such property as agent and trustee for all, and administer the trust in accordance with the mortgage and such agreement. Subsequently, two other creditors took chattel mortgages on the same property, with full knowledge of all the facts in regard to the first mortgage, and became parties to the arrangement first made, substantially the same as if they had been named in the first mortgage, to be paid—Zschetzsche after the fourteen creditors, and Stickney last. All the parties, from first³³ to last, knew that the mortgagor was hopelessly insolvent, and that he was indebted to a large amount outside of the claims secured. Do the facts and circumstances constitute an assignment for the benefit of creditors? That is the question.

From the foregoing, it is needless to say that we think the learned trial judge erred in not finding, as requested by the appellants, that at the time of the making and execution of the first mortgage, it was agreed by all the parties interested in the transaction that one of the mortgagees should take immediate possession of the mortgaged property, in trust for all the mortgagees, and sell the same and distribute the proceeds, after paying the expenses among the creditors named in the first mortgage, pro rata, until all were paid in full, and that the mortgagees Zschetzsche and Stickney subsequently became parties to such agreement. In *Winner v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 257, it was distinctly held that chattel mortgages and assignments of accounts, transferring the entire property of an insolvent debtor to certain of his creditors, with intent that one of such creditors, for himself and as agent for the others, should take possession and convert such property into money and divide the same pro rata among such favored creditors, are, in effect, general assignments for the benefit of creditors, with preferences, and void as to the other creditors. This rule has stood the test of repeated reviews, and is so entrenched in the jurisprudence of this state that it is not

liable to be modified; and whenever a case is presented coming squarely within such rule, there will be no hesitation in applying it, to prevent the statutes of this state on the subject of voluntary assignments for the benefit of creditors, and against preferences, from being violated.

Counsel for respondents cite several cases decided in this court to show that this case is not within the rule stated, but a brief examination of them will show plainly that they differ from *Winner v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 257, and this case as well, in several material particulars. In *Cribb v. Hibbard*, 77 ³⁴ Wis. 199, there were two chattel mortgages taken as independent transactions, without collusion, each creditor acting for himself to secure a claim due to him alone. One of the mortgagees held a claim which accrued to him originally and one that he had purchased. The mortgages did not cover all the property of the mortgagor, and there was no agreement for a trustee to act for all parties. In *Menzesheimer v. Kennedy*, 75 Wis. 411, an insolvent debtor gave two chattel mortgages upon his property to two of his creditors, to secure their respective claims. One of the mortgagees acted for himself and as agent for the other. There was no understanding between the debtor and creditors that they should take possession of the property. In *Michelstetter v. Weiner*, 82 Wis. 301, there were three chattel mortgages, each given to secure a distinct claim. No agreement to take possession was made at the time of the execution of the mortgages, and afterward the property was turned out to the attorney for the mortgagees in satisfaction of the indebtedness secured. The court held that the whole transaction was simply a transfer of property, made absolutely by way of full payment and satisfaction of debts, and constituted really but an ordinary conveyance. It is needless to review the other cases cited. They all differ in essential particulars from *Winner v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 257, and the case under consideration.

In *Cribb v. Hibbard*, 77 Wis. 208, *Ingram v. Osborn*, 70 Wis. 184, and other cases in this court, it is laid down that the test, in order to determine the question of whether a transaction amounts to an assignment for the benefit of creditors, is that: "There must be a trustee, creditors, and cestui que trust who can compel an enforcement of the trust, in order to constitute such an assignment"; but "it is not essential that a trustee should be named as such in the instrument" (*Cribb v. Hibbard*, 77 Wis. 199), or be specifically named at all at the time of ³⁵ the transaction, if it is definitely agreed that there shall be a trustee in

fact, to hold property and administer it as such. Nor is it essential that all, in order to be bound, should be parties to the transaction at the outset. They will be equally bound if, with the knowledge of the facts, they become parties afterward, as in the case of *Zschetzsche and Stickney* in this case. Neither is it essential that the transfer should be made directly to the trustee. If made directly to creditors, covering all the insolvent's property, coupled with an agreement that all such property shall be immediately turned over to one of the creditors or some third party to act as trustee for all, that is sufficient. We have, then, all the elements to bring this case within *Winner v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 257, and the other cases cited, following and approving it, showing a clear violation of the statutes of this state on the subject of assignments for the benefit of creditors and prohibiting preferences in such assignments. To sustain the judgment appealed from, on the facts disclosed, would render it perfectly easy for any insolvent debtor to make an assignment for the benefit of creditors, with preferences, by merely executing a chattel mortgage directly to his creditors, covering all his property, with an agreement that one of such creditors should take immediate possession of the mortgaged property and administer it for the benefit of all in the order named in the mortgage, and thereby nullify the statutes on the subject.

The chattel mortgages should have been held void and the garnishee defendants held liable.

By the Court. The judgment of the circuit court is reversed, and the cause remanded, with directions to render judgment in favor of the plaintiffs in accordance with this opinion.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—CHATTEL MORTGAGES, and assignments of accounts, covering all the property of insolvent debtors, and made to effect a preference, are, in effect, general assignments with preferences, and void as to other creditors, under the statute forbidding preferential assignments: *Winner v. Hoyt*, 66 Wis. 227; 57 Am. Rep. 257, and note. *Contra*, *Aulman v. Aulman*, 71 Iowa, 124; 60 Am. Rep. 783. Chattel mortgages, executed at the same time, by an insolvent debtor, to certain of his creditors, giving them priority, but not allowing them to prorate, if made in good faith to secure bona fide debts, do not constitute fraudulent assignments for the benefit of the creditors preferred, as against those not preferred, although such mortgages cover all the assets of the mortgagor: Note to *Monaghan Bay Co. v. Dickson*, 39 Am. St. Rep. 708. If the effect of a conveyance is, upon its face, to hinder and delay creditors, it must be construed as void against such creditors, without stopping to inquire what may have been the actual intention of the grantor: *Riley v. Carter*, 76 Md. 581; 35 Am. St. Rep. 443. A chattel mortgage for the benefit of certain creditors, which is an assignment of all the mortgagor's

property, is void as to unsecured creditors: Note to Thompson v. Richardson Drug Co., 29 Am. St. Rep. 506. The relationship between an insolvent debtor and a preferred creditor is a fact to be considered by the jury on the question of intent to defraud creditors: Note to Hanson v. Bean, 38 Am. St. Rep. 519.

SINGLETON v. HILL.

[91 WISCONSIN, 51.]

APPEAL—FINDINGS.—If there is not a clear preponderance of evidence against a finding, it must be sustained on appeal.

STATUTE OF FRAUDS.—THE MEMORANDUM required by the statute of frauds need not be formal, or in one writing or paper, or be made directly between the parties to the contract.

STATUTE OF FRAUD—LETTERS AS MEMORANDUM.—A letter to a vendor from his agent conveying an offer for land, and his letter in reply to the agent accepting such offer, constitute a sufficient memorandum of a contract for the sale of the land to satisfy the statute of frauds.

Action for the specific performance of a contract for the sale of real estate, and to set aside a deed made to the defendant Johnson with knowledge of such contract. Sheldon Ranney, having written authority from the defendant Hill, the owner of certain lands, to sell them for one hundred and seventy-five dollars, negotiated with the plaintiff in regard to such sale. The negotiations resulted in plaintiff's offering that sum for the lands. Ranney communicated this offer, by letter, to Hill, who replied, by letter, to Ranney, accepting the offer and agreeing to forward the deed. Ranney then communicated such acceptance to the plaintiff, who paid Ranney ten dollars on the contract, and, by Ranney's authority, entered into possession of the land pursuant to the contract. Johnson, with knowledge of the facts, afterward purchased the land from Hill, and received a conveyance of it.

F. S. Veeder, for the appellants.

Barney & Beebe, for the respondent.

⁵² **MARSHALL, J.** Appellants excepted to the finding of fact that respondent paid part of the consideration and entered into possession by authority of the agent before the sale and conveyance to Johnson, and that the latter took possession with knowledge of the rights of respondent. It cannot be said there is a clear preponderance of evidence against such finding; therefore it must be sustained: Jones v. Pease, 21 Wis. 644; Docter v. Hellberg, 65 Wis. 415. This, of itself, is sufficient to entitle plaintiff

to the judgment appealed from; but we think the letter written by Ranney, the agent of Hill, conveying to him respondent's proposition, and the letter from Hill to Ranney accepting the same, constitute a sufficient memorandum of the contract of sale to satisfy the statute of frauds, which provides that "every contract . . . for the sale of any lands . . . shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the sale is to be made, or by his lawfully authorized agent": Rev. Stats., sec. 2304. It is not necessary that the memorandum should be formal, or in one writing or paper, or made directly between the parties to the contract. The point raised by the learned counsel for appellants that the letters were mere communications between Hill and his own agent is not material, for it is sufficient if the memorandum consists of letters passing between the vendor and a third person, who is agent for the parties ⁵⁸ or one of them: *Drury v. Young*, 58 Md. 546; 42 Am. Rep. 343. Stone, J., discussing the question, quotes with approval from *Gibson v. Holland*, L. R. 1 Com. P. 1, as follows: "The object of the statute of frauds is to prevent perjury in the setting up of contracts by parol evidence. With this view, it requires the contract to be proved by the production of some note or memorandum in writing. Now, a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves, or between one of them and his own agent. Indeed, one would be inclined to think a statement made by the party to his own agent would be the more satisfactory evidence of the two." Letters between the vendor and the vendee, or the vendor and his own agent, sufficiently definite to disclose the subject matter of the contract—the land—so that it may be identified, and expressing the consideration, are sufficient to satisfy the statute; and in this connection it may be stated that the location and identification of the land may be shown by parol: *Tice v. Freeman*, 30 Minn. 389; *Hurley v. Brown*, 98 Mass. 545; 96 Am. Dec. 671.

The evidence in this case supports the findings of fact excepted to, and the findings of fact support the conclusions of law. The judgment appealed from must therefore be affirmed.

By the Court. Judgment affirmed.

Newman, J., took no part.

APPEAL.—A FINDING OF FACT made by a jury or trial judge will not be disturbed by the appellate court, if it is supported by com-

petent evidence: *Edwards v. Reid*, 39 Neb. 645; 42 Am. St. Rep. 607, and note.

STATUTE OF FRAUDS—MEMORANDUM.—The form of memorandum required by the statute of frauds is immaterial, if its contents adequately set forth the agreement: *Hurley v. Brown*, 98 Mass. 545; 96 Am. Dec. 671. Any writing, from a solemn deed down to mere hasty notes or memoranda in books, papers, or letters, is sufficient: *McConnell v. Brillhart*, 17 Ill. 354; 65 Am. Dec. 661; *Kopp v. Reiter*, 146 Ill. 437; 37 Am. St. Rep. 156.

STATUTE OF FRAUDS—LETTERS AS MEMORANDUM.—If a contract which comes within the statute of frauds can be extracted from correspondence between the parties, the statute is satisfied: *Hickey v. Dole*, 66 N. H. 336; 49 Am. St. Rep. 614, and note; *Misell v. Burnett*, 4 Jones, 249; 69 Am. Dec. 744. A memorandum of sale sufficient to satisfy the statute of frauds may consist of letters signed by the vendor and written to his agent, if they refer to, and connect with, each other, and contain all the terms of the sale and a sufficient description of the property: *Lee v. Cherry*, 85 Tenn. 707; 4 Am. St. Rep. 800.

CANTERBURY v. BANK OF SPARTA.

[91 WISCONSIN, 52.]

BANKS AND BANKING—DELIVERY OF DRAFT.—The mailing of a letter, addressed to the cashier of a bank, in which is inclosed a draft, is, in legal effect, a delivery of the draft to that bank, and the sender has no rightful authority to take the letter from the mail.

BANKS AND BANKING—DRAFTS—RIGHT OF STOPPAGE IN TRANSITU.—If a bank, being the payee of a draft, sends it to another bank for collection, and the latter, at the request of the drawee, and on the faith of his solvency, gives him credit for the amount, makes its own draft on a third bank, payable to the order of the first bank, and mails it to the latter "in payment of" the first draft, this is a delivery of the second draft by the drawee of the first draft, through the collecting bank, to the first bank; and the collecting bank cannot, on learning of the drawee's solvency, stop payment of the second draft, or withdraw it from the mail.

Action to recover the value of a draft taken from the post-office. On January 6, 1892, W. E. Coats & Co., of Sparta, were indebted to the plaintiff, Canterbury, of La Crosse, in the sum of two thousand two hundred and fifty dollars, and on that day Canterbury drew his draft for seven hundred dollars and seventy cents, upon Coats & Co., in favor of the State Bank of La Crosse. The plaintiff discounted this draft at that bank, which indorsed it to the Bank of Sparta for collection; and it was sent by letter to the defendant, which received it in the forenoon of January 7, 1892. Coats & Co. had an account with the defendant bank, but it was then overdrawn. Coats & Co., however, accepted the draft, and requested the defendant to pay the same. The Bank of Sparta, having faith in the solvency of Coats & Co., gave them credit for the amount, and drew its own draft for that sum on the Atlas National Bank of Chicago, payable to the cashier of the

State Bank of La Crosse, which was mailed to the latter bank "in payment of" the draft on Coats & Co. The letter containing the draft on the Chicago bank was posted about half-past four o'clock in the afternoon of January 7, 1892. The defendant, having ascertained that Coats & Co. had failed, attempted to get the letter containing the draft out of the postoffice, but found that it had gone to La Crosse. By telephoning, the defendant succeeded in getting the letter and draft out of the postoffice at La Crosse, and the next morning destroyed the draft and the letter, and erased all entries respecting the payment of the draft in defendant's books. The defendant protested the plaintiff's draft for nonpayment, and returned it to the State Bank of La Crosse. Thereupon, the La Crosse bank assigned to the plaintiff its cause of action against the defendant by reason of the facts stated. A verdict was directed in favor of the plaintiff and against the defendant for the amount of the draft and interest. Upon a motion for a new trial, the court directed judgment in favor of the defendant, notwithstanding the verdict; and from this judgment the plaintiff appealed.

Winter, Esch & Winter, for the appellant.

Morrow & Masters for the respondent.

⁵⁶ CASSODAY, C. J. It may be conceded that the vendor of negotiable paper has the right of stoppage in transitu to the same extent as the vendor of other species of personal property. Here the La Crosse bank discounted the plaintiff's draft on W. E. Coats & Co., and forwarded the same to the defendant for collection. The defendant was under no obligation to pay that draft—especially as the account of W. E. Coats & Co. at the defendant bank was then considerably overdrawn. Nevertheless, the defendant, on the request of the managing agent of W. E. Coats & Co., whose authority is not questioned, made its own draft on the Chicago bank for the amount, payable to the cashier of the La Crosse bank, and sent the same in a letter by mail to the cashier of the La Crosse bank "in payment of draft on W. E. Coats & Co.," and that letter, with the draft inclosed, reached La Crosse in the regular course of mail. Undoubtedly, the defendant, in making its draft on the Chicago bank, gave a corresponding credit to W. E. Coats & Co. on the faith of their solvency; but it did so voluntarily and for their accommodation, and without being induced to do so by any fraud or mistake of fact. While the defendant retained the actual or constructive possession of that draft, it could, undoubtedly, ⁵⁷ withhold its application in pay-

ment of the draft on W. E. Coats & Co; but if, by sending the draft by mail to La Crosse, it parted with such possession and vested the title to the draft in the La Crosse bank, then, manifestly, it lost all rightful authority to take the same from the mail. In thus mailing and sending the draft, the defendant acted as the agent of the La Crosse bank. Such mailing of the letter inclosing the draft was, in legal effect, a delivery of the draft to the La Crosse bank: 1 Randolph on Commercial Paper, sec. 218; 1 Daniel on Negotiable Instruments, sec. 67; Buell v. Chapin, 99 Mass. 594; 97 Am. Dec. 58; Kirkman v. Bank of America, 2 Cold. 397; Mitchell v. Byrne, 6 Rich. 171; Sichel v. Borch, 2 Hurl. & C. 956; Funk v. Lawson, 12 Ill. App. 229. The mere fact that, after the draft was so sent by mail, the defendant ascertained that W. E. Coats & Co. had failed, and hence that it had injudiciously given them further credit to the amount of the draft, did not authorize the defendant to stop payment of the draft or take it from the mail. The draft was not transmitted to W. E. Coats & Co., but was transmitted by them, through the defendant, to the bank at La Crosse.

In support of the views expressed, see Boylston Nat. Bank v. Richardson, 101 Mass. 287; Pacific Bank v. Mitchell, 9 Met. 297; Pratt v. Foote, 9 N. Y. 463; Whiting v. City Bank, 77 N. Y. 363; Eaton v. Cook, 32 Vt. 58.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded, with direction to enter judgment against the defendant for the amount of the verdict directed in favor of the plaintiff, with interest and costs.

Newman, J., took no part.

STOPPAGE IN TRANSITU.—THE MAILING OF PAPERS constitutes a delivery. Thus, the mailing of an accident insurance policy to the insured constitutes a delivery, although it does not reach him owing to his death: Dailey v. Preferred Masonic etc. Assn., 102 Mich. 289. The vendor of negotiable paper has the right of stoppage in transitu to the same extent as the vendor of any other species of property: Daniel on Negotiable Instruments, 4th ed., sec. 64. In cases of insolvency, where a party giving credit attempts, by telegram, to reclaim the fruits of that credit from the mail, while yet within his reach, the proper course is to commence a suit, and obtain an order therein restraining the postmaster from transferring or disposing of the papers in controversy: Muler v. Pondir, 55 N. Y. 325; 14 Am. Rep. 259.

JOHNSTON v. HUMPHREY.

[91 WISCONSIN, 76.]

SETOFF—ASSIGNMENT FOR CREDITORS.—Equity will, as against an assignee for the benefit of creditors, enforce a right of setoff expressly given by statute.

SETOFF—INSOLVENCY—WHEN RIGHT OF DEBTOR BECOMES FIXED.—If a banker becomes insolvent, and makes an assignment for the benefit of creditors, the right of his debtor as to setoff does not become fixed at the time the bank closes its doors, but when the assignment is completed.

SETOFF AGAINST INSOLVENT BANKER.—One who owes an insolvent banker may, for a valuable consideration, and before notice of his assignment for the benefit of creditors, purchase the bankers' certificates of deposit, and become the owner thereof in good faith, within the meaning of the statute governing the allowance of setoff, although prior to such purchase the bank has closed its doors.

Alfred J. Goss was, on and prior to June 8, 1893, doing a banking business at Hudson, under the name and style of "Hudson Savings Bank." It was open and did business on June 8, 1893, but closed its doors the next day, and did no business afterward. Goss made, on June 15, 1893, a voluntary assignment for the benefit of his creditors, to the defendant Humphrey, who qualified as assignee. The assignment included all the assets of the Hudson Savings Bank. The plaintiff, at the time the doors were closed, was indebted to Goss in the sum of seventy thousand dollars, of which amount about ten thousand dollars were then due or became due prior to such assignment; but the remainder was not due until afterward. The plaintiff, between June 9, 1893, and June 14, 1893, purchased and became the owner of ten certificates of deposits in such bank issued by Goss, and aggregating about ten thousand dollars. The plaintiff sought to have such certificates allowed as setoffs against the amount of his indebtedness due when the assignment was made. The court refused to allow such setoffs, and the plaintiff appealed.

W. F. McNally, and Baker & Helms, for the appellant

Spooner, Sanborn, and Kerr & Spooner, for the respondent.

⁷⁰ CASSODAY, C. J. The statute provides, in effect, that a demand by one party may be set off against, and as a defense, in whole or in part, to, demands by the other party, whenever the demand arises upon contract, express or implied, if it existed at the time of the commencement of the action, and then belonged to the party claiming to set off the same, and was due to him in his own right, either as being the original contractor or payee, or as being the assignee and owner thereof; and that,

if the contract has been assigned to the party, a demand existing against such party, or any assignor of such contract, at the time of his assignment thereof, and belonging to the opposite party, in good faith, before notice of such assignment, may be set off, to the amount otherwise recoverable upon such contract, whenever the demand be such as might have been set off against the party or assignor while the contract belonged to him; but, in case the action be upon a negotiable promissory note or bill of exchange, then such setoff can only be allowed when such note or bill has been assigned to the party "after it became due": Rev. Stats., sec. 4258.

80 The question whether the appellant is entitled to set off the certificates of deposit so purchased by him depends upon whether the rights of the parties under this statute became fixed at the time A. J. Goss closed his bank, June 9, 1893, or at the time he made a general assignment for the benefit of his creditors, June 15, 1893. It has heretofore been supposed by this court that "the rights of the creditors and debtors of an insolvent assignor as to setoffs become fixed immediately upon the completion of the assignment, in analogy to the rule applicable to debtors and creditors in the case of a deceased insolvent": *Union Nat. Bank v. Hicks*, 67 Wis. 192; *Oatman v. Batavian Bank*, 77 Wis. 503; 20 Am. St Rep. 136; *Jones v. Piening*, 85 Wis. 267. The same rule has been recognized in other states: *Smith v. Brinkerhoff*, 6 N. Y. 305; *Rothschild v. Mack*, 115 N. Y. 9; *Fera v. Wickham*, 135 N. Y. 225; *Peirce v. Bent*, 69 Me. 381. So it is held in England that, "where there are mutual dealings between a debtor and his creditors, the line as to setoff must, as a general rule and in the absence of special circumstances, be drawn at the date of the commencement of the bankruptcy": *In re Gillespie*, 14 Q. B. Div. 963.

It is conceded that an equitable setoff may be allowed in a proper case without statutory authority. The question here presented is whether equity will refuse a right of setoff expressly given by statute. We find no case authorizing such refusal. On the contrary, the authorities all seem to agree that equity will follow and obey an express statute applicable to the case: 2 Story's Equity Jurisprudence, secs. 1430-1437; *Bathgate v. Has-kin*, 59 N. Y. 537; *Jordan v. National etc. Bank*, 74 N. Y. 473; 30 Am. Rep. 319; *Spaulding v. Backus*, 122 Mass. 554; 23 Am. Rep. 391. Here the appellant seems to have a right of setoff, by the express language of the statute. There seems to be plenty of authority to support such right of setoff: *Lloyd v. Turner*, 5

Saw. 463, and cases there cited; *Mattocks v. Lovering*, 3 Fed. Rep. 212; *Peirce v. Bent*, 69 Me. 381; *Jordan* ⁸¹ *v. Sharlock*, 84 Pa. St. 368; 24 Am. Rep. 198; *Collins v. McKee* (Penn., Oct. 21, 1886), 6 Atl. Rep. 396; *Wilson v. Gabriel*, 4 Best & S. 243. Cases are cited where it has been held, in effect, that the setoff here would not be allowed. But it is believed those cases mostly arose under statutes which did not permit a creditor of an insolvent debtor to obtain a preference by attachment or otherwise. That is certainly so with the case of *Smith v. Hill*, 8 Gray, 572, as will appear by reference to the following cases: *Shelton v. Codman*, 3 Cush, 318; *Andrews v. Southwick*, 13 Met. 535; *Ward v. Proctor*, 7 Met. 318; 39 Am. Dec. 782; *Sprague v. Wheatland*, 3 Met. 416; *Bigelow v. Pritchard*, 21 Pick. 169. The same seems to be true as to the Michigan cases relied upon: *Stone v. Dodge*, 96 Mich. 514; *Bradley v. Smith*, 98 Mich. 449; 39 Am. St. Rep. 565. So proceedings under the recent bankrupt act dissolved prior attachments within a certain limit of time. But no such statute exists in this state.

There can be no doubt, under the evidence, that the appellant purchased the several certificates of deposit mentioned for a valuable consideration, and became the owner thereof in good faith, within the meaning of section 4258 of the Revised Statutes. The mere fact that the bank had closed its doors did not prevent such purchase in good faith.

By the Court. The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

SETOFF—INSOLVENCY.—COURTS OF EQUITY, in matters of setoff, follow courts of law. The general rule is, that a claim against an insolvent, purchased after the commencement of the insolvency proceedings, with knowledge of the insolvency, cannot be set off against a claim due the insolvent; but it has been held that a claim against an insolvent, purchased by his debtor prior to the adjudication of insolvency, but with full knowledge, at the time of the transfer, of the fact of the insolvency, may be set off by the debtor against the debt due from him to the insolvent: See monographic note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 578, 582. This note treats, at length, of setoff by and against banks.

FAUST v. AMERICAN FIRE INSURANCE COMPANY.

[91 WISCONSIN, 158.]

INSURANCE—PRESUMPTION OF KNOWLEDGE AS TO NATURE OF BUSINESS.—An insurance company is presumed to be acquainted with the business it insures, and with the materials necessarily used in prosecuting it, and to have included such materials in the risk, the same as if each article had been particularly mentioned in the written portion of the policy; and the written portion, in that regard, will control the printed portion prohibiting the keeping of such articles.

INSURANCE—PROHIBITED ARTICLES—CONSTRUCTION OF POLICY.—If insurance is effected with reference to an established and current business, whose protection is really the object of the insurance, the printed portion of the policy prohibiting the keeping of certain articles, will not be so construed as to seriously embarrass or suspend a business which is expressly permitted in the written portion of the policy.

INSURANCE—WRITTEN AND PRINTED CONDITIONS.—If a contract of insurance, by the written portion, covers property to be used in conducting a particular business, the keeping of an article necessarily used in such business does not avoid the policy, although it is expressly prohibited in the printed conditions of the contract.

INSURANCE—CONSTRUCTION OF PHRASE “NOT MORE HAZARDOUS.”—In a policy of insurance upon a building “occupied as a furniture store and repair shop,” a written clause covering “the stock of furniture, upholstery goods, and other merchandise not more hazardous, usual to a retail furniture store, while contained therein,” applies to merchandise kept in the trade in the store, and the words “not more hazardous” refer to such merchandise only, and have no reference to the necessary articles kept for use in the repair shop.

INSURANCE—WAIVER OF PROOFS OF LOSS.—There is a denial of liability, under a policy of fire insurance, upon the ground of a violation of the clause prohibiting the use of benzine, and a waiver of the provisions of the policy requiring proofs of loss, where the adjuster of the insurance company visits the premises insured, soon after a loss by fire, and receives from the insured a list of the property destroyed, but, upon learning that benzine had been kept on the premises, tells the insured that the policy was thereby rendered void, that he can do nothing for him, and that he must present his claim to the company, if the list is retained, and the company refuses to communicate with the insured respecting the loss.

Action to recover a loss under a policy of insurance. The written portion of the policy covered a building “occupied as a furniture store and repair shop,” and a “stock of furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store, while contained therein.” The printed portion of the policy prohibited the keeping of benzine on the premises, and provided for immediate notice in writing to be given to the company, in case of loss, and sworn proofs of loss within sixty days after the date of fire. The printed portion of the policy also provided that the company should not be held to have waived any provision or condition of the policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination provided for. It further pro-

vided that there should be no waiver by an agent of the company, except by agreement written upon, or added to, the policy. The answer set up a breach of the condition prohibiting the keeping or use of benzine on the premises, as well as a failure on the plaintiff's part to furnish proofs of loss as required by the policy. The evidence showed that the insured, at the time the policy was issued, and at the time of the fire, had a small amount of benzine on the premises, kept solely for use in the repair shop, and that it was necessary for such use. It also showed that notice of the loss was given to the company the next morning after the fire; that soon thereafter the company's adjuster visited the scene and was furnished by the appellant with a list of the goods burned; that he then discovered that benzine had been kept on the premises, and thereupon notified the plaintiff that such fact rendered the policy void; that he took away with him the list of the property destroyed, furnished by plaintiff, and that the same had ever since been retained by him or someone for the company. From that time on the defendant refused to communicate with the plaintiff respecting the loss. Defendant's motion for a nonsuit was granted, by the trial court, upon the ground that the contract of insurance was rendered void by a violation of the provision prohibiting the keeping or use of benzine on the premises. Judgment was rendered accordingly, and the plaintiff appealed.

Burr W. Jones and E. R. Stevens, for the appellant.

Bashford, O'Connor & Aylward, for the respondent.

161 MARSHALL, J. The main question presented on this appeal is, whether the presence of a small amount of benzine on the premises for use in the repair shop rendered the contract of insurance void. Keeping in mind the undisputed evidence that the prohibited article was not kept as an article of merchandise for sale, but as an article usually and necessarily kept in operating the business of the repair department of the furniture store, which the policy expressly covered, we find abundant authority to support the general rule, which we adopt, that where a contract of insurance, by the written portion, covers property to be used in conducting a particular business, the keeping of an article necessarily used in such business will not avoid the policy, even though expressly prohibited in the printed conditions of the contract. To that effect are *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15; 37 Am. Rep. 647; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83; *Collins v. Farmville Ins. etc. Co.*, 79 N. C. 279; 28 Am. Rep. 322—cited by appellant's counsel, to which many may be

added: *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418; 38 Am. Rep. 687; *Stout v. Commercial etc. Assur. Co.*, 11 Biss. 313; *Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. St. 350, 353; *Plinsky v. Germania Fire etc. Ins. Co.*, 32 Fed. Rep. 47; *Bryant v. Poughkeepsie Mut. Ins. Co.*, 17 N. Y. 200; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray, 359; 77 Am. Dec. 414; *Franklin Fire Ins. Co. v. Chicago etc. Co.*, 36 Md. 102; 11 Am. Rep. 469; *Carlin v. Western Assur. Co.*, 57 103 Md. 515; 40 Am. Rep. 440; *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 197; *Hall v. Insurance Co. of North America*, 58 N. Y. 292, 17 Am. Rep. 255, and many others.

In the early case of *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 197, it was held that the underwriters must be presumed to have been acquainted with the business and with the materials necessarily used in prosecuting it, and to have included such materials in the risk, the same as if each article had been particularly mentioned in the written portion of the policy; that the written portion in that regard will control the printed portion prohibiting the keeping of such articles. This case has been frequently cited and approved, and may be said to be strictly in line with the great weight of authority on the subject. In *Hall v. Insurance Co. of North America*, 58 N. Y. 292, 17 Am. Rep. 255, the court referred to *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 197, and several others of like character, stating, in effect, that they were all cases where the use of the prohibited article was necessary in the business; while in the case then under consideration it was only said to be usually used. It was sought by the insurance company to avoid the policy, notwithstanding, by distinguishing between necessary and customary use, but the court held that, under a policy covering a business, permission to use all articles ordinarily, as well as articles necessarily, used must be held to be given and covered by the contract of insurance. In *Carlin v. Western Assur. Co.*, 57 Md. 515, 40 Am. Rep. 440, the policy covered a factory and machinery, and prohibited the keeping or use of petroleum. The court held, in effect, that if the engineroom and machinery were included in the description of the insured premises, the keeping of petroleum, although among the prohibited articles, would not avoid the policy if the evidence showed that it was an appropriate and customary article used in the assured's trade for lubricating machinery, and that he kept it solely for that purpose; that the insurance company, when it issued the policy, knew that the factory could not be run without machinery, and it must be 104 supposed to have contracted with reference to such

use as an ordinary incident of the business; that if petroleum oil was usual and necessary, then such use must have been contemplated, though prohibited in the printed portion of the policy. The court concluded that the rule in respect to the question under consideration as stated is well settled.

It must be recognized that there is some conflict in the authorities on this subject, but the great weight of authority fully sustains the rule as above stated.

In the light of the foregoing, obviously the contract of insurance which covered the building to be used as a repair shop in connection with the furniture store permitted all things necessary to the enjoyment of the property for such use. The clause in the written portion of the policy, "Four hundred dollars on the stock of furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store," must be construed to cover merchandise kept in the trade in the furniture store, and the words "not more hazardous" to refer to such merchandise only, and have no reference to the necessary articles kept for use in the repair shop. The words, "any usage or custom of trade or manufacture to the contrary notwithstanding," contained in the printed portion of the policy, so far as they would otherwise prohibit the necessary use of benzine in the repair shop, must be held to be controlled by the written portion of the policy, which expressly insures the building in part as a repair shop; this upon the presumption, that must exist, that the parties intended that the repair shop as it was, and it must necessarily continue to be if it continued at all, must be carried on with all usual and necessary incidents, and that as such it was protected by the contract of insurance; also by force of the well-established rule, that the written special description of the particular subject matter, wherever inconsistent with the printed clauses of the policy, must control: *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *Cushman* ¹⁶⁵ v. *North Western Ins. Co.*, 34 Me. 487; *Archer v. Merchants' etc. Ins. Co.*, 43 Mo. 434. The construction we thus give the policy renders the contract just and reasonable, and carries out the obvious intention of the parties to it. Any other construction would lead to the absurd result that the prohibitory clause of the policy would absolutely prevent the carrying on of the business expressly permitted in the written portion. No such absurdity can be held to have been contemplated by the parties, unless the terms of the contract are such as not to permit of any other reasonable construction. As said in *Carlin v. Western Assur. Co.*, 57 Md. 515, 40 Am. Rep. 440;

"Where the contrary is not expressly made to appear, it is not to be presumed that, when an insurance is effected with reference to an established and current business, whose protection is really the object of the insurance, such a narrow and stringent construction of the provision of the policy was intended as will necessarily cause its serious embarrassment or suspension."

The only other question which requires consideration is, whether there has been a failure to comply with the condition requiring proofs of loss, so as to defeat a recovery on the policy. The circumstances of the defendant's adjuster's visit to plaintiff soon after the fire, his receiving and taking away a list of the property destroyed, furnished by plaintiff, and the retention of the same by the company or its agents, and the denial of liability for the loss on account of the presence of benzine on the premises, are sufficient to constitute a waiver of the provisions of the policy requiring proofs of loss: *Vankirk v. Citizens' Ins. Co.*, 79 Wis. 627; *Zielke v. London Assur. Corp.*, 64 Wis. 442; *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562; *Parker v. Amazon Ins. Co.*, 34 Wis. 363; *King v. Hekla Fire Ins. Co.*, 58 Wis. 508; *Harriman v. Queen Ins. Co.*, 49 Wis. 71; *Phoenix Ins. Co. v. Bachelder*, 32 Neb. 490; 29 Am. St. Rep. 443; *Carson v. German Ins. Co.*, 62 Iowa, 433; *Boyd v. Cedar Rapids Ins. Co.*, 70 Iowa, 325; *O'Brien v. 168 Ohio Ins. Co.*, 52 Mich. 131. In *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562, the court held that when the agent of the insurance company, after examining upon the spot the circumstances attending the loss, told plaintiff he could not recommend the company to pay the loss for certain reasons, it was a denial of all liability on the part of the company, and a waiver of its right to demand the usual proofs of loss. That substantially fits this case. The adjuster visited the premises, and when he discovered the presence of benzine, according to his testimony, he did very little further, and told the assured the policy was to all intents and purposes void; that he could do nothing for him; and that he, the assured, would have to present his claim to the company as provided by the policy. That, coupled with the refusal of the company to hold any communication thereafter with the assured, constituted a denial of liability by the company on the ground of a violation of the clause prohibiting the use of benzine on the premises, and effectually waived proofs of loss.

It follows from the foregoing that the judgment of the circuit court must be reversed and a new trial granted.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

INSURANCE.—An insurance company is presumed to know the nature of the business insured: *Western etc. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346; 27 Am. St. Rep. 703, and note. If inconsistent, written words in the policy control printed matter: *Goicoechea v. Louisiana State Ins. Co.*, 6 Mart., N. S., 51; 17 Am. Dec. 175; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604; 51 Am. St. Rep. 102. In considering the conditions and prohibitions in a policy of insurance, the parties must be presumed to have intended, the one to insure, and the other to obtain insurance on, the subject matter of insurance as it necessarily was at the time, and must continue to be during the life of the policy. A condition against the use or keeping of gasoline on the insured premises is not broken by the use of gasoline to an extent necessary to carry on the business for which the insurer knew that the property insured was used, and where both parties must have known either that the business insured must be discontinued or gasoline used therein. A stipulation prohibiting the use, by the insured, of naphtha, benzine, gasoline, etc., in the premises avoids the policy and forfeits the insurance, unless such use was one incidental to the business, adopted from necessity or custom, and recognized by the insurer: *Fraim v. National Fire Ins. Co.*, 170 Pa. St. 151; 50 Am. St. Rep. 753, and note. To justify the use of gasoline on insured premises, on the ground that such use was necessary to continue the business which the insurer knew to be the one carried on by the assured, the necessity need not be absolute, nor need it be proved that the gasoline was of such vital importance to the business that it could not be ignored. It is sufficient that the gasoline was in ordinary use by the trade for the attainment of the results for which it was employed by the assured: *Fraim v. National Fire Ins. Co.*, 170 Pa. St. 151; 50 Am. St. Rep. 753. If an insurance company receives and retains proofs of loss without making any objections thereto, it will be deemed to have waived any defects therein: *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis. 112; 33 Am. St. Rep. 29; and the mere silence of the company, in such a case, may so mislead the insured, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel: *Welsh v. London Assur. Corp.*, 151 Pa. St. 607; 31 Am. St. Rep. 786, and note.

PARKER v. STOUGHTON MILL COMPANY.

[91 WISCONSIN, 174.]

THE RECEIVER OF A FOREIGN MUTUAL INSURANCE COMPANY, appointed by a foreign court of competent jurisdiction, may maintain an action, in the courts of this state, against a member of the company resident here, to recover an assessment levied by a decree of the foreign court, upon a premium note which was a part of the assets of the company in the hands of the receiver when the assessment was made.

JUDGMENT, FOREIGN—CONCLUSIVENESS OF.—A judgment which is conclusive in the state where it was rendered is conclusive here. Hence, the decree of a court of competent jurisdiction in another state, levying an assessment upon the premium notes of a mutual insurance company in the hands of a receiver, being conclusive, in that state, upon all members of the company, until attacked in a direct proceeding, is conclusive in this state in an action to recover such assessment.

Suit by Parker, as receiver of the Mutual Fire Insurance Company of Chicago, against the Stoughton Mill Company, to recover an assessment made upon the defendant as a member of such insurance company. The assessment was based upon two certain

premium notes made by the defendant to the insurance company prior to the appointment of the receiver. Two separate causes of action were set forth in the complaint, one upon each of the notes. The facts, as shown by the complaint, were that the firm of Dow, Townsend & Co. became members of said insurance company; that the firm executed a certain premium note, to the company, and received a policy of insurance; that subsequently the firm assigned its interest in the policy to the defendant, which thereupon became a member of the insurance company; that the defendant executed and delivered certain premium notes to the insurance company; that the insurance company became insolvent, and had, after proper service of process, a receiver appointed for it by an Illinois court of competent jurisdiction; that an assessment upon such premium notes was made by the foreign court; and that the premium note forming the basis of the first cause of action was a part of the assets of the company in the hands of the receiver when the assessment was made. The complaint also alleged the appointment of the plaintiff as receiver, and that under and by virtue of certain laws of Illinois, and his appointment as receiver, he "had power to prosecute and defend suits in the name of the corporation, or in his own name," etc., and by reason thereof was vested with authority to bring and maintain the suit brought. The decree of the Illinois court levied an assessment of sixty-five per cent upon the premium note of the first cause of action, and membership liability of all the members of said company, and fixed the assessment against the Stoughton Mill Company, upon the premium note referred to, at the sum of four hundred and thirty-five dollars and ten cents. The decree provided that, upon failure to pay the assessment, the receiver should proceed to collect the full amount of the liability of the delinquent member. The complaint also alleged, after an averment of notice and failure to pay, that the receiver was entitled to recover on said premium note, in accordance with the provisions of such decree, the sum of six hundred and sixty-nine dollars and thirty-eight cents. The second cause of action set up the other premium note, and contained substantially the same allegations contained in the first cause of action, with the additional averment that such note had, on March 14, 1890, and prior to the appointment of the plaintiff as receiver of said company, expired by its terms, and had been returned to the defendant, but that at the time of such return or surrender the defendant had not paid any of the liability which had occurred thereon prior to the expiration of said note. The

amount sought to be recovered by the plaintiff upon the second note was one hundred and seventy-two dollars and thirty-seven cents. The defendant demurred to the complaint, on the ground that it appeared upon the face thereof: 1. That the plaintiff had not legal capacity to sue, being only an officer of a court in a foreign jurisdiction; 2. That the first count of the complaint did not state facts sufficient to constitute a cause of action; 3. That the second count of the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrer to the whole complaint, on the ground of want of capacity in the plaintiff to sue; but overruled the demurrers to the first and second counts, and dismissed the suit at plaintiff's cost. An order was entered accordingly. The plaintiff appealed from that part of the order sustaining the demurrer and dismissing the action; and the defendant appealed from that part of the order which overruled the demurrers to the two counts of the complaint.

D. J. Schuyler, C. W. Greenfield, and Olin & Butler, for the appellant and respondent Parker.

Luse & Wait, for the appellant and respondent Stoughton Mill Company.

179 WINSLOW, J. The first important question in this case is simple. An Illinois mutual insurance company has become insolvent, and a receiver thereof has been appointed by an Illinois court of competent jurisdiction, and an assessment upon the premium notes has also been made by the court. The defendant, a Wisconsin corporation, was insured in the insolvent company, thus becoming a member thereof, and gave its premium note, which was a part of the assets of the company in the hands of the receiver when the assessment was made. Can the receiver maintain an action in the courts of this state to recover of the defendant the amount of the assessment upon its premium note?

This court has held that an assignment of property made by a foreign court pursuant to a bankrupt act does not transfer the title to personal property in this state: *McClure v. Campbell*, 71 Wis. 350; 5 Am. St. Rep. 220. Also, that a receiver of an insolvent debtor appointed in a creditor's suit in a foreign state, has no title to the property of the debtor within this state, and will not be allowed to maintain an action in the courts of this state to set aside an alleged fraudulent conveyance of such property: *Filkins v. Nunnemacher*, 81 Wis. 91. The principle of both these decisions is manifestly the same, namely, that decrees of foreign courts have no effect upon the title of property within this state. This court

has also held, in effect, that a foreign receiver will be heard to assert in the courts of this state a title to a chose in action ¹⁸⁰ which he claims by an assignment valid and binding against all parties to the litigation: *Gilman v. Ketcham*, 84 Wis. 60; 36 Am. St. Rep. 899. The last-named case rules the present case. Here it appears that the receiver has been invested by the Illinois court with the practical ownership of choses in action which were then in possession of the insurance company and within the jurisdiction of the court, namely, the premium notes of the defendant. I say "practical ownership," because it is apparent from the complaint that the corporation itself is either actually dissolved or in process of dissolution, and all its property is in the hands of the court. So far as there can be any ownership of such property under such circumstances, it must be in the receiver. The corporation will never rise to claim it. It is not the property of the court, and hence, whatever substantial property there is in any one must be in the receiver, charged of course with his duties in relation to it. There is no question here of a transfer of property in this state. No such transfer was attempted. The property in question (that is, the defendant's note and its liability to pay assessments) was in Illinois at the office of the company. They were choses in action, and their situs was at the residence of the company: *State v. Gaylord*, 73 Wis. 316. The case, therefore, is simply this: A foreign receiver is attempting to enforce in the courts of this state a contract of which he has been invested with the practical ownership by a foreign court having jurisdiction of the property and of its former owner. We think the principles of judicial comity laid down in *Gilman v. Ketcham*, 84 Wis. 60, 36 Am. St. Rep. 899, fully cover the case, and, following them, we hold that the action may be maintained.

But it is argued that the complaint shows that the assessment made was inequitable and unjust, and was in fact a horizontal assessment, and hence will not be enforced. Upon this contention the case of *Great Western Tel. Co. v. Burnham*, 79 Wis. 47, 24 Am. St. Rep. 698, is relied upon. That was a case of an assessment, ¹⁸¹ made by an Illinois court having jurisdiction, upon the stockholders of a bankrupt telegraph company; and it affirmatively appeared upon the face of the complaint that some of the stockholders had paid forty per cent of their subscriptions and some only two per cent, and that the assessment sued on was a horizontal assessment of thirty-five per cent upon all. This was held to be conclusively unequal and unfair. It seems to have been considered that the plaintiff had, by his own allegations, im-

peached and discredited the decree of the court; and it was held that the complaint was demurrable, notwithstanding the fact that the assessment was made by a court of competent jurisdiction. We shall not attempt to justify all that is said in that case. By the constitution of the United States, article 4, section 1, the courts of this state are bound to give full faith and credit to the "public acts, records, and judicial proceedings of every other state." If a judgment is conclusive in the state where rendered, it is conclusive here. The decree by which the assessment in question was made was undoubtedly conclusive on the members or policy holders of the defunct company, unless attacked in a direct proceeding, notwithstanding they were not present when it was rendered: *Hawkins v. Glenn*, 131 U. S. 319; *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 211. It has so been held by the appellate court of Illinois in considering this very assessment: *Rand v. Mutual Fire Ins. Co.*, 58 Ill. App. 528. We can come to no other conclusion than that we are bound, under the constitutional requirement of "full faith and credit," to hold that the decree making the assessment in question, being conclusive in Illinois upon all members and policy holders unless attacked by direct proceeding, is conclusive here and not open to collateral attack: *Griggs v. Becker*, 87 Wis. 313. Whatever is said in *Great Western Tel. Co. v. Burnham*, 79 Wis. 47, 24 Am. St. Rep. 698, inconsistent with this conclusion, we are unable to follow.

¹⁸² The necessary conclusion from these considerations is, that the complaint stated a good cause of action, and that the general demurrer to the whole complaint on the ground of want of capacity in the plaintiff to sue was improperly sustained. It was admitted on the argument that an error had been made inadvertently in the statement of the second cause of action, which rendered it demurrable; therefore, the demurrer will be overruled as to the first cause of action, and sustained as to the second cause of action, with the usual leave to amend.

By the Court. The order appealed from is reversed, with costs in favor of the plaintiff, except that part which overrules the demurrer to the first cause of action, which is affirmed; and the cause is remanded for further proceedings in accordance with this opinion.

FOREIGN RECEIVERS—RIGHT TO SUE.—A receiver may generally sue in the courts of another state. His power to do so, however, arises from comity merely, unless there is a special statute authorizing such a suit: See monographic notes to *Alley v. Caspari*, 6 Am. St. Rep. 179, 187, on jurisdiction of the courts of one state or country over citizens of another; and *Straughan v. Hallwood*, 8 Am. St. Rep. 49, 53, on the

territorial powers and jurisdiction of receivers. A receiver may sue upon a judgment obtained in the courts of the state within whose jurisdiction he was appointed: *Note to Alley v. Caspari*, 6 Am. St. Rep. 179, 187.

JUDGMENT OF SISTER STATE—"FAITH AND CREDIT."—Under the constitution of the United States, the judgment of a sister state must be accorded in this state the same faith and credit which it has in the state where it was rendered: *Crumlish v. Central Imp. Co.*, 38 W. Va. 390; 45 Am. St. Rep. 872. This rule applies to a judgment against an insurance company: *Firemen's Ins. Co. v. Thompson*, 155 Ill. 204; 46 Am. St. Rep. 335.

THE PRINCIPAL CASE was distinguished in *Swing v. White River Lumber Co.*, 91 Wis. 517. That was an action to recover an assessment upon a premium note given to the Union Mutual Fire Insurance Company, a corporation created under the laws of the state of Ohio. The complaint alleged that the plaintiff was trustee of the creditors of such corporation, duly appointed by a court of the state of its domicile, after a judgment by the supreme court of that state, upon the complaint of the attorney general, ousting and excluding the insurance company from being a corporation, and that by the order of such court he had levied the assessment upon all the premium notes, including defendant's, held by him as such trustee; but it did not allege that, by the laws of Ohio, or by the order or judgment of said court, the plaintiff, as trustee, had any right to sue for and recover the assets of the insurance company, or that any assignment of such assets had been made to him. The defendant demurred to the complaint on the grounds: 1. That the plaintiff had not legal capacity to sue; 2. That the complaint did not state facts sufficient to constitute a cause of action. Upon notice and motion, the circuit court made an order striking out the demurrer as frivolous, with leave to the defendant to answer, within a specified time, upon payment of costs, from which order the defendant appealed, and Pinney, J., rendered the following opinion:

"In *Gilman v. Ketcham*, 84 Wis. 60, 36 Am. St. Rep. 899, it was held that a foreign receiver will be heard to assert in the courts of this state a title to a chose in action which he claims by an assignment valid and binding against all parties to the litigation. This ruling was applied in *Parker v. Stoughton Mill Co.*, 91 Wis. 174, ante, p. 881, where a foreign receiver had been invested by a court of competent jurisdiction of the state of Illinois with the practical ownership of choses in action belonging to an insurance company of that state, the affairs of which were being wound up and its property applied to the payment of its losses, etc.; and an action in the name of such receiver, upon an assessment of a premium note, was sustained upon the principles of judicial comity laid down in *Gilman v. Ketcham*, 84 Wis. 60; 36 Am. St. Rep. 899. But in *Parker v. Stoughton Mill Co.*, 91 Wis. 174, ante, p. 881, it was alleged in the complaint, in addition to the appointment of the receiver, that by chapter 73 of the General Statutes of Illinois, by virtue of his appointment, he had power to prosecute and defend suits in the name of the corporation or in his own name, and by reason thereof was vested with authority to bring and maintain the action. The proceeding in the supreme court of Ohio, to which reference is made in the complaint, was doubtless regulated by statutory authority, and the powers and duties of the trustee in such cases are probably prescribed by the statute of that state, or the order or judgment appointing him, but this court cannot

take judicial notice of the statutes of another state, or of the proceedings in its courts. They must be pleaded and proved as facts whenever any right is claimed under them. Presumably, at least, the powers and duties of such trustee are similar to those of a receiver in equitable actions or proceedings, in respect to which it is, in general, considered necessary that he should set out in his pleading, when he sues, the authority under which he assumes to act—as his appointment by a court of competent jurisdiction in a case within its jurisdiction, and that he has authority to prosecute the action. The rule is quite general that he may not sue without having first obtained, in some form, leave of the court, unless authorized by statute to bring actions: Beach on Receivers, secs. 650, 693, and cases cited; 20 Am. & Eng. Ency. of Law, 229. Where the rights of such an officer do not rest merely upon his appointment by the court of another state, but there has been an assignment to him, in his official capacity, of the property in question, or, by virtue of the statute of such state the title to the property is vested in him, he may, it seems, sue and recover the same, not strictly by virtue of his appointment, but by reason of his title, he being considered, for that purpose, substantially an assignee: High on Receivers, sec. 244; Gilman v. Ketcham, 84 Wis. 60; 36 Am. St. Rep. 899. The complaint does not allege that by the laws of the state of Ohio, or by the judgment or order of the supreme court of that state, the plaintiff, as trustee, has any title, right, or authority whatever to sue for and recover the assets of the Union Mutual Fire Insurance Company, or that any assignment of such assets had been made to him, and it therefore fails to show facts sufficient to entitle plaintiff to sue for and recover the assessment in question. The defendant was not bound to plead the objection in abatement. It appeared on the face of the complaint that the plaintiff had no legal capacity to sue, as such trustee, in the courts of this state, in respect to the demand in question, and had no title, as such, to recover the same. The demurrer should have been sustained." The court then reversed the order of the circuit court, and remanded the case, with directions to sustain the defendant's demurrer, with leave to the plaintiff to amend on terms.

THAYER v. HUMPHREY. DAVIES v. HUMPHREY.

[91 WISCONSIN, 276.]

INSOLVENCY—PARTNERSHIP AND INDIVIDUAL CREDITORS.—Generally speaking, partnership creditors cannot prove in competition with the individual creditors of a partner.

PARTNERSHIP—INSOLVENCY—APPLICATION OF ASSETS. In the administration of the affairs of a partnership, and of the individual members thereof, the fixed rule must be applied that joint estate goes first to joint creditors, and separate estate to separate creditors, with the exception that where there are no partnership assets, and there is no living solvent partner, partnership creditors may prove with the separate creditors of a partner in the settlement of his estate *pari passu*.

PARTNERSHIP—JOINT CREDITORS—LIEN—PREFERENCE.—Partnership creditors have no lien, strictly so called, on partnership assets, but must work out their preference over the creditors of

the individual members of the partnership through the equities of such members.

PARTNERSHIP—CONVERSION OF PARTNERSHIP INTO INDIVIDUAL PROPERTY.—If one member of a firm sells out his interest, in good faith, to his copartner, or to another, without in any way retaining his equity to have the firm creditors paid out of the assets the property is converted into the individual property of the purchaser, free from all the equities of the seller, even if the purchaser, as the consideration for such purchase, agrees to pay the firm debts; otherwise, if the purchaser agrees, expressly or impliedly, to apply the assets to such purpose.

PARTNERSHIP—INSOLVENCY—ASSETS.—The word “assets,” in the law of partnership, is not confined to assets at law, but includes all assets applicable to the payment of the partnership debts.

PARTNERSHIP—INSOLVENCY—OSTENSIBLE FIRM—JOINT PROPERTY.—If there is an ostensible firm by holding out to creditors, generally, the property of such firm is to be considered, in equity, joint property for the administration thereof in insolvency, the same as if such property belonged to a firm in fact.

PARTNERSHIP—RIGHTS OF CREDITORS AND MEMBERS OF OSTENSIBLE FIRM AS TO APPLICATION OF ASSETS.—Those who deal with persons representing themselves to creditors, generally, as partners in a certain business, are entitled to have the property used in such business applied to the payment of the debts incurred therein in preference to the individual debts of the members of the partnership, and the ostensible member of such partnership is likewise entitled to have the assets of the ostensible firm so applied.

PARTNERSHIP—INSOLVENCY—SALE BY OUTGOING PARTNER—APPLICATION OF FIRM ASSETS TO PAYMENT OF FIRM DEBTS.—If a member of an insolvent firm sells out with the understanding that the business is to be continued with the same assets, and the purchaser or purchasers, as consideration for the sale, are to assume and pay the old debts, and the circumstances are such as to evidence the fact that the purpose of the transaction is to pay the old firm debts and to wind up the old partnership concern by the payment of the debts of such concern out of the partnership assets and a continuation of the business, the court is warranted in concluding that the equity of the outgoing partner to have the assets of the firm applied to the payment of the firm debts is not changed, and that the right of the creditor to enforce it continues.

PARTNERSHIP—INSOLVENCY—OLD AND NEW FIRMS—PREFERENCE OF NEW FIRM CREDITORS OVER INDIVIDUAL CREDITORS OF NEW FIRM.—If one of the members of an insolvent firm sells out his interest to an outside party, or to his associates, and thereby a new firm is formed, which assumes the debts of the old firm, the intention of all the parties being that the new firm shall continue the business in substantially the same way, with substantially the same assets, and that the old debts shall be paid out of such business, and such new firm subsequently makes an assignment for the benefit of creditors, the creditors of the old and of the new firm may, in the administration of the assignment, prove their claims *pari passu*, and be preferred over individual creditors of the members of such new firm.

PARTNERSHIP—OSTENSIBLE FIRM AFTER DISSOLUTION—CREDITORS OF OLD AND NEW FIRMS.—If one member of an insolvent partnership sells out, and the firm is dissolved, under circumstances justifying the court in finding an implied promise, made at the time of the sale, that the firm debts should be paid out of the firm assets, an equity is reserved which the creditors can enforce. Neither a creditor of the old firm, nor a creditor of an ostensible firm taking the place of the old one, can prove *pari passu* with the individual creditors of an ostensible member of the new firm, whose name does not appear in the

title of the firm further than as represented by the "& Co.," and who has made an assignment for the benefit of creditors; but they can prove *pari passu*, with all the creditors of the new firm, in an assignment for the benefit of creditors made by the member of the new firm who really owns and conducts its business, and whose name does appear in the title of the ostensible firm.

Equitable administration of the affairs of two insolvent partnerships. Thayer and Davies were the appellants, and Humphrey, the assignee in insolvency, was the respondent. On November 3, 1891, Alfred J. Goss and J. D. Putnam were, and had been continuously for some years prior thereto, doing a milling business as copartners under the firm name of J. D. Putnam & Co., at River Falls, Wisconsin. On that day, the firm was insolvent and was dissolved, J. D. Putnam selling out his interest therein with the understanding that the business should thereafter be continued by J. B. Goss, as J. B. Goss & Co. The consideration for the sale on Putnam's part was that he should transfer his interest in the firm property, and also his individual property, for the benefit of the firm, and that the new firm should assume and pay all the old firm debts. Putnam supposed that J. B. Goss was to be the purchaser, but the transfer was made, first to A. J. Goss, for some reason not clearly shown, and by him, shortly afterward, to J. B. Goss. On said date, notice of dissolution was published, and that the business would, in the future, "be carried on under the firm name of J. B. Goss & Co.," who would settle all claims of the late copartnership. A. J. Goss, in fact, dropped out, and J. B. Goss became sole proprietor. The new concern had no way of paying the old firm debts except out of the assets derived from the old firm, and the accumulations of the business. The business was thereafter conducted in the name of J. B. Goss & Co., and the firm was advertised as such without any information to the public of a change in the members of the firm, except such as was contained in the published notice, until June, 1893, when A. J. Goss, who was the proprietor of a bank at Hudson, Wisconsin, failed, and J. B. Goss also failed. Each made an assignment for the benefit of creditors, the former to H. L. Humphrey, the defendant. At the time of such failures, J. B. Goss was indebted to A. J. Goss, at the bank, to the amount of forty-five thousand dollars, which included a large amount of old firm indebtedness existing at the bank at the time of the dissolution and thereafter assumed by J. B. Goss, and the balance was for money loaned by A. J. Goss to enable the former to carry out his agreement to assume and pay the J. D. Putnam & Co. debts, and to carry on the business. J. B. Goss was a son of A. J. Goss, and was not supposed at any time to be the owner of much prop-

erty or means of any kind, but the father, up to the time of the assignment, was supposed to be very wealthy. Substantially all the creditors of the old firm and also of J. B. Goss & Co., prior to the assignment, supposed that A. J. Goss was a member of the new firm. Alfred J. Goss had been described in the firm name, J. D. Putnam & Co., as the company, and it was held in *Thayer v. Goss*, 91 Wis. 90, 97, that the fact that the name of J. B. Goss took the place of that of J. D. Putnam was no notice of the withdrawal of Alfred J. Goss, but was equivalent to a holding out that he still remained in the business and as a member of the firm of J. B. Goss & Co., designated therein in like manner as in the case of the firm of J. D. Putnam & Co., whether any such firm existed or not. A. J. Goss was, therefore, held to be an ostensible partner, and liable for all the debts of the concern of J. B. Goss & Co., by such holding out. There were three sets of creditors, namely, those of the old concern of J. D. Putnam & Co., those of the new concern of J. B. Goss & Co., consisting of J. B. Goss, and A. J. Goss, as an ostensible partner, and those of J. B. Goss alone. There was, in fact, no firm, though there was an ostensible firm; and there were no firm assets of the ostensible firm known as J. B. Goss & Co., unless the assets and property owned by J. B. Goss in the business conducted under the name of J. B. Goss & Co. should be considered partnership assets in equity, by reason of A. J. Goss being liable to all the creditors as a partner by holding out. There was no living solvent partner. Each of the appellants filed a claim against the respondents' assignor in his assignment proceedings, and such proceedings were had that an issue was made up as to each in respect to whether he was entitled to share *pari passu* with the other creditors of such assignor. The decision was against the claimants, upon the ground that they were partnership creditors.

F. M. White and J. S. White, for the appellants.

Spooner, Sanborn, Kerr & Spooner, for the respondents.

279 MARSHALL, J. There are no findings of fact in these cases, but the evidence distinctly shows that the firm of J. D. Putnam & Co., on the third day of November, 1891, when Putnam sold out as hereafter stated, was hopelessly insolvent; that J. D. Putnam, the managing partner of the firm, was insolvent as well; that he desired to retire from the business and have its affairs closed up, and, in order that this might be done without an assignment on his part and on the part of the firm as well, which it was thought would imperil the private business of A. J.

Goss, it was agreed that the firm should be dissolved, and that Putnam should transfer his interest in the firm property, and also his individual property, for the benefit of the firm, and that the business should be thereafter continued under some new management, in which the old debts should be assumed and paid through its operations. J. B. Goss, the son of A. J. Goss, conducted the negotiations for the latter, but it was concluded in such a way that Putnam believed, and had a right to believe, that the son was to take his (Putnam's) place in the firm; that Putnam was simply to step out and J. B. Goss to step in. When the transfer was made, it was in form to A. J. Goss, but it satisfactorily appears that Putnam supposed that J. B. Goss ²⁸⁰ was the real purchaser, and that the business was to be carried on so as to liquidate the firm debts and eventually relieve him from liability. The agreement of dissolution expressly stated that the business would be conducted by J. B. Goss & Co., who would settle all claims of the old partnership. It was so advertised to the world, over the signatures of J. D. Putnam and A. J. Goss; J. B. Goss managing the whole affair. At this time, the legal title to the property was in A. J. Goss, but he soon afterward conveyed it to J. B. Goss, who thereafter held it as the real owner of the business, though the same was always carried on under the name of J. B. Goss & Co., and all the old creditors, pursuant to the agreement made at the start, as they presented their claims, were recognized as creditors of J. B. Goss & Co., down to the time of the assignments of J. B. Goss and A. J. Goss, hereafter mentioned.

Through the confusion surrounding the sale—by reason, among other things, of the claim on the part of Putnam that J. B. Goss was the purchaser and came in and took his place, while the title was nevertheless at first made to A. J. Goss; that the business was, however, from the start, advertised as that of J. B. Goss & Co., and that, soon after the new arrangement, the property was actually conveyed to J. B. Goss, and that it continued to the end to be administered by him as J. B. Goss & Co., and the old debts to be recognized as the debts of J. B. Goss & Co., while there was no firm in fact—it may be clearly seen that the real purpose on the part of Putnam was to turn over his property for the benefit of the creditors of the partnership; that this was well known to both A. J. and J. B. Goss; that J. B. Goss immediately took charge of all the assets of the concern and administered them according to such understanding; that A. J. Goss made the title over for the same reason, and, for the purpose of having the partnership business settled up without involving

him in his private enterprises, to ²⁸¹ have it so run along, pending the settlement, that all the old debts might become really the debts of his son, while the delusion was kept up that there was a firm, J. B. Goss & Co., and that the "& Co." stood for A. J. Goss. In short, it is clear that J. D. Putnam, J. B. Goss, and A. J. Goss intended, in all they did, to have the business and assets of J. D. Putnam & Co. devoted to the payment of the debts of the old partnership and of the new management, and all their acts are consistent with such intention, and not with any other, though, of course, J. D. Putnam was not a party to the scheme by which it was attempted to convert the liabilities of J. D. Putnam & Co. into the personal liabilities of J. B. Goss.

It is quite clear that while, after the Putnam sale, the business was run by J. B. Goss as J. B. Goss & Co., and though he was at law the actual owner of the property, A. J. Goss was, by his consent, so held out to creditors generally as a partner that all persons who had dealt with the old firm and constituted its creditors, and all who dealt with the new firm as well, had a right to, and did, consider that the only change that had taken place was that J. D. Putnam had stepped out and that J. B. Goss had stepped in, and that the debts of the old firm had been assumed by, and became the debts of, the new firm. We must assume, in the absence of evidence to the contrary, though the evidence fairly establishes the fact, that all persons who did business with J. B. Goss & Co. supposed that there was a firm in fact as well as in name, and that the "& Co.," stood for A. J. Goss.

The ostensible firm actually assumed, by agreement with the creditors, nearly all the debts of the old concern, and among them the debt of the appellant Lottie Thayer, but did not so assume the debt of the appellant Davies. Such ostensible firm also incurred other obligations. It was insolvent from the start, and, in the course of events—in ²⁸² effect, by the act of J. B. Goss—made an assignment for the benefit of creditors; and A. J. Goss, being insolvent, made an assignment for the benefit of creditors as well. There was then, in fact, no firm, though there was an ostensible firm; no firm assets, strictly so called, because there was no firm in fact; yet there are assets that were owned and used in the business of the ostensible firm of J. B. Goss & Co., and that passed into the possession of the assignee of J. B. Goss—hence assets of the ostensible firm. There is no living solvent partner.

Now, in this situation, can the creditors of J. B. Goss, doing business as J. B. Goss & Co., who were so circumstanced as to be

entitled to hold J. B. Goss and A. J. Goss liable as members of an ostensible firm—and all the creditors, at least of the new concern, including those having claims against the old firm that, by arrangement with them, have been assumed and made debts of J. B. Goss & Co., are so circumstanced in fact—prove their claims *pari passu* with the individual creditors of A. J. Goss in his assignment? Also, can the creditors of the firm of J. D. Putnam & Co. so prove?

This presents interesting questions of law, some of which have not heretofore been presented to, or decided by, this court—questions upon which there is such conflict of authority in this country that the true rule to be adopted has not been arrived at without difficulty, and then not with the unanimous decision of the court, which is to be regretted. Nevertheless, after careful consideration of the state of the law as held by the courts of this country, and of England as well, we have, as we believe, reached a conclusion thoroughly grounded in the well-recognized principles of equity jurisprudence, which should be applied in the progressive spirit that ever has and should ever characterize the growth and application of such principles. They should not only not be lost sight of, but they should not be fenced in and restricted ²²³ within such narrow limits as to lead to a suspicion of their correctness, but should be applied on such well-defined lines as to leave no doubt in respect to their true character and scope.

There are several propositions of law that apply which are well established—too well to need to be more than stated—among which are, that the assets of an insolvent partnership, in insolvency proceedings, must be applied first to the payment of the partnership debts; that, generally speaking, partnership creditors cannot prove in competition with the individual creditors of a partner; that the fixed rule is, that joint estate must go to joint creditors, and separate estate to separate creditors, though the former may prove *pari passu* with separate creditors when there is no living solvent partner and no partnership assets.

Now, in this case there is no solvent partner. J. D. Putnam, J. B. Goss, and A. J. Goss are all insolvent. So, keeping in mind the above-stated propositions of law, the vital question is, Are there any partnership assets to which appellants can resort? If there are such, then the foundation stone, upon which they construct their claim of right to share *pari passu* with the individual creditors of A. J. Goss, disappears.

On that subject we shall not attempt to harmonize the large number of cases that can be found in this country. The simple question of whether, when there is an ostensible firm by holding

out to creditors generally, the property of such firm is to be considered, in equity, joint property for the administration thereof in insolvency, the same as if such property belonged to a firm in fact, is the key to the situation. That it ought to be so considered is, we assume, too clear for argument; that is to say, if A and B do business with persons generally as A & Co., and incur liabilities to such persons who deal in good faith, believing that there is a firm in fact as well as in name, and under such circumstances ²⁸⁴ that they have a right to believe it is composed of A and B, and the business becomes insolvent, the property of the ostensible firm should be considered, to all intents and purposes, in regard to the administration of the business in insolvency under the control and direction of a court of equity, the same as if they were partners in fact. The doctrine that estops B from saying that he is not a partner of A at the suit of the creditors of the ostensible firm should estop A from holding that the property is his individual property, to the prejudice of those who dealt with the firm as a firm in fact, and should estop the creditors of the ostensible firm, in the case of the bankruptcy of such firm, from resorting primarily to the individual property of the members of such firm; in short, should work effectually to compel liquidation in all respects the same as if the members of such firm were just what they seem to be. This is what the doctrine of estoppel is for; that is what equity is supposed to accomplish—to prevent fraud and promote justice between man and man in the administration of human affairs. And we are therefore prepared to find that such is the law as substantially declared by the court of appeals in chancery of England.

In *In re Rowland*, 1 Ch. App. 421, the precise question here under consideration was presented. The business was conducted in the name of Rowland & Co. Crankshaw was held to be the ostensible partner, in a contest to determine whether the property should be administered in bankruptcy as joint property of Crankshaw and Rowland, partners, or as the individual property of the one who was the actual owner. The opinion of the court, which, being short, can best be stated by quoting it in full so far as relates to the particular question under consideration, is by Lord Cranworth, as follows:

"In the administration of bankruptcy, it has been the object from the earliest times to apportion the assets as fairly ²⁸⁵ as possible between the joint and separate creditors. There is found much difficulty in doing this satisfactorily, but some rules have been clearly laid down, for instance, that the joint property

pays the joint creditors, and the separate property pays the separate creditors. Now, what is said here is that this estate, though said to be joint, is in fact separate. These two gentlemen traded under the name of Rowland & Co., and tradesmen supplied them with large quantities of goods, and then they became bankrupts, and it is now said that they were not partners, and that the real arrangement between them was that everything belonged to Crankshaw. That is no reason; and, as Crankshaw suffered Rowland to trade in the name of the firm, any persons trading with him are entitled to say that Rowland and Crankshaw are the persons with whom they dealt and that the goods are joint goods."

This is a most concise statement of the law, as held by the English court of chancery. The meaning is too plain and unmistakable to leave any room for discussion, and we find that the rule so tersely stated has been adhered to and repeatedly approved in subsequent cases in language rather tending to extend than restrict the principle involved. In *Ex parte Sheen*, 6 Ch. Div. 235, the question was again before the court, where the circumstances were that there was no general holding out, and the court held that where there is no ostensible partnership by a holding out to creditors generally, but only a holding out to two or three creditors, the facts are not sufficient to make the property of the alleged ostensible firm joint estate. This, though not referring to, inferentially approves *In re Rowland*, 1 Ch. App. 421. In *Ex parte Hayman*, 8 Ch. Div. 11, the question again came before the court of chancery, on appeal from the chief judge in bankruptcy, and *In re Rowland*, 1 Ch. App. 421, was expressly approved. The case so clearly covers the two cases under consideration that we ²⁸⁶ quote liberally from the opinion, after stating the facts. Such facts are as follows:

Prior and up to August 31, 1875, Hayman, Catford, and Pulsford carried on business as Hayman, Pulsford & Co. On that date, the firm was dissolved, and notice was published stating the fact. At the same time a letter was sent to each of the persons with whom the firm had done business, stating the fact of dissolution, and that thereafter the business would be carried on by Thomas Pulsford, under the style of Pulsford, Son & Co. Thereafter, the business was so conducted. Tom Pulsford, the son of Thomas Pulsford, took an active part in conducting the business up to the time the insolvency occurred, when Thomas Pulsford filed a petition in bankruptcy; and on the suggestion that, on account of the way the business had been conducted, it might be held that the father and son were partners, a petition was also filed by them.

as joint traders. The creditors resolved upon a liquidation by arrangement, and such resolution was registered. Hayman, a separate creditor of the father in respect to matters outside the firm of Pulsford, Son & Co., appealed from the order for a liquidation of the business as that of a firm, on the ground that there was no partnership. He prevailed, and the registration was canceled, and the decree was not appealed from. Thereafter, the father and son signed a declaration of insolvency, upon which Ravenscroft, a creditor, presented a petition alleging that they had treated father and son as partners, under the firm name of Pulsford, Son & Co., on which an adjudication was made against them by consent. Hayman then appealed to the court to annul the adjudication. On this application, following *In re Rowland*, 1 Oh. App. 421, the application was dismissed, on the ground that, though no actual partnership had subsisted between father and son, yet the son had been held out as a partner to the petitioning creditor to such an extent as to enable him to maintain the adjudication. This decision was ²⁸⁷ not appealed from. Hayman then applied to the court for an order declaring that all, or such portion as the court should think proper, of the estate which appeared in the acts of the bankrupts, or either of them, as joint estate, formed part of the separate estate of the father, and for a direction that the trustee should treat the same accordingly, as separate estate of the father. Hayman was the only separate creditor, that is, creditor outside those of the business of Pulsford, Son & Co. On the hearing, the evidence showed that substantially all the creditors did business with Pulsford, Son & Co., as a firm consisting of the father and son, though it appeared that the father was the actual owner of the business, and that there was no firm in fact. Hayman's application was refused, and he appealed. On the hearing of this appeal in the chancery division of the high court of justice, James, L. J., propounded to appellant's counsel the following interrogatory: "If I go to a shop, and find the names Thompson & Jones on the door, and I go in and find Thompson and Jones selling goods, am I not warranted in believing that they are partners?" to which answer was made in effect: "That would not change the nature of the assets and make property which belonged to the father in fact the joint property of father and son"—just as it is claimed in this case, it will be observed. Appellants contend that the fact of holding out sufficient to constitute an ostensible firm of J. B. Goss & Co. will not change the nature of the assets, so as to make the individual property of J. B. Goss joint property, in equity, of J. B. Goss &

Co. The positions are identical. In the opinion of the court this is answered by James, L. J. After reciting the facts in *In re Rowland*, 1 Oh. App. 421, as in Lord Cranworth's opinion in that case, he says:

"Every point of that judgment applies to this case, with this single exception, which fact is in favor of the decision of the registrar, that, instead of the words used being '& Co.,' which is an ambiguous term and might mean anybody in ²⁸⁸ the world, the words are 'Pulsford, Son & Co.' But it is said that this conclusion will work hardship to the appellant, who is a creditor of the father alone. I think that is only one of those misfortunes which occur to persons who deal with others who afterward become insolvent and become bankrupt having partners. The hardship would have been exactly the same upon Hayman if there had been a real partnership created by a formal instrument. The same consequences would then have happened as happen where there is only an ostensible partnership." It will be distinctly noted at this point that the court makes no distinction in the administration of estates of an ostensible and actual firm in bankruptcy. The lord justice proceeds: "The rule has been established that joint creditors take the joint estate and separate creditors take the separate estate, and you only have to consider what is joint and what is separate estate, and you must apply the rule independently of the hardship. The supposed hardships are those which it may inflict in any particular case. We can only apply the fixed rule that that which is joint estate shall go to the joint creditors, and that which is separate estate shall go to the separate creditors."

The reasoning of these cases is, in our opinion, unanswerable, and we deduce therefrom the principle of law that, if a person allows another to carry on business in such a way as to amount to a holding out to persons generally that he and such other are partners, and credit is given to both on the supposition that they are partners in facts, the property with which such business is carried on, though in law that of such person, in equity will be treated as the joint property of such person and such other; and neither of them, nor the creditors of either, can prove up in insolvency in competition with the creditors who have trusted same effect is *Van Kleeck v. McCabe*, 87 Mich. 599. Applying the two as partners and the business as that of the two. To the the law thus stated to the question under consideration, ²⁸⁹ the conclusion is easily reached that, while there are no firm assets at law of the ostensible firm of J. B. Goss & Co., all the

property used by J. B. Goss in conducting the business, in equity, is the joint property of such ostensible firm, and to it all the creditors of such ostensible firm can resort, the same in all respects as if there had been a firm in fact.

This effectually disposes of the appeal of appellant Lottie Thayer, though it is as effectually ruled by the law applicable to the Davies appeal, as will appear by what follows. Appellant Davies never became the creditor of J. B. Goss or of J. B. Goss & Co., by any agreement to which he was a party; and, while his appeal presents the question of whether there is any joint property to which he can resort, such question involves a different question from the one discussed as particularly applicable to the Thayer appeal.

We must start the discussion of the Davies appeal with the proposition of law—in respect to which, though there is some conflict, they are too well established by the great weight of authority to be questioned by this court—that partnership creditors have no lien on the partnership assets independent of the equity of the partners, but must work out their preference over the individual creditors of the members of the partnership through the equities of such members; that, so long as the equity of the individual members of the partnership exists to have the partnership property applied to the partnership debts, the creditors have the equity to compel its enforcement; that if one members sells his interest, bona fide, to his copartner or a stranger, without in any way retaining his equity to have the partnership creditors paid out of it, the joint property is thereby converted into the individual property of the purchaser. The question to be determined is in view of the facts that the sale was made by Putnam in consideration of the debts of the partnership being paid; that the firm was insolvent at the time; that the whole transaction was really made by him to relieve ²⁹⁰ himself of the partnership liability; that the property was put into the possession of J. B. Goss for the purpose of continuing the same business with the same assets and effecting a settlement of the old partnership affairs, all of which clearly appears. Can it be held that the equitable title to the property was changed, so as to affect the equitable right of Putnam to have the creditors of the old firm paid out of it, or were the equitable rights of the outgoing partner and the creditors preserved by reason of the facts, and the assets in the hands of J. B. Goss impressed with a trust to carry out the intention of the parties?

In discussing these questions, full effect should be given to the

significant controlling words in the rule, correctly stated in *Willis v. Thompson*, 85 Tex. 301, "without preserving the lien in any manner." In *Conroy v. Woods*, 13 Cal. 626, 73 Am. Dec. 605, it was held that where a sale is made by one partner to his copartner, and the consideration for the sale is the payment of the partnership debts, the sale is not bona fide and within the meaning of the rule, so as to cut off the equity of the vendor to have the property applied to the payment of the partnership debts. Very few cases can be found that go as far as the California court on this subject, except in the New Hampshire court, which does so, holding that the creditor has an equitable interest independent of the equity of the individual partner. In *Ex parte Cooper*, 1 Mont. D. & D. 358, and *Ex parte Williams*, 11 Ves. 3, it is held that where an outgoing partner sells bona fide to his copartner, and takes for his consideration an agreement that the purchaser shall pay the debts, no equitable interest in the property is retained. To the same effect are *Stanton v. Westover*, 101 N. Y. 265; *Fulton v. Hughes*, 63 Miss. 61; *Dimon v. Hazard*, 32 N. Y. 65; and many other cases that might be cited. In *Darby v. Gilligan*, 33 W. Va. 246, it is held that where a firm is insolvent, if a partner sells out to his copartner, and the purchaser agrees to pay the firm debts, ²⁹¹ the sale cannot be considered bona fide, so as to cut off the equity of the firm creditors to be preferred; and to the same effect is *Olson v. Morrison*, 29 Mich. 395. In the latter case, Olson and Jones were partners. Olson sold out to Morrison, the consideration being that the vendee should pay the debts of the firm. It sufficiently appears that the firm was insolvent. The vendee neglected to comply with his agreement, and the creditors, joining with the vendor, brought suit to compel performance of the agreement, and to subject the property to the payment of the partnership debts. Held, that the agreement to pay the debts as consideration for the transfer was a sufficient recognition of the equitable lien of the partnership creditors, tracing the same through the equity of the vendor, to enable them, joining with him, to enforce such equity.

In *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683, it was held that, as between the firm and its creditors, the title of the former to the joint property is not divested by any separate transfers to outside parties for the individual benefit of the respective vendors, and that, when there has been no transfer by the firms as such, conveying the corpus of the property, and it remains in specie, though transferred by the separate transfers of the individual members, it may yet be followed and reached in the

hands of those claiming under such separate transfers by creditors of the firm. This is upon the theory that neither partner separately has any interest in the corpus of the property; that his interest is limited to his proportionate share of what remains after a settlement of all partnership obligations and an accounting between himself and his copartner. A distinction is drawn in this case between a bona fide sale by one of a partnership to two of his copartners without reservation, which, under the prevailing rule of *Ex parte Ruffin*, 6 Ves. 119, operates to liberate the assets from the partnership liability, and a sale made by one member of a firm of more than two to one of the partners, or to ²⁸² an outside party. In that class of cases, the New York courts have uniformly held, since *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683, that the partnership effects are not liberated from the partnership liability. In this case, if it is held that the sale was really to J. B. Goss, under the New York rule the corpus of the property never passed by any act of the firm so as to change the equitable title in respect to creditors existing at the time of the sale.

The trend of the New York cases since *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683, has been to extend the rule which preserves the equity of the creditors in case of the sale by one of the members of an insolvent firm, the purchaser assuming the partnership obligations in place of the outgoing partner, whether such sale is to a copartner or otherwise. This clearly appears by the following, from the opinion in *Bulger v. Rosa*, 119 N. Y. 465: "The equity of the firm creditors cannot be defeated by any attempted conversion of the assets of the insolvent firm into the individual assets of one of the partners, through a transfer by one partner of his interest therein to the other. In such a case, till the assets come to the hands of a bona fide purchaser, the same can be reached by the partnership creditors." To the same effect are *Nordlinger v. Anderson*, 123 N. Y. 544, and *Peyser v. Myers*, 135 N. Y. 599. In the latter case, there had been a change in the firm some time prior to the assignment for the benefit of creditors, the new firm not having made any express contract to pay the old firm debts. There were two sets of creditors, and, in discussing the subject of their equitable rights, the court said: "The priority of the lien of firm creditors is not divested by the transfer by an insolvent firm of the assets to one or more of the partners, nor can it be affected by any mere change in the personnel of the firm, as by the withdrawal of one partner from the firm or the introduction of another." See, also, *Phelps*

v. McNeely, 66 Mo. 554, 27 Am. Rep. 378, where it was held that if a partner sells out his interest ²⁰³ in the firm to his copartner, who agrees to pay the debts, the firm being at the time insolvent, the equities of the creditors are preserved. The evidence in that case tended to show that there was no property, other than that formerly belonging to the partnership, out of which the firm debts could be paid; but it does not clearly appear whether the court rested its decision on the ground that there was an implied promise under the circumstances to pay the firm debts out of the partnership assets or on the ground that the insolvency of the firm impeached the bona fides of the transaction. The court went further, and held that, notwithstanding the vendee of the property had turned the same out to secure his individual creditors, who had received it as security in good faith, it could nevertheless be reached by the partnership creditors; but this was subsequently overruled in *In re Edwards*, 122 Mo. 426.

We might go on at great length reviewing decisions on this subject, and cite numerous authorities where outgoing partners have been held to retain their equity to have the firm debts paid, and the rights of the creditors to the assets which have come under the control of equity have been worked out through the equity of such partners. Probably there are few questions upon which there is such a conflict of authority as the one under consideration; but nearly all are in harmony with the principle that if the bona fides of the transaction is impeached, or if the equity is retained by agreement, express or implied, then the creditors can enforce such equity. The conflict chiefly arises in regard to what circumstances or facts are sufficient to impeach the good faith of the transaction, and in respect to what is sufficient to show a contract that the partnership debts shall be paid out of the partnership assets, and impress a trust upon such assets for that purpose.

By the mere fact of the dissolution of a partnership by ²⁰⁴ one member selling out to his copartner or to a stranger, the purchaser or purchasers agreeing, as consideration for the purchase, to pay the partnership debts, the firm being insolvent at the time, no presumption of a bona fide agreement arises which will operate to change the equitable title of the property; and such agreement must clearly appear to exist inconsistent with the continuance of the equitable rights of the partner, and, through him, of the partnership creditors; else it is retained: *Lindley on Partnership*, 699. If the circumstances are such as to show that the property was merely transferred for the purpose of winding up the affairs

of the concern, there being no express agreement that the property shall be exclusively that of a vendee, it will, in case of bankruptcy, be distributed as joint estate: Lindley on Partnership, 699, 700. This is upon the presumption that such was the intention of the parties. The presumptions to be indulged in, in such cases, rather go to support an implied agreement to do what in equity and good conscience the parties ought to do. In *Sedam v. Williams*, 4 McLean, 51, and *Marsh v. Bennett*, 5 McLean, 117, it was held that the equity was retained to have the partnership creditors paid out of the partnership assets, and that such assets were impressed with a trust for that purpose by virtue of an express agreement. In *In re Dawson*, 59 Hun, 239, which does not appear to have been appealed from or criticised, it was held that where one member of a firm retires, selling out his interest to a third party, who continues the business with the remaining partner, with whom he enters into partnership, and the partnership assumes the debts of the previous firm, and such new firm becomes insolvent and makes an assignment for the benefit of creditors, the property transferred to the new firm becomes charged in equity with a trust for the payment of the debts of the old firm, which the outgoing partner may enforce. Such holding is certainly equitable and just when applied to a state of facts, ²⁹⁵ as in this case, which leaves no room for doubt but that it was the intention of all the parties dealing with the property to preserve and administer the partnership assets in the nature of a trust to liquidate the old debts; and to this extent we expressly approve of and apply it here. This does not, in the least, trench upon the rule that if a partner sells out, bona fide, his interest in the partnership assets and business, without in any manner retaining his equity to have the partnership creditors paid out of such assets, he waives his equity in that regard, but is perfectly consistent with it. If the agreement was express that the debts shall be paid out of the assets, then the equity is retained by express contract; if the circumstances of the transaction show that the contemplation of the parties was that the debts should be so paid, then the equity is retained by implied agreement; and the assets are, in the administration of the affairs of the purchaser in insolvency, as effectually impressed with a trust in favor of the vendor and, through him, the creditors of the old partnership, in the one case as in the other. The circumstances involved in these appeals point unerringly to the conclusion that it was the intention of J. D. Putnam, J. B. Goss, and A. J. Goss that the new concern of J. B.

Goss & Co. should continue the old business with the same assets, for the primary purpose of winding up such business and liquidating the debts theretofore contracted in it out of the old assets, so far as practicable. Hence the court below, sitting as a court of equity in the administration of the affairs of A. J. Goss and J. B. Goss, was warranted in concluding that the property of J. B. Goss is impressed with a trust to carry out the intention of all the parties concerned in the dissolution of the old firm and formation of the new concern of J. B. Goss & Co., that the debts of the old firm should be assumed by the new concern, and be paid out of the property turned over to it and the operations of the business, so far as this can be done with ²⁹⁶ due regard to the equities of the creditors who trusted such new concern.

On the subject of whether the two sets of creditors—those of the old firm of J. D. Putnam & Co., and those of the ostensible firm of J. B. Goss & Co.—can all prove in the insolvency proceedings of J. B. Goss, though that subject need not be decided here, we cite *Ex parte Chuck*, 8 Bing. 469, an early English case, which covers the subject; and, so far as we are able to find, it has never been criticised or overruled. The facts were that S. & S. had been doing business for some time as copartners, and were, as such, indebted to various persons. They took in W., and thereafter the business was conducted by S., S., & W., as copartners. The new firm became bankrupt, and there were creditors of both the old and the new firm as well. The court held substantially as follows: "We are of the opinion that the creditors of S. & S. and those of S., S., & W. should be admitted to prove *pari passu* upon the joint assets of the new firm." To the same effect is *Frow's Estate*, 73 Pa. St. 459. Foresman sold out his interest in an existing firm, having creditors, to the remaining members, who agreed to pay the debts. The vendees continued business as signment for the benefit of creditors. Held, that the two sets of a firm with the same assets for a time, and finally made an as-creditors—those of the old firm and those of the new firm—might prove *pari passu* against the assets of the new firm; that *Frow, Jacobs & Co.* were liable for the debts as partners in the firm of *Foresman & Co.*, which they took upon themselves when *Foresman* retired from the firm and they continued the business. When *Foresman* sold out, the purchasers intended to continue the business. They took all the assets and assumed the debts. The assets became the capital of the new firm, and the old debts became its debts. Under these facts, the court readily reached the conclusion that the creditors of the old and of ²⁹⁷ the new

firm should stand on an equal footing in the settlement of the new firm in bankruptcy. To the same effect are *In re Dawson*, 59 Hun, 239; *Shedd v. Bank of Brattleboro*, 32 Vt. 709; *Filley v. Phelps*, 18 Conn. 294; *Wright v. Carman*, 19 N. Y. Supp. 696. Held, in latter case, and in *Frow's Estate*, 73 Pa. St. 459, and *In re Dawson*, 59 Hun, 239, that the debts of the old became, by reason of the facts, the debts of the new firm. To the same effect is *Peyser v. Myers*, 135 N. Y. 599, where it is distinctly held that if there is a change in the personnel of an insolvent firm, and it subsequently makes an assignment for the benefit of creditors—there being an agreement, express or implied, at the time of the change, that the new firm shall assume and pay the old debts—the equity of the old creditors is equal to that of the new. There was no express agreement in that case, but the court held that there was an implied agreement.

This effectually disposes of all the questions presented, and leads to the conclusion that neither of the appellants can prove *pari passu* with the individual creditors of A. J. Goss in his assignment, but they can both prove *pari passu* with all the creditors of the ostensible firm of J. B. Goss & Co. in the assignment of J. B. Goss.

This opinion has been quite lengthy, but it may be well justified from the importance of the questions involved. In reaching the conclusion arrived at by the majority of the court, we resort to cases merely to determine what well-defined principles have been established applicable to the facts of the appeals before us. Having come to a satisfactory conclusion in that regard, we endeavor to broadly apply them so as to satisfy effectually the ends of justice, which are obviously the legitimate ends for which such principles have been worked out in the growth of equity jurisprudence. By so doing, the assets of J. B. Goss, held and used by him as those of the ostensible firm of J. B. Goss and A. J. Goss, will be marshaled and administered along definite lines, without ~~any~~ confusion or uncertainty as to the rights of the various sets of creditors and parties interested.

In order, now, that the principles of equity jurisprudence here applied may definitely appear, we recapitulate as follows:

1. In the administration of the affairs of a partnership and of the individual members thereof, the fixed rule must be applied that joint estate goes first to joint creditors, and separate estate to separate creditors, with the exception that where there are no partnership assets, and there is no living solvent partner, part-

nership creditors may prove with the separate creditors of a partner in the settlement of his estate *pari passu*.

2. Partnership creditors have no lien, strictly so called, on partnership assets, but must work out their preference over the creditors of the individual members of the partnership through the equities of such members.

3. If one of a partnership sells out, *bona fide*, his interest to his copartner or to another, without in any way retaining his equity to have the partnership creditors paid out of the assets, the property is converted into the individual property of the purchaser, free from all the equities of the seller, even if the purchaser, as the consideration for such purchase, agrees to pay the firm debts; otherwise, if the purchaser agrees expressly or impliedly to apply the assets to such purpose.

4. The word "assets," used in No. 1, is not confined to assets at law, but includes all assets applicable to the payment of the partnership debts, under the well-defined principles for the administration of the affairs of insolvent partnerships under the direction of a court of equity.

5. Those who deal with persons representing themselves to creditors generally as partners in a certain business are entitled to have the property used in such business applied to the payment of the debts incurred in such business in ²⁹⁹ preference to the individual debts of the members of the partnership, and the ostensible member of such partnership is likewise entitled to have the assets of the ostensible firm so applied.

6. If a member of an insolvent firm sells out with the understanding that the business is to be continued with the same assets, and the purchaser or purchasers, as consideration for the sale, are to assume and pay the old debts, and the circumstances are such as to evidence the fact that the purpose of the transaction is to pay the old firm debts and to wind up the old partnership concern by the payment of the debts of such concern out of the partnership assets and a continuation of the business, the court is warranted in concluding that the equity of the outgoing partner to have the assets of the firm applied to the payment of the firm debts is not changed, and that the right of the creditor to enforce it continues.

7. If one of the members of an insolvent firm sells out his interest to an outside party or to his associates and thereby a new firm is formed, which assumes the debts of the old firm, the intention of all the parties being that the new firm shall continue the business in substantially the same way, with substantially

the same assets, and that the old debts shall be paid out of such business, and such new firm subsequently makes an assignment for the benefit of creditors, in the administration of the assignment the creditors of the old and the new firm may prove their claims *pari passu*, and be preferred over individual creditors of the members of such new firm.

By the Court. The orders appealed from are affirmed, and the causes remanded for further proceedings according to law.

MR. JUSTICE NEWMAN, Mr. Justice Pinney concurring, delivered the following dissenting opinion in the case of Thayer v. Humphrey: "Lottie Thayer was a creditor, for money lent, of the milling copartnership of J. D. Putnam & Co. The firm comprised J. D. Putnam and Alfred J. Goss. It was afterward dissolved by mutual consent. The business was thenceforward carried on at the same place under the name of J. B. Goss & Co., who assumed all the debts of J. D. Putnam & Co. The firm property of J. D. Putnam & Co. was conveyed to James B. Goss, who alone carried on the business, under the name of J. B. Goss & Co. Thayer took the note of J. B. Goss & Co. for her claim against J. D. Putnam & Co., and surrendered the old note. She afterward recovered a judgment on her new note, against James B. Goss and Alfred J. Goss, in form joint and several. The trial court found that Alfred J. Goss was not a partner with James B. Goss in the firm of J. B. Goss & Co., but that he was liable to Thayer by reason of his being held out to her as a partner. Both Alfred J. Goss and James B. Goss are insolvent, and have made assignments for the benefit of their creditors. Alfred J. Goss assigned to H. L. Humphrey, the respondent; James B. Goss to one Weld. The assignment of James B. Goss includes all that remains of the property which was of J. D. Putnam & Co. No mention is made in either assignment of partnership property. J. D. Putnam also is insolvent. Thayer filed her claim, based on her judgment, with the respondent. It is stipulated that her original claim has become merged in this judgment. The respondent filed objections to the claim. The court held that she must first go against the partnership assets, and could not go against the individual assets of Alfred J. Goss until his separate creditors were paid. From this order Thayer appeals.

"The rule is fully settled, in the administration of the assets of insolvents, that the partnership debts are primarily payable out of the partnership assets, and are entitled to a preference over the individual debts of the insolvent; and so, in the reverse case, the individual debts are primarily payable out of the individual assets of the insolvent, and possess a like preference. The surplus, only, after satisfying such priorities, can be reached by the other class of debts. For this purpose, the joint estate and the separate estate of the insolvent constitute separate funds, to be administered separately: Story on Partnership, 7th ed., sec. 376; 17 Am. & Eng. Ency. of Law, 1202, and cases cited in note 1; Parsons on Partnership, 4th ed., sec. 382; note to McCulloh v. Dashell, 18 Am. Dec. 271; Murrill v. Neill, 8 How. 414; Curtis v. Woodward, 58 Wis. 499; 46 Am. Rep. 647.

"There are certain exceptions to this rule, which go to prove and ascertain it. One such exception, which is as well settled as the rule

itself, is the case where there are no partnership assets to be administered and no living solvent partner. Where there are no partnership assets to be administered and no living solvent partner, then the joint creditor is entitled to share *pari passu* with the individual creditors of the separate estate: Story on Partnership, 7th ed., sec. 378; 17 Am. & Eng. Ency. of Law, 1205, and cases cited in note 4; Curtis v. Woodward, 58 Wis. 499; 46 Am. Rep. 647; Parsons on Partnership, 4th ed., sec. 384, note 1.

"In the instant case, there was, in fact, no partnership. There are no partnership assets. There is no living solvent partner. The case seems to come clearly within the exceptions to the rule as above stated. There was no partnership. The trial court so decided, and that is conclusive here. The fact that there was no partnership is absolute proof that there are no partnership assets. It is undisputed that J. D. Putnam, Alfred J. Goss, and James B. Goss, all the debtors involved in the controversy, are all and each insolvent.

"J. D. Putnam conveyed all his interest in the partnership property of J. D. Putnam & Co., in November, 1891, to Alfred J. Goss. Alfred J. Goss conveyed the entire property to James B. Goss. James B. Goss assigned the entire property for the benefit of his creditors. Alfred J. Goss has assigned all his property for the benefit of his creditors. There is absolutely no property in existence which anyone claims to be partnership assets of James B. Goss and Alfred J. Goss. To require the petitioner to pursue for her remedy any such supposititious partnership assets is to mock her with the delusive promise of a remedy which must inevitably disappoint the expectation which it fosters.

"The circumstance that the property which James B. Goss assigned for the benefit of his creditors is, in part, the same property which was once the firm property of J. D. Putnam & Co., is of no significance. No equity of the creditors of J. D. Putnam & Co. followed this property into the hands of James B. Goss. There is no hint of bad faith in the transfer, or that it was made in contemplation of insolvency. The rights of creditors in the assets of a partnership must be worked out through the equities of the partners. If the partner has no right, the creditor has none. The right of the partners is, in effect, a right to share in the surplus left after discharging all the firm debts. Each partner has the right to require all the firm assets to be applied to the payment of the firm debts; for so, only, can his liability in *solido* for them be diminished. But this right of a partner is property which can be sold and transferred. It is effectually sold and transferred by a sale and transfer, in good faith, of all his interest in the firm property, whether to his partner or to a stranger. Such a sale and transfer dissolves the partnership and extinguishes every right which the retiring partner had in the firm property, including the right to require it to be applied to the payment of firm debts, unless such right is preserved by the terms of the sale: Story on Partnership, 7th ed., secs. 307, 358, 360; Bates on Partnership, secs. 528, 540, 550-552; Parsons on Partnership, 4th ed., secs. 178, 246, 248, 394, note 1, on page 330, and cases cited; Collyer on Partnership, Perkins' ed., sec. 894, 904, 905; Lindley on Partnership, Am. ed., with Andenreid's notes, 1888, 407, 765; 35 Cent. L. J. 418, and cases cited in note 3, on page 421; 17 Am. & Eng. Ency. of Law, 970-975, and cases cited in note 3; Case v. Beauregard, 99 U. S. 119; Fitzpatrick v. Flannagan, 106 U. S. 648; Huikamp v. Moline etc.

Co., 121 U. S. 310, 323; Baker's Appeal, 21 Pa. St. 76; 59 Am. Dec. 752; Ladd v. Griswold, 9 Ill. 25; 48 Am. Dec. 443; In re Lloyd, 22 Fed. Rep. 88; Saunders v. Reilly, 105 N. Y. 12; 59 Am. Rep. 742; Davis v. President etc. of Hudson Canal Co., 109 N. Y. 47; 4 Am. St. Rep. 418; Robb v. Mudge, 14 Gray, 534. The effect is the same where the remaining partner or other purchaser assumes the debts of the firm. This is a personal contract only, and leaves the retiring partner in the condition of an unsecured creditor: Bates on Partnership, sec. 528; Story on Partnership, 7th ed., 559; 17 Am. & Eng. Ency. of Law, 975; Robb v. Mudge, 14 Gray, 534. Such sales of a partner's interest in firm property are presumed to be valid: Kimball v. Thompson, 13 Met. 283. The authorities are nearly uniform. Only a few cases are out of line.

"These considerations seem to show sufficiently that there are no joint assets of Alfred J. Goss and James B. Goss, and so that the petitioner has the right to go against the individual assets of either in the hands of their respective assignees. The case properly ends here. This covers all the issues tried and on which there was evidence. Whatever else is decided is in the absence of necessary parties, and is based upon inference and conjecture instead of evidence. The property which the court says is subject to the petitioner's claim, as the joint property of the two Gosses, is now actually in the possession of the assignee of James B. Goss for the benefit of his individual creditors. It is held for them, and is claimed by them. But they have not been represented in this proceeding, nor their rights investigated. No opinion of their rights, volunteered in their absence, is binding on them. When the petitioner presents her claim for proof against these assets, she meets a fresh contest with these new creditors. And it may not be so easy to put them down, being present, as when they are absent. It is easy to put the absent in the wrong. Les absents ont toujours tort. Whether she has a remedy against those assets can only be known at the end of that contest.

"It may be true—it is not necessary to question it—that Alfred J. Goss is estopped, as against this petitioner, to deny that he was a partner with James B. Goss, and that these were, in fact, partnership assets. But this does not aid the petitioner, nor bring her nearer to a remedy against these assets, until it is also established that James B. Goss and his individual creditors are bound by a like estoppel. That cannot be established in this proceeding, because neither the necessary parties are before the court, nor the evidence by which it is to be established. And there is great danger of doing the petitioner an irreparable wrong if, with so little knowledge of the actual situation, her remedy is limited by the court to those assets; for, at the best, it is but a desperate chance.

"It is said that James B. Goss is also estopped to deny the alleged partnership and the joint ownership of the property used in it. But the court has not listened yet to James B. Goss' side of that question. It is assumed, without proof, that he permitted Alfred J. Goss to hold himself out as a partner, and the property and business as partnership property and business. Certainly, the other side of this question should have an opportunity to be heard before any person's rights should be limited or destroyed by a decision of it. In truth, it is neither alleged nor shown—as, indeed, it could not well be, in the absence of proper parties—that James B. Goss did, in fact, hold out Alfred J. Goss

as a partner, or as having an interest in the property or business; while it does appear that he conducted the business alone, and had the sole ostensible possession of the property and business, while Alfred J. Goss lived in another city, miles away, and had no apparent connection with the business.

"Apparently, the principal part, if not all, of the ostensible property used by James B. Goss in conduct of the business, was the mill itself. It may be a question of some difficulty whether the bare occupation of the mill for the purpose of carrying on the business, without a positive representation of ownership, could estop any person to claim ownership of it according to the true recorded title. Mere occupation of real estate by carrying on a business in it must create a very slight, if any, presumption that the occupant is the owner; for, perhaps, a majority of the business of the country is carried on in rented premises. It has not been claimed before, so far as known, that the mere occupancy of real estate by a business created any presumption against its owner that he was a partner to the business being carried on in his property; and no case has been found which holds that the mere occupancy of real estate by a business creates any estoppel against the owner to claim his own.

"But it is not very important whether James B. Goss shall, when the question is presented, be held to be estopped or not. A much more important question will be whether his individual creditors are estopped from claiming that these assets, which are in the hands of his assignee for their benefit, were really his individual assets. No one questions that they were his individual assets in law, and they are his individual assets in equity unless these individual creditors are estopped to claim them as such. Now, there really is no evidence in the case which shows the nature of these debts to the individual creditors of James B. Goss. It seems to be assumed by the majority that they were all debts contracted to persons who gave credit to an ostensible partnership; while, in truth, there is no evidence on the subject. There is nothing to show that these debts are not all due to persons who dealt with him in good faith, relying upon his apparent sole responsibility from the possession of this property and his sole conduct of the business. Nor does it appear whether these debts were contracted in the milling business, or whether they were the misfortunes of independent enterprises. In this condition of the case, it certainly cannot be prudent to decide this question of which set of creditors have the superior equity of these assets. It is sufficient to decide such questions as have been tried before the trial court between the parties who were then before the court, and which are before this court, upon the appeal. If there are bona fide individual creditors, they may not be estopped to claim according to the true legal title of the assets, although their debtor be so estopped: *Bates on Partnership*, sec. 105, and cases cited in note 1, p. 123.

"The case really made shows that there are no joint assets, practically, available to the petitioner. If there are any, they are desperate and nominal only. It is not equity to relegate the petitioner to them for her only remedy, for it is not expected that there will be a surplus in either separate estate after the individual creditors are paid. It is a forlorn hope. She should be permitted to share *pari passu* with the individual creditors of Alfred J. Goss."

MR. JUSTICE NEWMAN, Mr. Justice Pinney concurring, delivered the following dissenting opinion in the case of *Davies v. Humphrey*: "This case arises out of the same failures and assignments as *Thayer v. Humphrey*, but, in some of its circumstances, differs from that case. The appellant was also a creditor of J. D. Putnam & Co., but he did not accept of J. B. Goss & Co. as a substitute for his original debtor. So he is not a creditor of either James B. Goss or J. B. Goss & Co.; and neither are in any way liable for his claim. The appellant seeks to prove his claim against the estate of Alfred J. Goss in the hands of his assignee for the benefit of his creditors. It is answered to his application: 'Your remedy is against the assets of James B. Goss, which are in the hands of his assignee for the benefit of his creditors.' And so he is turned away. It is not claimed that there are any firm assets of J. D. Putnam & Co. in existence, nor that either partner is solvent, nor that the transfer to J. B. Goss & Co. did not pass the legal title to all the assets of J. D. Putnam & Co. to J. B. Goss & Co. But it is held that the right of the partners to have these assets applied first to the payment of the debts of the firm was reserved by the terms and conditions of the transfer. This is believed to be without a shadow of foundation in fact. It is put upon the ground that the transaction was for the purpose of applying the assets of the firm to the payment of its debts; and this in the teeth of all the evidence. The firm of J. D. Putnam & Co. was composed of J. D. Putnam and Alfred J. Goss. Both partners signed and published a notice of the dissolution of the firm, in which the public was notified that the same business would be continued by J. B. Goss & Co., who assumed all the debts of the firm; and the same business was, in fact, carried on at the same place by J. B. Goss & Co. for two years and upward. It does not seem necessary to say that the intent to have the business carried on with the same property is incompatible with the purpose to have the property applied to the payment of the debts. The greater part of the property received by J. B. Goss & Co. was the grist-mill itself. J. B. Goss & Co. got nothing of value for the promise to pay the debts of the old firm, unless they got the right to carry on the business with the property received from the old firm. The real intention of the transaction is obvious. It was to make a novation of the debts of the old firm—to substitute a new debtor in place of the old one. This was not altogether effected, because some of the old creditors did not consent to the substitution. If the purpose was to apply the firm property to the payment of firm debts, the obvious way to make the purpose effectual was to make an assignment of it for the benefit of the firm's creditors. It seems that this, clearly, was the ordinary case of a transfer of the firm's assets for the purpose of a novation. In such a case, all are agreed that the partners of the old firm lose their equity to have the assets transferred applied to the payment of the debts.

"This case, too, is decided in the absence of parties and evidence necessary to its final disposition. The other side is not heard, as it must be before it can be bound by the decision. Non constat that, when these parties and their evidence are heard, J. D. Putnam & Co. will be found estopped, as against the creditors of J. B. Goss & Co., from claiming any right in this property of which they have held out J. B. Goss & Co. to be the owners.

"The appellant, on the case as it now appears, should be admitted to

share *pari passu* with the individual creditors of Alfred J. Goss, on the authorities cited in the dissenting opinion in *Thayer v. Humphrey*."

PARTNERSHIP—INSOLVENT—APPLICATION OF ASSETS.—

In settling the affairs of a partnership where loss must result to one or several classes of creditors, courts of equity will first apply partnership assets to the payment of the partnership liabilities, and the separate or individual assets to the payment of the individual liabilities: See monographic note to *Smith v. Smith*, 43 Am. St. Rep. 364, 367, on the rights and remedies of partnership creditors.

Partnership creditors have no lien upon the firm property. Each partner has a lien or equity on such property; and the creditors of the firm, by appropriate proceedings in court, may avail themselves of that equity through him, but not otherwise: *Carver Gin etc. Co. v. Bannon*, 85 Tenn. 712; 4 Am. St. Rep. 803; *Goldthwaite v. Janney*, 102 Ala. 431; 48 Am. St. Rep. 56; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; 98 Am. Dec. 332; *Backus v. Murphy*, 39 Pa. St. 397; 80 Am. Dec. 531. But it is only where the partnership is dissolved by death, or the bankruptcy of the firm, that the lien of the partnership creditors can arise. If there are no net assets of the joint estate, that is, nothing remaining after paying the expenses of properly settling the estate, the firm creditors may prove against the separate estates of the partners *pari passu* with the individual creditors; and, since the firm has a claim against the partners, it cannot be said to have no assets, unless there are no solvent partners. In order to come on the separate estate, the joint creditors must, therefore, prove that there are no joint assets, and no solvent partner, and may then do so: *Parsons on Partnership*, 4th ed., 478, note, and cases there cited; note to *Smith v. Smith*, 43 Am. St. Rep. 369; *Curtis v. Woodward*, 58 Wis. 499; 46 Am. Rep. 647; *Hundley v. Farris*, 103 Mo. 78; 23 Am. St. Rep. 863. Contra, that even then the joint creditors cannot come on the separate assets: *Warren v. Farmer*, 100 Ind. 593; *Howe v. Lawrence*, 9 Cush. 553; 57 Am. Dec. 68; *In re Gray*, 111 N. Y. 404. A bona fide sale, for a valuable consideration, by one partner to another, of all the partnership effects, is valid, and the property so conveyed becomes the separate estate of the purchaser, although the firm and both partners are at the time insolvent: *Howe v. Lawrence*, 9 Cush. 553; 57 Am. Dec. 68. If one partner buys the interest of his copartners in the firm, agreeing to pay the firm debts, the property of the firm remains bound for such debts just as before the sale: *Conroy v. Woods*, 13 Cal. 626; 73 Am. Dec. 605. A transfer of the interest of one partner to a third person does not deprive the other members of the firm of their right to insist that the partnership property be applied to the payment of the partnership debts. Hence, the creditors of a partnership have the same right to pursue the property as before the transfer was made: Note to *Smith v. Smith*, 43 Am. St. Rep. 375. A person who, not being a partner, in fact, suffers himself to be held out to the public or to individuals as a partner, thereby renders himself liable as a partner to any one who, in ignorance of the real facts, has been misled or injured by contracting on the faith of his conduct: See monographic note to *Hahlo v. Mayer*, 22 Am. St. Rep. 757, on the liability of one held out as a partner: *Webster v. Clark*, 34 Fla. 637; 43 Am. St. Rep. 217; *Fletcher v. Pullen*, 70 Md. 205; 14 Am. St. Rep. 355, and note showing that a partner who has actually retired from the firm may still be held liable as such to persons who have no notice of his withdrawal. If one who has carried on business alone, under a firm name, sells the business to his son, who continues the business under the same name, the former is liable for goods purchased by the latter from an actual dealer with the former, who has no knowledge or notice of the transfer: *Elterson v. Leeds*, 97 Ind. 336; 49 Am. Rep. 458. If parties represent

themselves as partners, persons who deal with them as such are entitled to have the property used in the business applied to the payment of their debts in preference to the individual debts of those representing themselves as partners: Note to Bixler v. Kreege, 47 Am. St. Rep. 924.

SMITH v. MILWAUKEE BUILDERS AND TRADERS' EXCHANGE.

[91 WISCONSIN, 303.]

MASTER AND SERVANT—INDEPENDENT CONTRACTORS.

Contractors who have agreed to erect a building, of certain materials, and according to fixed plans and specifications, are independent contractors, although the work is to be performed under the inspection, and to the satisfaction, of architects, acting as agents of the owner. The owner of the building is not liable for the negligence of the employes of the contractors, whereby a brick falls from the uncompleted building and injures one who is passing.

MUNICIPAL CORPORATIONS—ORDINANCES RESPECTING CONSTRUCTION OF BUILDINGS.—A municipality has authority, under a city charter giving the common council power "to control and regulate the construction of buildings," "to control and regulate streets," "to regulate the manner of using the streets and pavements," etc., to pass an ordinance that "any owner or contractor who shall hereafter build, or cause to be built," any building abutting on a public sidewalk shall, after the completion of the first story, cause a roofed passageway to be built in front of the building, upon the sidewalk, under pain of a certain fine or imprisonment. Such an ordinance is reasonable, and has the force of a law requiring both the owner and contractor to construct the covered way when it is required.

MUNICIPAL CORPORATIONS — ORDINANCE — NEGLIGENCE.—All persons who are required by an ordinance to construct a covered way next to a building which is being erected adjacent to a sidewalk in a city, are guilty of negligence, if they fail to do so, and are liable to one traveling on the sidewalk, in the exercise of ordinary care, who is injured by reason of such negligence.

NEGLIGENCE — PLEA OF INDEPENDENT CONTRACT.—The nonperformance of a duty imposed by an ordinance requiring builders to construct a covered way next to a building, which is being erected adjacent to a sidewalk in a city, cannot be excused by the plea of an independent contract whereby another agrees to perform the duty.

BUILDING CONTRACTS.—THE WORD "CONTRACTOR," in an ordinance requiring any owner or contractor who erects a building adjacent to a sidewalk in a city to construct a covered way next to the building, applies not only to contractors for the walls and brickwork, but also to a separate contractor for the iron work, consisting of girders, beams, and floor joists, and which constitute an integral and substantial part of the building.

DAMAGES—FUTURE PAIN AND SUFFERING.—In an action for personal injuries, the future pain and suffering for which a recovery may be had is that only which the plaintiff is reasonably certain to endure.

NEGLIGENCE—MISLEADING INSTRUCTION.—In an action for personal injuries, it is misleading to instruct the jury that the plain-

tiff, being in a place of danger, is not chargeable with contributory negligence because he did not use the best means of escaping, when warned. where he denies having received any warning, and the evidence shows that he did not understand, or know, that he was in any danger, and did not adopt any course of action in the presence of imminent danger or sudden peril.

A DEPOSITION cannot be used on the trial of a case against defendants who were not parties to the action when the deposition was taken.

WITNESSES—NEGATIVE TESTIMONY — ERRONEOUS INSTRUCTION.—Testimony which is positive in form may amount merely to negative testimony. Hence, an instruction that negative testimony is confined to that of a witness who, though present at a transaction, says that he did not see or did not hear, is erroneous, as such a rule is too limited.

WITNESSES—POSITIVE AND NEGATIVE TESTIMONY — ERRONEOUS INSTRUCTION.—It is erroneous to charge that the positive testimony of a witness to the existence of a certain thing and the testimony of another witness that such a thing did not exist, are equally credible.

Action to recover damages for injuries to the person of the plaintiff, caused by the falling of a brick from the top of the fourth story of a partially completed building in the city of Milwaukee, owned by the defendant, the Milwaukee Builders & Traders' Exchange. The accident happened about 8 o'clock on Monday morning, April 18, 1892. The defendant exchange, at the time of the accident, was constructing a five-story brick and iron building, and the defendant Neff had contracted with the exchange to build, and was then engaged in building, the masonry of the building, and had completed the walls to the top of the fourth story. The defendants Bayley, who were copartners, had contracted with the exchange to put in place the structural iron. Both Neff and the Bayleys were performing the work undertaken by them under separate and independent contracts with the exchange, and each contract provided that the contractor should well and sufficiently perform and finish his work "under the direction, and to the satisfaction, of Ferry & Clas, architects, acting as agents for the owner." Each contract also provided for the inspection of the work by the architects and their employes. On the Saturday previous to the accident, the walls of the building were in readiness for the iron girders to be put in place to support the floor of the fifth story. Neff's men, upon leaving the work Saturday night, put canvas upon the walls of the building, with loose bricks thereon to hold it in place. These men were not at work on the following Monday morning, but the Bayleys then commenced to put the iron girders in place for the fifth story, and to hoist girders and beams to the top of the fourth story by a derrick, and the

plaintiff, while passing along the sidewalk on Fifth street, about six feet from the building, was struck on the head by a brick, which, from some cause, fell from the top of the building, and which fractured the plaintiff's skull and severely injured her. The plaintiff was a woman about thirty years old. She claimed that all of the defendants were liable for her injuries, by reason of negligence. There was in force, at the time of the accident, an ordinance of the city of Milwaukee, which was introduced in evidence, and which provided, in substance, that any owner or contractor who should erect a building within the fire limits of the city of Milwaukee, abutting upon any sidewalk, should, after the completion of the first story of the building, cause a passageway to be laid in front of the building, upon the sidewalk, and cause the same to be roofed at a height not less than ten feet. The ordinance also provided that a failure to comply with it should be punished. As to whether there were any guards or barriers placed at the north and south ends of the wall, the evidence was conflicting, but it was admitted that no roof had been placed over the sidewalk on Fifth street. The jury rendered a special verdict in which it was found that no guards or barriers were placed at the north and south ends of the wall; that the brick which fell and injured the plaintiff was a loose one placed on canvas covering the wall or pier, and that it was caused to fall by the men who were at work hoisting the iron upon the building; that the defendants, the Milwaukee Builders & Traders' Exchange and Max Neff, were guilty of negligence, or want of ordinary care, which was the proximate cause of the injury; that the Bayleys were guilty of want of ordinary care which contributed to the injury; and that, if the court should be of the opinion that the plaintiff was entitled to recover, she was entitled to five thousand dollars damages. There was a judgment for the plaintiff against all of the defendants, and each appealed separately.

Winkler, Flanders, Smith, Bottum & Vilas, for the appellant the Milwaukee Builders & Traders' Exchange.

Van Dyke & Van Dyke, for the appellant Neff.

George E. Sutherland, and Rogers & Mann, for the appellants the Bayleys.

Austin & Fehr, for the respondent.

365 WINSLOW, J. The claim made by the defendant, the Milwaukee Builders & Traders' Exchange, the owner of the

building, that Neff and the Bayleys were independent contractors, seems to us well founded. It is true that in their contracts it is provided that the work is to be performed under the direction and to the satisfaction of the architects, acting as agents of the owner, but it is entirely certain from the whole contract that this is simply a reservation of the right of inspection. It is not a reservation of power to control the manner of the work, to change materials to be used, or prescribe ways and methods in which the work is to be carried out. The contractors have agreed to build the building according to fixed plans and specifications, and of certain materials. They can do the work in their own manner and with their own machinery, providing they comply with their contract. The architect can only require that the building be such as the contract demands. He has no control for any other purpose. We do not regard this reservation of the right of inspection of the work as changing the character of the contract: *Hughbanks v. Boston Inv. Co.* (Iowa, 1895), 60 N. W. Rep. 640. It is evident that the falling of the brick was collateral to the ^{see} contract, and was, if negligence at all, the result of negligent acts on the part of some of the workmen employed by the contractors, and was not the necessary or natural result of any act which the contractors were employed to do. In this situation, the owner is not liable, at least in the absence of some other distinct ground of liability: *Hundhausen v. Bond*, 36 Wis. 29; *Hackett v. Western Union Tel. Co.*, 80 Wis. 187.

In the present case, however, the plaintiff claims another distinct ground of liability on the part of the owner of the building, as well as the contractors, arising out of the failure to make a covered passageway along the Fifth street front of the building, thus violating the city ordinance referred to in the statement of facts. This ordinance was passed by the common council before the erection of this building was begun, and provides, in substance, that "any owner or contractor who shall hereafter build, or cause to be built," any building abutting on a public sidewalk shall, after the completion of the first story, cause a roofed passageway to be built in front of the building, upon the sidewalk, under pain of a certain fine or imprisonment. The power to pass this ordinance seems clear. The charter gives the common council power "to control and regulate the construction of buildings," "to prevent and prohibit the erection or maintenance of any insecure or unsafe buildings," "to control and regulate streets," "to prevent the encumbering of streets and alleys in any manner, and protect the same from any encroachment or in-

jury," and "to regulate the manner of using the streets and pavements": Laws 1874, c. 184, subc. 4, sec. 3. An ordinance passed by the common council, which is within its power to pass and is reasonable, has the effect of law within the corporate limits. This ordinance we think, is entirely reasonable, and it was therefore law to all intents and purposes, and it required both the owner and contractor to construct a covered way over the sidewalk where this accident happened. Had ³⁶⁷ such a way been constructed, the plaintiff could not have been injured. The failure to perform this statutory duty must be held negligence: 2 Thompson on Negligence, 1232; Mueller v. Milwaukee Street Ry. Co., 86 Wis. 340, and cases cited; Karle v. Kansas City etc. R. R. Co., 55 Mo. 476. If, by reason of such negligence, damage directly results to anyone for whose benefit the law was passed, and who is not guilty of contributory negligence, a civil action for damages may be maintained: Bott v. Pratt, 33 Minn. 323; 53 Am. Rep. 47; McCall v. Chamberlain, 13 Wis. 637. Nor can the nonperformance of such a duty be excused by the plea of an independent contract by which another has agreed to perform the duty: 2 Thompson on Negligence, 904. The plaintiff's contention that the failure to comply with this ordinance constituted negligence on the part of the owner and on the part of Neff, who was the contractor for the walls and brickwork, must certainly be sustained. The situation of the Bayleys is somewhat different, but still we think that they are contractors who are building a building within the meaning of the ordinance. Doubtless the ordinance would not apply to a painter or plumber, or a mere plasterer or decorator, or anyone whose work does not constitute a substantial part of the building. But the iron-work in this case is certainly an integral and substantial part of the building. It consists of iron girders, beams, and floor joists, evidently set in the walls, and without which there could be no building, but a mere shell. The mason and the iron contractor evidently must and do work together to make this building. The work of one seems to be fully as important as that of the other, and neither can do his work if the work of the other is not done. We hold, therefore, that the word "contractor," in the ordinance, applies as well to the Bayleys as to Neff, and that all the defendants are within the terms of the ordinance. The ordinance being a reasonable and valid one, and framed to protect the passenger from injury, when a passenger who is exercising ordinary ³⁶⁸ care is injured by reason of the failure to comply with its provisions, he may undoubtedly base

a claim of negligence on account of such failure against all whose duty it was, under the ordinance, to make the covered way.

These considerations demonstrate that there was no error in overruling the motions for nonsuit and the motions to direct verdicts made by the several defendants. A new trial of the case will be necessary, however, because of certain errors, which we will briefly state:

1. The jury were instructed on the subject of damages that the plaintiff would be entitled to compensation for the pain and suffering which she had endured, also for the pain which she may be likely or that there is a reasonable probability that she will endure in the future. This was error. The plaintiff is only entitled to recover for such future pain as the evidence shows she is reasonably certain to endure: *Block v. Milwaukee Street Ry. Co.*, 89 Wis. 371; 46 Am. St. Rep. 849.

2. The jury were also instructed as follows: "I instruct you, gentlemen, that a person is not guilty of contributory negligence in a case where that person receives an injury, being in a place of danger, because that person does not exercise his best judgment in avoiding injury and escaping from danger when warned. So, if the plaintiff, at the time the brick was seen to be falling from the top of that building, was warned and told to escape—told to get away from the falling brick—she is not chargeable with negligence because she did not use the best means of escaping from receiving an injury at that time, because, being in a place of danger, she is not chargeable with negligence if she did not use the best means of escaping." This was misleading in the present case, because no facts in evidence warrant it. The plaintiff denies having received any warning, and the evidence of the defendants' witnesses who testified to having shouted at the plaintiff when the brick was falling shows affirmatively that the plaintiff did not understand or know ^{see} that she was in any danger, and did not adopt any course of action while facing an imminent danger or sudden peril. Under such circumstances, the charge in question should not have been given.

3. The defendants Bayley were not parties to the suit as originally brought, and before they were made parties the deposition of one Kneer was taken. Upon the argument of the case, the attorney for the defendant Neff was allowed, against objection, to read a part of this deposition to the jury, against the Bayleys, in reply to the argument of Mr. Sutherland on behalf of the Bayleys. This was error. It could not be used as against the Bayleys, because they were not parties to the action when it was taken.

4. The charge was erroneous, also, when treating of positive and negative testimony. The trial judge practically told the jury that negative testimony was confined to that of a witness who, though present at a transaction, says that he did not see or did not hear. This is too limited a rule. Testimony which is positive in form may amount merely to negative testimony: *Ralph v. Chicago etc. Ry. Co.*, 32 Wis. 177; 14 Am. Rep. 725; *Draper v. Baker*, 61 Wis. 450; 50 Am. Rep. 143. It is erroneous, also, to say that the positive testimony of a witness to the existence of a certain thing, and the testimony of another witness that such a thing did not exist, are equally credible. This instruction ignores every well-settled principle which is to be applied in determining the credibility of witnesses, and lays down the rule that one witness will counterbalance another: *Draper v. Baker*, 61 Wis. 450; 50 Am. Rep. 143.

Numerous other questions were presented and argued, but we think the general principles laid down in this opinion so far simplify the questions presented that upon a new trial many of these questions will not again arise, and we do not deem it our duty to consider them in this opinion.

By the Court. Judgment reversed upon all the appeals, and action remanded for a new trial.

INDEPENDENT CONTRACTORS—NEGLIGENCE—LIABILITY.

An independent contractor is one who, exercising independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work: *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925, and note; monographic note to *Brown v. Smith*, 22 Am. St. Rep. 463, showing when the relation of master and servant exists. Neither an independent contractor nor his assistants are the servants of the party with whom he contracts: Note to *Brown v. Smith*, 22 Am. St. Rep. 463. A party for whom work is done does not reserve any control of those employed to do it, or the manner in which it is done, by requiring that it shall be done "in a thorough and workmanlike manner, to the satisfaction of his chief engineer": *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925. The owner, and not the independent contractor, is liable for injury arising from negligent construction of the work, if the owner retains and exercises the right to direct the manner in which the details of the work shall be performed, but the contractor is liable if the power of the owner to direct the construction is confined to the result of the work without any control over the manner in which it is done: *First Presbyterian Congregation v. Smith*, 163 Pa. St. 561; 43 Am. St. Rep. 808, and note. One who employs a fit and proper person as an independent contractor to do work not in itself unlawful, or a nuisance, or necessarily attended with danger to others, is not responsible for such contractor's negligence, nor for that of his sub-contractor or servants: *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925; *Engel v. Eureka Club*, 137 N. Y. 100; 33 Am. St. Rep. 692, and note; monographic note to *Blake v. Ferris*, 55 Am. Dec. 318, on the liability of an employer for the acts or negligence of a contractor.

But there is an exception to the rule that the negligence of an independent contractor is not ordinarily chargeable to his employer; and this exception exists in the case of statutory duties imposed on individuals or corporations from which they cannot acquire exemption by delegating performance to another, and of contracts for the performance of unlawful acts, or acts which will create a nuisance, or are necessarily attended with danger to others, however skillfully performed: *Engel v. Eureka Club*, 137 N. Y. 100; 33 Am. St. Rep. 692; *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161; 27 Am. St. Rep. 231; monographic note to *Stone v. Cheeshire R. R. Corp.*, 51 Am. Dec. 205, on liability of employer for acts of contractor or subcontractor. When work to be performed is necessarily dangerous, and an obligation rests on the employer to keep the place of the work in a safe condition, he is answerable for injury resulting from the dangerous condition in which the work is left, though it is being done for him by an independent contractor: *Omaha v. Jensen*, 35 Neb. 68; 37 Am. St. Rep. 432; *Dillon v. Hunt*, 105 Mo. 154; 24 Am. St. Rep. 374; *Homan v. Stanley*, 66 Pa. St. 464; 5 Am. Rep. 389. Thus, the plaintiff, while walking on a sidewalk, in front of a building which the defendant was erecting, was struck and injured by a brick falling therefrom. There were no barriers to prevent the approach of foot passengers, and it was held that the defendant might be liable for the injury on account of the omission to construct barriers, although there was no negligence in suffering the brick to fall: *Jager v. Adams*, 123 Mass. 26; 25 Am. Rep. 7; note to *Godley v. Hagerty*, 59 Am. Dec. 737.

MUNICIPAL CORPORATIONS—ORDINANCES—REASONABLENESS—NEGLIGENCE.—All ordinances of municipal corporations, within the limits of their authority, have the force of laws passed by the legislature of the state: *State v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663; *Lewis v. Denver City Water Works Co.*, 19 Col. 236; 41 Am. St. Rep. 248, and note; but a municipal ordinance must be reasonable to be valid: *Champer v. Greencastle*, 133 Ind. 339; 46 Am. St. Rep. 390, and note. Noncompliance with a statute or ordinance prescribing the performance of a duty imposed for the benefit or protection of others is negligence per se: Note to *Clements v. Louisiana Electric Light Co.*, 32 Am. St. Rep. 354.

DAMAGES—FUTURE PAIN AND SUFFERING.—In an action for personal injuries of a permanent nature, the plaintiff may recover damages for the physical and mental pain which he is reasonably certain to suffer in the future: Notes to *Louisville etc. R. R. Co. v. Minogue*, 29 Am. St. Rep. 381; *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 536.

POOL v. MILWAUKEE MECHANICS' INSURANCE Co.

[91 WISCONSIN, 530.]

INSURANCE—IMPLIED AUTHORITY TO OBTAIN ADDITIONAL.—If an insurance policy provides, in terms, that it shall be void, if the insured thereafter procures other insurance on the property, unless otherwise provided by agreement indorsed on the policy, or added thereto, and there is a written statement, signed by the company's agent, bearing even date with the policy, and attached thereto as a part thereof, to the effect that if, at the time of a fire, the whole amount of insurance on the property shall be less than eighty per cent of the actual cash value thereof, the company shall be liable for only such proportion of the loss or damage as the amount insured by the policy shall bear to said eighty per cent of said actual cash value, such statement gives implied authority to procure additional insurance, and, if procured within the prescribed limits, it does not vitiate the policy, especially where it is obtained by the same agent who issued the first policy.

INSURANCE—INCREASE OF HAZARD—QUESTION OF FACT.—If a policy of insurance, on a stock of goods, contains a clause that the policy shall be void "if the hazard be increased by any means within the control or knowledge of the insured," the question, in an action upon the policy, after a loss by fire, as to whether the seemingly necessary use, by the insured, of inflammable sulphur candles to fumigate his store building was an increase of the hazard by means within his "control or knowledge" is a question of fact to be determined by a jury from the evidence; and the trial court's refusal to submit to the jury the question whether the hazard was increased by the use of such fumigators is error, although it does submit the question as to whether the fire was caused by the fault or negligence of the insured, as the latter question is not equivalent to the former one.

INSURANCE—NEGLIGENCE OF INSURED.—In the absence of fraud or design, a fire insurance company is not relieved from liability on its policy by reason of loss by fire through the negligence of the insured, or his servants.

INSURANCE—WAIVER OF FORFEITURE—QUESTION OF FACT.—If a policy of fire insurance contains a provision that the company shall not be held to have waived any provision or condition of the policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to an appraisal of the loss, or any examination of the insured therein provided for, the question, in an action upon the policy, as to whether a forfeiture had been waived by other acts not so provided for, whereby it had put the insured to expense or disadvantage, is a question of fact, to be determined by the jury from the evidence.

Action to recover the amount of a policy of insurance, commenced August 28, 1895. The plaintiff had been insured, on February 14, 1894, against loss or damage by fire, in the sum of three thousand dollars, on his stock of dry goods, notions, carpets, cloaks, furnishing goods, and such other merchandise as is usually kept for sale in retail dry goods stores in the place described. The policy provided that it should be void, if the insured thereafter procured other insurance on the property, unless otherwise provided by agreement indorsed on the policy, or added thereto; or if the hazard should be increased by any means within the control or knowledge of the insured. There was a written statement, given in the opinion, attached to the policy. There was also a provision in the policy that the company should not be held to have waived any provision or condition of it, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination therein provided for. On April 29, 1894, the insured property was damaged and injured by fire to the amount of fifty-one thousand eight hundred and sixty-three dollars and sixty-nine cents. The plaintiff immediately gave notice of the fire, loss, and damage, and on June 7, 1894, furnished proofs of loss. The complaint alleged that the fire did not originate by any act or design of the plaintiff. The answer admitted the destruction, by fire, of a portion of the property mentioned, the notice of the fire, and alleged proofs of loss; but the defendant contended that the plaintiff

had obtained additional insurance without the written consent of the defendant, and increased the hazard of said risk by placing, in a wanton, reckless, and grossly negligent manner, in divers parts of the premises occupied by the goods described, certain candles or fumigators, of a dangerous and unsafe construction and composition; and that said candles and fumigators, having become ignited, or caused to be ignited, and left burning until the fire, without any person in charge or control of the same, caused the fire. On May 10, 1895, the plaintiff, the defendant, the Lancashire Insurance Company, and twenty-two other insurance companies entered into an agreement whereby ten thousand dollars was accepted and agreed upon as the cash value of the goods saved from the fire, and that this amount should be deducted from the amount of the sound cash value of the stock of goods when ascertained. The trial court directed the jury to return a verdict to the effect that the plaintiff was insured, that during the continuance of the contract a large portion of the property was destroyed by fire, and that notice of the fire was given and proofs of loss furnished as required by the policy. The jury also returned a special verdict to the effect that the fire was not caused by the fault or want of ordinary care on the part of the plaintiff, and that the total loss or damage to the plaintiff's property was fifty-one thousand eight hundred and sixty-three dollars and sixty-nine cents. The court ordered judgment to be entered upon the verdict in favor of the plaintiff for three thousand and eighty-six dollars and forty-nine cents, and costs to be taxed. The defendant appealed.

Mylrea, Marchetti & Bird, for the appellant.

W. L. Windom and Gabe Bouck, for the respondent.

538 CASSODAY, C. J. 1. Counsel contend that the court should have directed a verdict in favor of the defendant, by reason of other insurance having been put upon the property without the written consent of the defendant. As indicated in the foregoing statement, by certain clauses of the policy the same was to be void if the insured thereafter procured any other contract of insurance, unless otherwise provided by agreement indorsed thereon or added thereto, and it was further provided that the defendant was not to be liable for a greater proportion of any loss than the amount of the policy herein should bear to the whole insurance upon the property; that the policy was made and accepted subject to the stipulations and conditions therein, "together with such other provisions, agreements, or conditions" as

might be indorsed thereon or added thereto; that the provisions or conditions of the policy could only be waived by agreement in writing indorsed thereon or added thereto; and that "any privilege or permission affecting the insurance under this policy" must be so written thereon or attached thereto. There was a written statement, bearing even date with the policy and attached thereto as forming a part thereof, signed by the defendant's agent, to the effect that "if, at the time of the fire, the whole amount of insurance on the property covered by this policy be less than eighty per cent of the actual cash value thereof," then the defendant should, "in case of loss or damage, be liable for only such proportion of such loss or damage as the amount insured by this policy shall bear to the said eighty per cent of the actual cash value of such property." While this writing so attached does not expressly authorize such additional insurance without such consent, yet it does, by necessary implication, authorize the same and make it an object for the plaintiff to ⁵³⁹ take additional insurance until the eighty per cent of the actual cash value of the property should be obtained; and, in case it should be obtained, as it in fact was, then the defendant was, in case of total loss, to pay the full face of the policy. Especially should this be so construed, since the defendant's agent, in making this insurance contract, himself placed, or procured the placing of, the whole of such additional insurance, to the amount in all, including this policy, of fifty thousand dollars, and the loss or damage, as found by the jury, was more than fifty thousand dollars. We must hold that the policy was not void by reason of such additional insurance.

2. Counsel contend that the court should have directed a verdict in favor of the defendant, for the reason that the plaintiff increased the hazard by means within his knowledge and control, contrary to a provision of the policy quoted in the statement; that is to say, by using in his store certain inflammable sulphur candles, known as the "Johnson Fumigators," from which the fire originated. There is no claim that, after the making of the contract of insurance, there was any change in the condition or locality of any of the property insured. There seems to have been a necessity of fumigating the plaintiff's store and the goods contained therein and covered by the insurance. The fumigators employed seem to have been adapted to that end. The only ground for controversy in respect to them, it would seem, is as to whether their use increased the hazard by means within the control or knowledge of the plaintiff, within the meaning of

the policy. That was necessarily a question of fact, to be determined by the jury from the evidence: *Copp v. German etc. Ins. Co.*, 51 Wis. 637; *Spensley v. Lancashire Ins. Co.*, 54 Wis. 433; *Kircher v. Milwaukee etc. Ins. Co.*, 74 Wis. 470. The trial court expressly refused to submit to the jury these questions: "Did the use of fumigators by plaintiff, as used, increase the hazard? Was such use the proximate cause of the fire?" The first of these questions, ⁵⁴⁰ or its equivalent, should, as we think, have been submitted, and such refusal to submit them was error. We do not think the fourth question submitted was equivalent to such questions or either of them. It was this: "Was said fire caused by the fault or want of ordinary care on the part of the plaintiff?" This merely submitted to the jury the question of the plaintiff's negligence or fault. Upon that question, the court charged the jury to the effect that the plaintiff was only required to use ordinary care, or such care as men of ordinary care ordinarily use—not extraordinary care and prudence; that the burden of proof rested on the defendant to show, by a preponderance of evidence, that the plaintiff did not use ordinary care. Counsel for the plaintiff is undoubtedly right in claiming that the mere negligence of the assured does not avoid a policy. "In the absence of fraud or design, there can be no question but that a fire insurance company is not relieved from liability on its policy by reason of loss by fire through the negligence of the assured or his servants": *Karow v. Continental Ins. Co.*, 57 Wis. 62; 46 Am. Rep. 20, and cases there cited. Thus it appears that the principal question submitted to the jury was immaterial, and that the real question in controversy, and litigated, was not submitted to the jury in any form, unless the word "fault" in the question may be said to have covered it. Assuming that it did, still the verdict would be defective, since the question was in the alternative—"fault or want of ordinary care"; and hence the mere negative answer of the jury leaves it impossible to tell whether the jury found the plaintiff free from any "want of ordinary care" or some other "fault." The plaintiff accepted the policy with the condition that it should be void if he increased the hazard by any means within his control or knowledge. That was the contract, and the question whether he did so increase the hazard was a question of fact for the jury.

3. Counsel contend, in effect, that, even if the policy was ⁵⁴¹ forfeited by reason of such increase of hazard, yet that the defendant waived such forfeiture by reason of its adjuster, with full knowledge of the use of such fumigators and the circumstances

of the fire, having ordered the goods saved from the fire to be moved to a place of safety and an inventory thereof taken; and, after such inventory was partially taken, at an expense to the plaintiff of about two hundred dollars, the defendant's adjuster and the adjusters of the other companies represented in the loss sold the goods so saved to the plaintiff for ten thousand dollars, and on May 10, 1895, it was agreed in writing, by and between the plaintiff and such other companies, that ten thousand dollars was accepted and agreed upon as the cash value of the goods saved, and that the same should be deducted from the amount of the sound cash value of said stock at the time of the fire, when the same should be ascertained. As indicated in the foregoing statement, the policy required the plaintiff, as often as requested, to exhibit to the defendant all that remained of the property, and to submit to an examination under oath, and to produce books, bills, invoices, etc., and, in case of disagreement as to the amount of the loss, to have the same appraised as therein prescribed; and that the defendant should not be held to have waived any provision or condition of the policy, or any forfeiture thereof, by reason of any requirement, act, or proceeding on its part relating to such appraisal or examination. Of course, the defendant was at liberty to do all the things which, by the terms of the policy, it was expressly authorized to do without such waiver. Whether, in the instant case, it did more and, inconsistent with the terms of the policy and a defense on the ground of such forfeiture, put the plaintiff to expense or disadvantage, was, under the evidence, a question of fact for the jury, and not of law. As there must be a new trial, we deem it unnecessary to say more.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

INSURANCE—WAIVER—QUESTIONS OF FACT.—Conditions in a contract of insurance for the benefit of the company may be waived by it, and the fact of such waiver is a question of fact for the jury. This rule applies to a waiver of forfeiture: *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472; 23 Am. St. Rep. 62, and note; *Bonnert v. Pennsylvania Ins. Co.*, 129 Pa. St. 558; 15 Am. St. Rep. 739; and to anything which tends to increase the risk: *Clark v. Union Mut. Fire Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721. Such waiver need not be express. It may be inferred from the acts of the insurer evidencing a recognition of liability after the condition is broken: *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158; 39 Am. St. Rep. 637, and note.

VILAS v. McDONOUGH MANUFACTURING COMPANY.

[91 WISCONSIN, 607.]

MECHANIC'S LIEN—INTERPRETATION.—A statute giving a mechanic's lien, is to be liberally interpreted, so as to make the remedial purpose of the legislature effectual.

MECHANIC'S LIEN—FURNISHING MACHINERY IS FURNISHING MATERIALS.—One who furnishes machinery for the construction of a new mill furnishes materials for the construction of a building. The machinery, when attached, becomes a part of the building, and is real estate. The building without the machinery is no mill. The building with the machinery attached becomes a mill, but still is described by the generic term "building," and is subject to the lien which the statute gives to such as furnish materials for the construction of a building.

MECHANIC'S LIEN, ATTACHES TO WHAT.—If a mechanic's lien is given on a building itself, there can be no lien upon the details or constituent parts of the building. The greater includes the less.

MECHANIC'S LIEN—PRIORITY OF, OVER MORTGAGE. Under a statute giving a lien to persons who furnish materials for the construction of a building, and to persons who erect machinery on the lands of others, and making the lien for materials furnished prior to any other lien which originates subsequent to the commencement of the construction of the work or building, one who furnishes the machinery for the construction of a new mill has a right to a lien upon the mill building and the freehold, upon the ground that he has furnished materials for its construction; and this lien is prior and paramount to any other lien originating subsequently to the commencement of the construction of the mill.

Action to foreclose a mortgage on a lumber mill and other property. The mill and land was owned by Donald A. Kennedy. On December 31, 1890, Vilas loaned Kennedy ten thousand dollars, and took a mortgage on the mill and land, dated the same day, and recorded on January 10, 1891, as security for the repayment of the money. Before making the loan, the plaintiff made inquiry as to the title to the property, and as to encumbrances upon it, and was assured that there was no lien or encumbrances upon the property, and that there was no outstanding contract from which any lien or encumbrance could arise. The mill had been recently built by Kennedy, and it was still unfinished and substantially without machinery. Between February 14, 1891, and May 4, 1891, the McDonough Manufacturing Company manufactured for, and sold and delivered to, Kennedy sawmill machinery to the amount and value of five thousand two hundred and fifty-nine dollars and twenty-five cents, which was put into the mill and became a part thereof. This machinery was furnished pursuant to a verbal order or agreement made about November 5, 1890, whereby the appellant, the manufacturing company, agreed to manufacture the machinery and ship it as ordered. The appellant commenced immediately to manufacture

the machinery, and had some of it completed before the date of plaintiff's mortgage, and manufactured and shipped it all as ordered and previously agreed upon. The company filed its petition for a mechanic's lien on October 26, 1891, claiming four thousand two hundred and fifty-nine dollars and twenty-five cents. In the foreclosure suit, the appellant and other lien claimants were made defendants. The appellant claimed that its lien was prior and paramount to the lien of plaintiff's mortgage, but the trial court held the mortgage to be the prior and paramount lien, and rendered judgment accordingly. The company appealed from this judgment.

T. F. Frawley, for the appellant

Winkler, Flanders, Smith, Bettum & Vilas, for the respondent.

¶11 **NEWMAN, J.** The question is, whether the appellant's lien for machinery supplied to Kennedy's mill after the date of the execution of the plaintiff's mortgage upon the mill property is prior and paramount to the lien of the mortgage. This question must be determined upon the proper interpretation of the statute which gives the lien. It is section 3314 of the Revised Statutes. So far as material to the question to be decided, it reads as follows:

"Every person who, as principal contractor, architect, civil engineer, or surveyor, performs any work or labor, furnishes any materials, or prepares any plans or estimates for, in, or about the erection, construction, repair, or removal of any dwelling-house or other building, or any machinery erected or constructed so as to be or become a part of the freehold upon which it is situated, . . . shall have a lien thereupon, and upon the interest of the owner of such dwelling-house, building, machinery, . . . in and to the land upon which the same is situated. . . . Such lien shall be prior to any other lien which originates subsequent to the commencement of the construction . . . or work aforesaid of or upon such dwelling-house, building, machinery, . . . and shall also attach to and be a lien upon the real property of any person on whose premises such improvements are made."

The object of the interpretation of a statute is to ascertain what the legislature intended to accomplish by it. When that intention is ascertained, that is the law. Statutes giving what are called "mechanics' liens" provide new remedies not given by the common law. They are supplementary to the common law, and remedial in their nature, and are to be fairly, even liberally, inter-

puted, so as to make the remedial purpose of the legislature effectual.

The statute recited above, so far as relates to the question involved, gives liens in two classes of cases. It gives liens to persons who furnish materials for the construction ⁶¹² of buildings, and to persons who erect machinery on the lands of others. The latter case is not included in the former, but is supplementary or additional to it. It provides for cases which are not within the former provision. The mechanic's lien statute, as at first enacted and in force, had only the former provision. The latter was subsequently added for the purpose of including within the benefits of the statute cases not already within it. While the statute as it now stands, with both cases included within it, was re-enacted as a whole in the revision of 1878, it, no doubt, bears the same interpretation as if the two provisions were contained in separate statutes.

The case of one who furnishes the machinery for the construction of a new mill is the case of one who furnishes materials for the construction of a building. The machinery, when attached, becomes a part of the building, and is real estate. The building without the machinery is no mill. The building with the machinery attached becomes a mill, but still is described by the generic term "building." It is subject to the liens which the statute gives to such as furnish materials for the construction of a building. This seems to be elementary, and to require no amplification. But it may be confirmed by citation of authority. Phillips on Mechanics' Liens, third edition, section 177, says: "Fixtures, machinery, etc., when necessary to the original purposes of the structure, and erected with it, may become responsible to the lien, when they would not otherwise have been, without express enactment, if put up independently. As between the owner and mechanic, everything put into and forming a part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is a part of the freehold; as wheels of a mill . . . are subject to the mechanics' lien law." In *Summerville v. Wann*, 37 Pa. St. 182, it was held that a statute which provides that "every building erected . . . shall be subject to a lien for the payment of all ⁶¹² debts contracted for work done or materials furnished for or about the erection or construction of the same" gives a lien against the building for engines and machinery constituting a part of a new mill. In *Dimmick v. Cook*, 115 Pa. St. 573, it was held, under the same statute, that a lien was given on a new hotel for

furnishing such articles for its construction as "heating, laundry, and cooking apparatus." In Dickey's Appeal, 115 Pa. St. 73, it was held that a battery of boilers, imbedded in brick and stone and mortar, a funnel chimney or stack, built on firm foundation and extending through the roof, the engines, cranes, wire mills, furnace trains, and other fixtures firmly attached to the realty, all a part of the realty, and all together constituting one plant, are all part of the building, within the meaning of the law which gives a lien upon the building for materials furnished in its construction.

So, it must be considered that the appellant has a right to a lien upon the mill building and the freehold, as one who has furnished materials for its construction. It is within the former class—a lien upon the building itself. Being a lien upon the building itself, it is not a lien upon machinery otherwise provided for. This being established, there is little occasion to consider what cases come within that provision which gives a lien to the person who erects machinery on the lands of another. Probably it will be found that all are cases where the machinery erected does not become a constituent part of a building upon which a lien might be had. The windmills found upon so many of the farms are samples. Where a lien is given on the building itself, there can be no lien upon the details or constituent parts of the building. The greater includes the less. This seems to be evident.

The appellant's lien, being upon the building itself, is prior and paramount to any other lien which has originated subsequently ⁶¹⁴ to the commencement of the construction of the mill, by express provision of the statute itself. It is prior and paramount to the plaintiff's mortgage, which was executed since the commencement of the building. The fact that the plaintiff had not begun to furnish the machinery for which his lien is claimed, at the mill, at the time when the plaintiff made his loan and took his mortgage, is irrelevant to the question. This was so decided in *Lampson v. Bowen*, 41 Wis. 484. That case was, in some of its features, very much like the present case. It can almost be said to be a precedent for this case. Granted that furnishing machinery is furnishing materials for the building, and it is on all fours with this case. It was a question between the holder of a mortgage, executed while a dwelling-house was in process of erection on the premises, and a lien claimant for labor and materials furnished subsequently to the execution and recording of the mortgage. It arose on a motion of the mortgagee to

be let in to defend against the lien claimant. The motion was based upon an affidavit which alleged that none of the work was done or materials were furnished prior to the execution or recording of the mortgage. The court say: "To construe the statute to mean that such lien should commence to run from the time the mechanic commenced work on the house, or the materialman commenced to furnish materials therefor, and should only be paramount to liens which originated after that time, but subject to liens which originated before that time and after the erection of the building was commenced, would be to pervert the language and plain meaning of the statute." The condition of the building, its unfinished state, was notice to the plaintiff, within the contemplation of the law, that further expenses for the completion of the building for its original purpose as a mill were in contemplation, which, in some contingency, not remotely likely to happen, might eventuate in a lien ⁶¹⁵ which would be prior and paramount to the lien of his mortgage: *Chapman v. Wadleigh*, 33 Wis. 267.

By the Court. That part of the judgment appealed from is reversed, and the cause remanded, with direction to modify the judgment in accordance with this opinion.

CASSIDAY, O. J., dissented from the majority opinion in the principal case in language as follows: "It is found by the trial court, and remains unchallenged, that on or about September 1, 1890, the defendant, Kennedy, commenced the erection of his mill in Ashland, and that the 'building was practically completed' by him before he gave the note and mortgage to the plaintiff. It is conceded by my brethren that the mere 'order or agreement,' made about eight weeks prior to the execution of the plaintiff's mortgage, whereby the defendant company 'agreed to manufacture the machinery and ship it as ordered,' did not of itself create a lien upon the building or land in favor of the company. It is, moreover, conceded that the mere fact that, in pursuance of that order or agreement, the company commenced to manufacture at its shops in Eau Claire some of such machinery, and actually had some of it completed at such shops prior to the making or recording of that mortgage, did not of itself create a lien upon the building or land in favor of the company. The trial court found, and it remains unchallenged, that the first machinery shipped by the company from Eau Claire to Kennedy at Ashland was on January 22, 1891—twenty-two days after the plaintiff, relying upon assurances that there was no lien or encumbrance upon the property, loaned the money and took the mortgage, and twelve days after that mortgage had been recorded. From what has been stated, it logically follows, and must be conceded, that the lien in favor of the company was wholly created by what took place between January 22, 1891, and May 4, 1891, inclusive, as mentioned in the opinion filed. This being so, the company is in no more

favorable position than it would have been if the 'order or agreement, for the machinery had been made after the recording of the mortgage' and the same had all been subsequently manufactured. It follows, as a necessary sequence, that, at the time the plaintiff loaned his money and took the mortgage, the building and land in question were free and clear from any encumbrance in favor of the company, and that the same continued to be true, not only up to the time of recording of the mortgage, but for several days thereafter. All this is, in effect, conceded by my brethren; but, as they construe our statute, they feel constrained to hold that, although the lien in favor of the company was wholly created after the recording of the plaintiff's mortgage, yet that, when so created, it related back to the commencement of the building, September 1, 1890, and thus became 'prior and paramount to any other lien which has originated subsequently to the commencement of the construction of the mill, by express provision of the statute itself,' and hence 'is prior and paramount to the plaintiff's mortgage, which was executed since the commencement of the building.'

"Under such construction of the statute, the company's lien would have so related back and become prior and paramount to the plaintiff's mortgage, even had the lien not been created for several months, or even for several years after the recording of the mortgage; and this would be so, even if Kennedy borrowed the money with the avowed purpose of paying for such machinery and otherwise keeping out of debt. The decision is to the effect that the company and Kennedy were, by transactions which accrued wholly after the recording of the plaintiff's mortgage, enabled, by virtue of the statute, to divest the plaintiff's lien and render the same subordinate and subject to the lien in favor of the company for machinery thereafter sold and delivered, to the amount of five thousand two hundred and fifty-nine dollars and twenty-five cents; and that, too, without the consent or knowledge of the mortgagee, and without any notice to him, actual or constructive. True, it is said in the opinion filed, in effect, that the completed building, without the machinery in it, was notice to the plaintiff, within the contemplation of law, that further expenses were in contemplation, which 'might eventuate in a lien which would be prior and paramount to the lien of his mortgage.' The fact that Kennedy had completed the construction of the building, and that the same, and the land upon which it was situated, were free and clear of all liens and encumbrances at the time he borrowed the ten thousand dollars, and gave the mortgage thereon as security, would seem to indicate to the ordinary mind that he did not contemplate running in debt for the machinery. But the mortgagee was not bound to take notice of things which, at the time of taking and recording his mortgage, had no existence except in the 'contemplation' of the mortgagor—and there only, in the language of the opinion filed, in case of 'some contingency not remotely likely to happen.'

"The statute, as construed by the majority of the court, is, in my judgment, repugnant to that provision of the constitution of the United States which declares that 'no state shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws': Amendments, art. 14, sec. 1. That provision was ordained and established for the very purpose of taking away from every state and its legislature every one of the powers thus prohibited. A majority of this

court have just held, in an opinion by my brother Newman, that notice of forty days by publication in case of street assessments is not such due process of law as to conclude and bar the lotowner: *Hayes v. Douglas County*, 92 Wis. 000. But here, as indicated, the plaintiff is divested of substantial property rights without any notice. True, the validity of the statute, as thus construed, was not discussed at the bar, and is not mentioned in the opinion filed. Nevertheless, the effect of the decision is to divest the plaintiff of a vested right of property, without any notice, and by reason of transactions which occurred wholly after the recording of the mortgage, and which transactions had no existence at the time of recording the mortgage, except as mere contingent possibilities in the contemplations of the mortgagor and the company.

"But it is unnecessary to extend this discussion in a mere dissenting opinion on a point not mentioned, but necessarily decided, in the opinion filed. Besides, four years ago my views upon a similar question were expressed, and numerous authorities cited in support of them, in a dissenting opinion in *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 180-186. That decision gave a lien to a subcontractor without regard to the contract price or the sum due from the owner to the principal contractor. As there indicated, the validity of such legislation must finally be determined by the supreme court of the United States; and, until so determined, the question is open to the expression of opinion. In addition to the authorities cited in that opinion in support of the views here expressed, see *St. Louis etc. R. R. Co. v. Gill*, 156 U. S. 649; *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; *Wallace v. Georgia etc. Ry. Co.*, 94 Ga. 732; *State v. Julow*, 129 Mo. 163; 50 Am. St. Rep. 443.

"The opinion in the case at bar, like all other decisions of this court in support of the validity of such legislation, fails to meet the objection upon which this dissent is based. It purports to be based upon the letter of the statute—assuming it to be a valid statute. The construction given is certainly far-reaching in its effects, and strikes at the fundamental right of parties to make their own contracts, and deal with property, without being embarrassed by secret liens to be subsequently created. It frustrates and renders nugatory the salutary statute known as the recording act. The plaintiff here had the right to rely upon the statute which made all prior and unrecorded conveyances void as against his mortgage, taken and recorded in good faith and for full consideration paid: Rev. Stats., sec. 2241. A mortgage is a 'conveyance' within the meaning of that section: Rev. Stats., sec. 2242. Since that is so as to existing secret liens and conveyances, it must, for a much stronger reason, be so as to a lien not created until weeks after the plaintiff recorded his mortgage. In my judgment, the statute may be fairly construed as giving the lien only from the time the machinery began to be put into the building. And especially should it be so construed since the rule is well settled that where a statute is open to two interpretations, one of which would render it nugatory and the other valid, that construction should be adopted which makes it valid."

MECHANIC'S LIEN.—A statute giving a mechanic's lien is remedial in its nature and should be liberally construed: *Dugan Cut Stone Co. v. Gray*, 114 Mo. 497; 35 Am. St. Rep. 787. As to whether machinery manufactured and sent to the owner, and set up by the latter

in a building, will furnish the basis for a mechanic's lien, the cases are at variance; and the words "materials furnished" have sometimes been construed to include such machinery: See monographic notes to Chapin v. Perse etc. Paper Works, 79 Am. Dec. 275, 276, on lien of materialmen; La Crose etc. R. R. Co. v. Vanderpool, 78 Am. Dec. 695, on what structures are subject of mechanics' liens; East Tennessee Iron Mfg. Co. v. Bynum, 3 Sneed, 268; 65 Am. Dec. 56, and note. The lien begins when the work is commenced or the materials furnished, and has precedence over a mortgage executed subsequently to that time: Avery v. Clark, 87 Cal. 619; 22 Am. St. Rep. 272. A lien for labor or material is paramount to the lien of a mortgage executed after the building was commenced, but before such labor or material was furnished: Note to Chapman v. Brewer, 47 Am. St. Rep. 789. Compare Farmers' Bank v. Winslow, 8 Minn. 86; 74 Am. Dec. 740.

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ACCORD AND SATISFACTION.

1. AN ACCORD AND SATISFACTION REQUIRES a new agreement and a performance thereof. It must be an executed contract, founded upon a new consideration, although an agreement to accept an independent executory contract has been held sufficient. (*Nassoidy v. Tomlinson*, 695.)

2. ACCORD AND SATISFACTION.—If a check is sent to a person, and the claim is then made that it is for the entire sum due him, and he is requested to return a receipt in full, and he, knowing that the sender of the check still claims it is for the whole sum due, collects such check and sends a receipt on account, such acceptance and collection operate as a full accord and satisfaction, and he cannot maintain an action to recover the balance claimed to remain unpaid. (*Nassoidy v. Tomlinson*, 695.)

3. A DEMAND IS NOT LIQUIDATED, even if it appears that something is due, unless it appears how much is due; and when it is admitted that one of two different sums is due, but there is a genuine dispute as to which is the proper amount, the demand is unliquidated within the meaning of that term as applied to accord and satisfaction. (*Nassoidy v. Tomlinson*, 695.)

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AGENCY.

1. AGENCY—QUESTIONS OF LAW AND FACT.—Whether an agency exists, under an ascertained state of facts, is a question of law, to be determined by the court, but it is within the province of the jury to find whether the facts necessary to establish the agency exist. (*Seehorn v. Hall*, 562.)

2. PRINCIPAL AND AGENT.—THE AUTHORITY OF AN AGENT IS ENLARGED as to third persons by implication, when the principal permits him to do acts not expressly authorized, or which are recognized as valid after they have been done. (*Hanover Nat. Bank v. American Dock etc. Co.*, 721.)

3. A PRINCIPAL IS LIABLE IN A CIVIL ACTION for the fraud or other malfeasance of his agent perpetrated in the course of his employment, although the principal did not authorize, justify, nor know of, the misconduct. (*Jarvis v. Manhattan Beach Co.*, 727.)

4. PRINCIPAL AND AGENT.—IF, THROUGH INATTENTION or otherwise, a principal suffers his agent to act beyond his authority without objection, he is bound to those who are not aware of any want of authority, to the same extent as if the power had been directly conferred. (*Hanover Nat. Bank v. American Dock etc. Co.*, 721.)

5. AGENCY—MISREPRESENTATIONS BY AGENT—RESCISSION OF CONTRACT.—If an agent obtains possession of the property of another by making a stipulation or condition which he is not authorized to make, the principal must either return the property, or remain subject to the condition upon which it was parted with by the former owner. (*Meyerhoff v. Daniels*, 782.)

6. AGENCY—FALSE REPRESENTATIONS OF AGENT—RESCISSION.—In an action to recover for goods sold to an agent in reliance upon his false representations, evidence that his principal received the goods upon credit, that the agent had an interest in the principal's business, that the representations were made with the authority of the principal and were false, and that the purchase was beyond the demands of the principal's business, is admissible. (*Meyerhoff v. Daniels*, 782.)

7. AGENCY—FALSE REPRESENTATIONS BY AGENT—RESCISSION.—If goods are obtained from the owner, through the false representations of the agent of another, the owner may rescind the contract and recover the goods from the principal of such agent, whether the latter had authority to make such representations or not. (*Meyerhoff v. Daniels*, 782.)

8. AGENCY—LIABILITY FOR SUBAGENT.—If an agent employs a subagent to perform a part of the work or service he has contracted to do, he is liable to his principal for any negligence or omission of duty on the part of such subagent in the course of his employment. (*Bailie v. Augusta Sav. Bank*, 74.)

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1. ANIMALS—INJURIES BY—LIABILITY FOR.—If domestic animals, such as oxen and horses, injure anyone in person or property when they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury, unless he knows that they are accustomed to do mischief; and such knowledge must be alleged and proved; but, if they are wrongfully in the place where they do the mischief, the owner is liable, though he had no notice that they were accustomed to do so before. (*Reed v. Southern Express Co.*, 62.)

2. ANIMALS—BITE OF HORSE—LIABILITY FOR.—If a draught horse attached to a vehicle is momentarily left standing in a street near the sidewalk, and bites a person passing by, the owner of the horse is not liable for the injury occasioned, where it is not shown that the horse was, or ever had been, of a vicious nature, or that the owner had any reason to apprehend that it would suddenly bite anyone. (*Reed v. Southern Express Co.*, 62.)

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APPEAL.

1. **APPEAL—ASSIGNMENT OF ERROR—TIME.**—A demurrer to a rule nisi having been overruled, and no exceptions pendente lite having been filed, it is too late to assign as error the judgment overruling the demurrer, in a bill of exceptions sued out more than sixty days after the date of such judgment. (*Corniff v. Cook*, 55.)

2. **APPELLATE PRACTICE—EXCEPTIONS—ASSIGNMENT OF ERROR.**—If a commissioner, to whom a case has been referred, reports in favor of subrogation, wholly ignoring an answer denying that the debt has been paid in full, and such report is sustained by the court without considering such answer, the supreme court is bound to consider the question of such omission on appeal, if it is made the subject of an exception to the report, and also of an assignment of error. (*Musgrave v. Dickson*, 765.)

3. **APPELLATE PRACTICE.**—Objection to evidence not made at the time it is introduced is waived. (*State v. Crosswhite*, 571.)

4. **APPEAL—FINDINGS.**—If there is not a clear preponderance of evidence against a finding, it must be sustained on appeal. (*Singleton v. Hill*, 868.)

5. **APPELLATE PRACTICE.**—A verdict which is right upon the evidence will not be reversed on appeal because of erroneous instructions. (*Louisville etc. Ry. Co. v. Nicholai*, 206.)

6. **APPELLATE PRACTICE—EXCESSIVE VERDICT.**—A verdict which is plainly excessive, so much so that it cannot be accounted for, except upon the ground of passion or prejudice, must be set aside on appeal. (*Davis v. Selley*, 356.)

7. **STARE DECISIS.**—In determining whether a conclusion of law in any adjudicated case is a precedent in a subsequent one, the value of the first is measured by its similarity or dissimilarity to the second in its controlling facts. And even if the court, announcing the conclusion, misapprehends or mistakes the facts, the conclusion, to be of any value as a precedent, must be taken as applicable to the facts as assumed by the court; they, as concerns the judgment, are the facts, and whether existing or nonexisting, either prompt or compel the conclusion of law that determines the judgment. (*Yoders v. Amwell*, Tp. 750.)

ASSESSMENTS.

See Judgments, 3.

ASSETS.

See Partnership, 6, 10, 13.

ASSIGNMENT.

1. **ASSIGNMENT—AN UNACCEPTED DRAFT OR BILL OF EXCHANGE** does not, before acceptance, operate as an assignment of a debt due from the drawee to the drawer. (*Northern Trust Co. v. Rogers*, 526.)

2. **ASSIGNMENT.**—A CHECK IS AN ASSIGNMENT of the funds of the drawer to the amount of the check, as between the drawer and payee, when the check is given, but, as between the payee or holder and the drawee, the check is not complete as an assignment until presentation for payment. (*Northern Trust Co. v. Rogers*, 526.)

See Cotenancy, 5; Mortgages, 5; Partnership, 3; Patents, 3.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS.—To constitute an assignment for the benefit of creditors, there must be a trustee, creditors, and a cestui que trust, who can compel an enforcement of the trust, though it is not necessary that a trustee should be named as such, in the instrument, or be specifically named at all, at the time of the transaction, if it is definitely agreed that there shall be a trustee, in fact, to hold property and administer it as such. Nor is it essential that all, in order to be bound, should be parties to the transaction at the outset. They will be equally bound if, with knowledge of the facts, they become parties afterward. Neither is it essential that the transfer should be made directly to the trustee. If made directly to creditors, covering all the insolvent's property, coupled with an agreement that all such property shall be immediately turned over to one of the creditors, or some third party, to act as trustee for all, that is sufficient. (*Strong v. Kalk*, 863.)

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—VOID CHATTEL MORTGAGES.—If an insolvent debtor, wishing to prefer certain creditors, who are relatives and friends, gives them a chattel mortgage, covering all his property, coupled with an agreement that one of such creditors shall immediately take possession of such property, as agent and trustee for all, and sell it, and distribute the proceeds among them, pro rata, until all are paid, and two other creditors afterward take chattel mortgages on the same property, with full knowledge of all the facts, and become parties to the arrangement first made, with the understanding that their claims shall be paid after those of the other mortgagees, all parties to this arrangement knowing that the mortgagor is hopelessly insolvent, and that he is indebted to a large amount outside of the claims secured; the transaction amounts to an assignment for the benefit of creditors, in violation of the statute on the subject of assignments for the benefit of creditors, and prohibiting preferences in such assignments; and the chattel mortgages are therefore void. (*Strong v. Kalk*, 863.)

See Setoff.

ASSIGNMENT OF ERROR.

See Appeal, 1, 2.

ASSUMPSIT.

See Mandamus.

ATTACHMENT.

1. ATTACHMENT—BURDEN OF PROOF.—An officer, justifying an attachment, has the burden of proof to show, by a preponderance of evidence, that he did, in fact, effectually levy it; but such preponderance is not to be determined alone by the number of witnesses testifying to a particular fact. The jury should be instructed to take into consideration the opportunities of the witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest, or lack of interest, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial; and from all these circumstances to determine upon which side is the weight, or preponderance, of the evidence. Hence, after such a charge, it is not error to refuse to instruct the jury that "the question whether the burden of proof has been carried is to be settled by looking at the number of witnesses testifying in favor or against certain facts, their demeanor on the stand, character, interest, etc." (*Corniff v. Cook*, 55.)

2. ATTACHMENT—SUFFICIENCY OF LEVY—POSSESSION AND REMOVAL OF PROPERTY.—If an officer, having property within his view, and where he can control it, professes to levy upon it,

and to assume control of it, by virtue of a writ of attachment, the levy is valid, although the officer leaves the property, to be kept for him, in the hands of the defendant in attachment. Hence, if a constable levies upon goods in clubrooms belonging to a corporation, and makes an inventory thereof, the property being at the time under his view, in his immediate presence, and constructively in his possession, and the defendant in attachment, through its president, agrees, immediately afterward, to hold the goods subject to the order and control of the officer, who shortly thereafter makes an entry of levy upon the attachment, the levy is sufficient, although the constable does not take actual manual custody of the goods, or lock up the house, or remove the goods therefrom. (*Corniff v. Cook*, 55.)

3. ENTIRETIES—GARNISHMENT.—If land owned by husband and wife by entireties is sold by them, the husband's half of the proceeds of the sale, though remaining undivided, is subject to garnishment for the payment of his separate debts. (*Fogleman v. Shively*, 213.)

4. MUNICIPAL CORPORATIONS — GARNISHMENT. — Public policy forbids that a municipal corporation should be subject to garnishment in any case where its indebtedness arose on account of the exercise by it of governmental functions. It cannot, therefore, be garnished for money due by it to a contractor for constructing a sewer or other public work, although such work is fully completed before the garnishment is served, and the debt is for a balance then due the contractor. (*Leake v. Lacey*, 112.)

See Contempt; Injunctions, 4.

ATTORNEY AND CLIENT.

1. PLEADING—COLLUSION BETWEEN CLIENT AND DEFENDANT.—Characterizing a transaction as fraudulent does not make it so in law unless it is so in fact. Therefore, a charge, by the plaintiffs' attorney, of fraudulent collusion between the plaintiff and the defendant in a damage suit, for the purpose of cheating the attorney "out of his fees and expenses," amounts to nothing, if he does not state facts sufficient to support the charge. An allegation that the client compromised his claim with the defendant and dismissed the action before judgment, without the consent of his attorney, is insufficient, as the client had a lawful right to do so. (*Hanna v. Island Coal Co.*, 246.)

2. ATTORNEY AND CLIENT—LIEN OF ATTORNEY—CLIENT'S RIGHT TO COMPROMISE ACTION.—Under a statute giving a lien to an attorney on any judgment obtained by him for his client, the attorney, in an action to recover damages for injuries to his client, acquires no lien for fees, and money expended, until after judgment. Hence, until then, the client may settle, compromise, and release the cause of action, without consulting his attorney, and without making the defendant liable to the latter, although the client has agreed with his attorney not to do so, and the defendant has notice of such agreement, and of the attorney's claim. Neither will the client's insolvency render the defendant liable to the attorney. (*Hanna v. Island Coal Co.*, 246.)

3. ATTORNEY AND CLIENT—LIEN OF ATTORNEY—COMPROMISE BEFORE JUDGMENT.—If a cause of action is one for unliquidated damages, and not assignable, such as an action for personal injuries resulting from negligence, the client cannot give his attorney any lien that will prevent a settlement or compromise by the parties before judgment, even if the amount is definitely fixed, and an agreement made that the same shall become a lien, and the adverse party notified of the fact. (*Hanna v. Island Coal Co.*, 246.)

ATTORNEYS' FEES.

See Mortgages, 9.

AUCTIONS.

AUCTION SALES—MEMORANDUM, WHO MAY MAKE.—An agent of the owner of land, engaging an auctioneer to make sale thereof cannot, as the latter's clerk, make an entry of the sale, so as to bind the bidder to whom the property is finally knocked off by the auctioneer. A memorandum so made does not satisfy the statute of frauds. (*Howell v. Shewell*, 148.)

BAGGAGE.

See Carriers, 5-7; Railroads, 7, 8.

BANK-BOOKS.

See Wills, 2.

BANKS.

1. **BANKS AND BANKING—DELIVERY OF DRAFT.**—The mailing of a letter, addressed to the cashier of a bank, in which is inclosed a draft, is, in legal effect, a delivery of the draft to that bank, and the sender has no rightful authority to take the letter from the mail. (*Canterbury v. Bank*, 870.)

2. **BANKS AND BANKING—DRAFTS—RIGHT OF STOPPAGE IN TRANSITU.**—If a bank, being the payee of a draft, sends it to another bank for collection, and the latter, at the request of the drawee, and on the faith of his solvency, gives him credit for the amount, makes its own draft on a third bank, payable to the order of the first bank, and mails it to the latter "in payment of" the first draft, this is a delivery of the second draft by the drawee of the first draft, through the collecting bank, to the first bank; and the collecting bank cannot, on learning of the drawee's insolvency, stop payment of the second draft, or withdraw it from the mail. (*Canterbury v. Bank*, 870.)

3. **A BANK ACCOUNT PAYABLE TO THE ORDER OF HUSBAND OR WIFE**, the balance at the death of either to belong to the survivor, constitutes an agreement between the bank and the husband which remains in force after his death, and justifies the payment to her, as survivor, of the moneys remaining on deposit at his death. (*Metro-politan Sav. Bank v. Murphy*, 473.)

4. **BANKS—DEPOSIT OF CHECK—LIABILITY.**—If a bank, in the ordinary course of business, receives from a depositor a check upon another bank, and credits it on his deposit-book, not as cash, but as a check, the bank is not liable for the value of the check as a purchaser thereof, especially where it appears that the bank merely undertook the collection of the check for the benefit of the depositor, and that it was not the intention of the parties that the title to the check should pass to the bank as absolute owner. (*Bailie v. Augusta Sav. Bank*, 74.)

5. **BANKING—REFUSAL TO PAY CHECK—DAMAGES.**—If an indorsed check is sent for collection by due course of mail to the bank on which it is drawn and in which the drawer has on deposit at the time sufficient funds to pay it, the return of the check unpaid, due solely to the negligent mistake of an employé of the bank, is, in effect, a refusal to pay, and renders the bank liable to the drawer for substantial, temperate, compensatory damages, without proof of special or actual damages. (*Atlanta Nat. Bank v. Davis*, 139.)

6. **BANKS—FAILURE TO PRESENT CHECK WITHIN A REASONABLE TIME, EFFECT OF.**—If the holder of a bank check neglects to present it for payment within a reasonable time, and the bank fails between the time of drawing and the presentation of the check, the drawer is discharged from liability to the extent of the injury he has sustained by such failure, and an indorser is discharged absolutely. (*Comer v. Dufour*, 89.)

7. **BANKS—PRESENTATION OF CHECKS—REASONABLE TIME.**—What is a reasonable time in which to present a check to a

bank for payment depends upon circumstances, and the relation of the parties between whom the question arises. When the facts are undisputed, the question is one of law, to be determined by the court. (*Comer v. Dufour*, 89.)

8. BANKS—PRESENTATION OF CHECK RECEIVED AT DISTANT PLACE.—If a check is received at a place distant from the place where the bank upon which it is drawn is situated, and is forwarded by due course of mail to a person in the latter place for presentment, the person to whom it is thus forwarded has until the close of banking hours on the next secular day after he has received it to present it for payment, unless there are special circumstances which require him to act more promptly. (*Comer v. Dufour*, 89.)

9. BANKS — PRESENTMENT OF CHECK — ALLOWING DRAWEE TO RETAIN FUNDS.—The holder of a check, after having once presented it, cannot derive any advantage from the fact that he could, without being chargeable with unreasonable delay, have held it longer before making presentment. The first presentment fixes the rights of the parties. If the drawee is then ready and willing to pay, and the holder allows the fund to remain longer in the hands of the drawee, he does so at his peril. (*Comer v. Dufour*, 89.)

10. BANKS — EFFECT OF TAKING SUBSTITUTED CHECK, AND OF DELAY IN ITS PRESENTMENT.—If the holder of a check accepts, in lieu of money, a check of the drawee, he does so at his peril. If such acceptance does not, of itself, discharge an indorser of the original check, the indorser should certainly be held discharged, if the substituted check is not presented promptly, and the collection is thereby defeated. Such presentment cannot be delayed, at the risk of the indorser, for any time beyond that within which, with reasonable diligence, the presentment can be made. (*Comer v. Dufour*, 89.)

11. BANKS—DELAY IN PRESENTMENT OF SUBSTITUTED CHECK—DISCHARGE OF INDORSER—DIRECTION OF JUDGMENT.—If a bank cashes a check after its indorsement by an accommodation indorser, and sends it, for collection, to its correspondent in the city where the bank upon which the check was drawn is located, and it, with a number of other checks, is there presented to the drawee for payment, but the runner of the correspondent accepts in payment of all these checks a small sum of money and the drawee's check upon another bank in the same city, which, if promptly presented, would be paid, but which is held by the runner, or the bank he represents, for two hours or more, during which time the original drawee fails, and in consequence of which the substituted check is dishonored, the bank which cashed the original check cannot hold the indorser of that check liable for the amount thereof, though, after the substituted check was dishonored, the original check was reclaimed by replevin, duly protested for nonpayment, and returned to the bank which cashed it. Under such circumstances, the lower court will be directed to render a final judgment in favor of the defendant. (*Comer v. Dufour*, 89.)

12. BANKS AND BANKING—FORGED CHECKS.—A banker upon whom a forged check has been drawn cannot, upon discovery of the forgery, recover the amount from a bona fide holder to whom he has paid it. (*Germania Bank v. Boutell*, 519.)

13. BANKS AND BANKING—FORGED CHECKS.—A bank that pays to another a forged order, indorsed in blank by the forger, received and indorsed by the first bank to the paying bank "for collection," may recover the money back, provided the bank paid is in no worse position than if payment of the order had been refused by the correspondent bank. Delay by the latter bank in giving notice of the forgery is immaterial, unless the bank paid is thus placed in a worse position than if it had received notice earlier. (*First Nat. Bank v. First Nat. Bank*, 221.)

14. BANKS AND BANKING—FORGED CHECKS.—In the absence of actual fault or negligence on the part of the drawer, his constructive

fault in not knowing the signature of the drawer, and detecting a forgery, does not preclude his recovery from one who has received the money with knowledge of the forgery, or who took the check under circumstances of suspicion, without proper precautions, or whose conduct has been such as to mislead the drawer, or to induce him to pay the check, without the usual scrutiny or other precautions against mistake or fraud. (*First Nat. Bank v. First Nat. Bank*, 221.)

15. BANKS AND BANKING—FORGED CHECKS.—To entitle the holders to retain money obtained through mistake, upon a forged check, he must be able to put the drawer alone in the wrong, and must be able truthfully to assert that he put the whole responsibility upon the drawer, and relied upon him to decide; and that the mistake arising from his negligence cannot be corrected without placing the holder in a worse position than if payment had been refused. (*First Nat. Bank v. First Nat. Bank*, 221.)

16. BANKS—LOSS OF SPECIAL DEPOSIT THROUGH ACT OF EMPLOYEE.—It is incumbent upon a bank, where the loss of a special deposit occurs through the negligence or dishonesty of one of its employees, to show reasonable care and circumspection on its part, both as to the selection of such employee in the first instance, and as to his subsequent retention in a position of trust. (*Merchants' Nat. Bank v. Carhart*, 95.)

17. BANKS—LOSS OF SPECIAL DEPOSIT—BURDEN OF PROOF. If a special deposit of property for gratuitous safekeeping is made with a bank, which, through its cashier, issues a receipt therefor, specifying that the same is held subject to the order of the depositor, and which receipt the cashier is authorized to issue, the depositor, in an action against the bank for the value of the deposit, makes out a prima facie case by introducing the receipt in evidence and proving the bank's failure to deliver the property on demand; and this casts upon the defendant the burden of showing that it had exercised at least slight diligence in the care and keeping of the property. (*Merchants' Nat. Bank v. Carhart*, 95.)

18. BANKS—THEFT OF DEPOSIT BY CASHIER—CARE REQUIRED OF BANK.—If a special deposit of property for gratuitous safekeeping, made with a bank, is stolen by its cashier, it cannot exonerate itself from liability by showing that it exercised due diligence in selecting the cashier. To escape liability the bank must show affirmatively that, during the whole term of the bailment, it exercised, at least, a slight, continuing supervision over the cashier; that, in doing so, no indication of dishonesty, or other reason for distrusting him, appeared; and that it was not guilty of gross negligence in retaining him after it knew, or ought to have known, in the exercise of slight diligence, that he was, or had become, unworthy of trust. This is not shown by proof that, up to a given time, three or more years previous to the discovery of the theft, his reputation was good, and that "he stood in the community for honesty and integrity as high as any man." (*Merchants' Nat. Bank v. Carhart*, 95.)

19. BANKS—THEFT OF DEPOSIT BY CASHIER—DILIGENCE, HOW MEASURED.—If a special deposit in a bank is stolen by its cashier, the question as to whether or not the bank observed that degree of diligence which was due the plaintiff is not dependent upon the question whether or not, under similar circumstances, it trusted its cashier with its own property of like kind, and it is not error to refuse a charge making it so dependent. What the bank ought to have done, in order to come up to the measure of diligence required by law, cannot be arrived at by showing what it actually did in other matters relating to its own affairs. (*Merchants' Nat. Bank v. Carhart*, 95.)

20. BANKS—COLLECTIONS BY SUBAGENT.—In the absence of any agreement to the contrary, a bank which receives a check from a customer is liable to him for any negligence whereby the collection of the check is defeated, whether such negligence is that of its own officers,

or of a subagent or correspondent to whom he sends the check for collection. It makes no difference that the bank does not charge anything for the collection, and it is immaterial whether such subagent or correspondent is the bank upon which the check is drawn, or another. (*Baillie v. Augusta Sac. Bank*, 74.)

See *Insolvency*; *Negotiable Instruments*, 13; *Setoff*.

BILLS OF LADING.

See *Railroads*, 3.

BONDS.

See *Corporations*, 1-3; *Municipal Corporations*, 23; *Suretyship*.

BROKERS.

See *Corporations*, 18.

BUILDING AND LOAN ASSOCIATIONS.

1. IF A BUILDING AND LOAN ASSOCIATION GOES INTO THE HANDS OF A RECEIVER, a member who is a mortgagor, is no longer under any obligation to pay monthly dues accruing after the commencement of the receivership. (*Buist v. Bryan*, 787.)

2. BUILDING AND LOAN ASSOCIATIONS.—A MEMBER WHO HAS BORROWED MONEY of, and executed a mortgage to, a building and loan association is, upon its going into the hands of a receiver, entitled to be credited upon his mortgage with all amounts paid as interest and all dues on his shares of stock, and if such credits equal or exceed the amount of the mortgage debt, no suit in foreclosure can be sustained. (*Buist v. Bryan*, 787.)

BUILDING CONTRACTS.

BUILDING CONTRACTS.—THE WORD "CONTRACTOR," in an ordinance requiring any owner or contractor who erects a building adjacent to a sidewalk in a city to construct a covered way next to the building, applies not only to contractors for the walls and brickwork, but also to a separate contractor for the iron work, consisting of girders, beams, and floor joists, and which constitute an integral and substantial part of the building. (*Smith v. Milwaukee Builders' etc. Exchange*, 912.)

BUILDINGS.

See *Municipal Corporations*, 13, 14.

BURDEN OF PROOF.

See *Attachment*, 1; *Libel*, 3; *Towns*.

CANCELLATION.

See *Equity*, 1.

CARRIERS.

1. CARRIERS OF PASSENGERS—DUTY AND LIABILITY.—A carrier must exercise the highest degree of care to secure the safety of its passengers, and is responsible for the slightest neglect, if any injury is caused thereby. A carrier's duty is not ended with carrying a passenger safely from one point to another, but the carrier must set the passenger down safely, if, in the exercise of the utmost care, it can be done. (*Evansville etc. R. R. Co. v. Athol*, 303.)

2. CARRIERS OF PASSENGERS, NOT BEING INSURERS of their safety, are not responsible for injury to them, if all reasonable care, skill, diligence, prudence, and foresight for their safety have been employed. (*Hite v. Metropolitan etc. Ry. Co.*, 555.)

3. CARRIERS—NEGLIGENCE—PRESUMPTION.—An injury to a passenger, shown to have been caused by reason of some defect or imperfection in the carrier's appliances, or by some omission of duty or negligent act of his servants, raises a presumption of negligence on his part. (*Hite v. Metropolitan etc. Ry. Co.*, 555.)

4. CARRIERS—DUTY OF PASSENGER TO READ TICKET.—If a passenger ticket is free from anything calculated to mislead or deceive the person buying it, and professes to, and does set out, a special contract between the carrier and the passenger so legibly and plainly, that it is carelessness on the part of the latter not to read it, his failure to read it when he has an opportunity estops him from saying that he has not read it, and he is bound by its stipulations. (*Louisville etc. Ry. Co. v. Nicolai*, 206.)

5. CARRIERS—REMOVAL OF BAGGAGE.—The baggage of a passenger, upon reaching its destination, must be called for within a reasonable time, or the liability of the carrier as an insurer ceases. The reasonable time within which the owner must call for it, is directly upon its arrival, making reasonable allowance for the crowded condition of the depot at the time. The lateness of the hour makes no difference if the baggage is put upon the platform. (*Ditman Boot etc. Co. v. Keokuk etc. R. R. Co.*, 352.)

6. CARRIERS—REMOVAL OF BAGGAGE.—If it is customary for a carrier to close its depot so soon after the arrival and departure of an evening train, that baggage handlers did not customarily go to the depot at night, and, if the only way that baggage arriving on that train could be obtained was by special request, surrender of check, and having it left outside of the depot, the owner of baggage so arriving is not guilty of negligence in leaving it in the depot over night without effort to remove it. In case of its destruction during that time, he may recover its value from the carrier. (*Ditman Boot etc. Co. v. Keokuk etc. R. R. Co.*, 352.)

7. CARRIERS—LIABILITY FOR BAGGAGE.—If the exemption provided by contract between a carrier and a passenger is not for loss or damage to baggage from a particular cause, but as to amount only, and the carrier does not account, nor attempt to account, for a refusal or failure to deliver the property the jury has a right to infer negligence on the part of the carrier, and the passenger may recover the amount of his loss. (*Louisville etc. Ry. Co. v. Nicolai*, 206.)

See Railroads, 3-12.

CASHIER.

See Banks, 17-19.

CERTIFICATES.

See Corporations; Warehousemen.

CHattel MORTGAGES.

See Assignment for the Benefit of Creditors, 2; Insurance, 9, 10.

CHECKS.

See Accord and Satisfaction, 2; Assignment, 2; Banks, 4-15; Insolvency; Payment.

CHOSES IN ACTION.

See Partnership, 3.

CLOUD ON TITLE.

1. CLOUD ON TITLE.—A CONVEYANCE WHICH SHOWS UPON ITS FACE that the grantor was at the time of its execution out of possession of the lands conveyed is void as to a party holding adversely to such grantor at the time of its execution, and is not a cloud upon his title. (*Reyes v. Middleton*, 17.)

2. CLOUD ON TITLE.—A CONVEYANCE VOID UPON ITS FACE, in the absence of rebutting proof, is not a cloud on the title, authorizing the interposition of equity for its removal. (*Reyes v. Middleton*, 17.)

COLLECTIONS.

See Banks, 20.

COLLUSION.

See Attorney and Client, 1.

COLLATERAL SECURITY.

See Corporations, 8-12.

COMITY.

See States.

COMMERCE.

See Interstate Commerce.

COMMISSIONERS.

See Mandamus.

COMPROMISE.

COMPROMISE—CONSIDERATION.—IF A CLAIM IS UNLIQUIDATED, the acceptance of a part and an agreement to cancel the entire debt furnishes a new consideration sufficient to sustain the compromise. (*Nassoidy v. Tomlinson*, 695.)

See Attorney and Client, 2.

CONFLICT OF LAWS.

1. CONFLICT OF LAWS—CONSTRUCTION OF CONTRACT.—A written contract dated in one state, offering to furnish beer at a certain place in another state, from time to time, as ordered, "kegs not returned to be paid for," and accepted at the latter place, is a contract made in the latter state, and, if void under the laws thereof, entitles the buyer to recover all payments made thereunder, without deduction for kegs not returned. (*Gipps Brewing Co. v. De France*, 329.)

2. CONFLICT OF LAWS—CONTRACTS—LEX FORI—REMEDY. The law of the place where a contract is made, including that applicable to the remedy, so far as it affects the validity or obligation of the contract, is as much a part of it as if expressly referred to or incorporated in its terms; and, if the contract is voidable there, it is voidable everywhere. This does not conflict with the general rule that in matter of procedure the lex fori controls, as "procedure," in this connection, applies to the nature of the action, as whether it shall be covenant, assumpsit, debt, etc., to the rules of pleading and evidence, the order and manner of trial, the nature and effect of process, and perhaps, to all other matters of remedy only, which are not incorporated into the contract as affecting its nature and obligatory character. (*Cochran v. Ward*, 229.)

See States; Corporations, 21-24; Railroads, 4.

CONNECTING CARRIERS.

See Accord and Satisfaction, 1.

CONSIDERATION.

See Compromise; Evidence, 3.

CONSTITUTIONAL LAW.

See Patents, 2; Statutes, 5-10.

CONSTITUTIONS.

A CONSTITUTIONAL PROVISION IS NOT SELF-EXECUTING which declares that dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by such stockholders, and such other means as shall be provided by law. The liability of stockholders must, therefore, be ascertained by examining such state statutes as have been enacted by the legislature in discharging the duty imposed upon it by such constitutional provision. (*Marshall v. Sherman*, 654.)

CONTEMPT.

AN ATTACHMENT UPON PROPERTY IN THE HANDS OF A RECEIVER of the court is a contempt of the court which has taken the property into its possession through its receiver, and cannot be regarded as creating a lien. (*Farmers Loan etc. Co. v. Bankers' etc. Tel. Co.*, 690.)

CONTRACTS.

1. CONTRACTS—"STEADY AND PERMANENT EMPLOYMENT"—RELEASE—MUTUALITY.—There is no want of mutuality in a contract made by a person having a cause of action against another for injuries sustained through the latter's negligence, whereby the former relinquishes his claim in consideration of a sum of money advanced, and of the latter's promise to furnish him with "steady and permanent employment" at stated wages, as the claim relinquished has a certain value. (*Pennsylvania Co. v. Dolan*, 259.)

2. CONTRACTS TO GIVE "STEADY AND PERMANENT EMPLOYMENT"—PUBLIC POLICY.—A verbal promise by a railroad company to give an employé, who is injured while performing his duties, "steady and permanent employment," in consideration of a written release executed by the latter, discharging the company from all liability arising out of the injury, is not void for uncertainty and indefiniteness as to time of employment, but is an agreement to retain the employé as long as the latter is able, ready, and willing to perform such services as the company may have for him to do. Such promise is not against public policy on the ground that the company is a quasi public servant, and cannot, by this kind of an agreement, "tie its hands," as the public could not be affected by holding the company to its contract. (*Pennsylvania Co. v. Dolan*, 259.)

3. CONTRACTS—PERSONAL SERVICES—STATUTE OF FRAUDS.—A contract personal in its nature, as one for personal services, which might terminate with the death of the party making it, though the contract is for an indefinite period, or a term of years, is not within the statute of frauds. (*Pennsylvania Co. v. Dolan*, 259.)

4. CONTRACTS.—THE STATUTE OF FRAUDS does not render an agreement absolutely void, but simply withholds the power of enforcement, and prevents the collection of damages for nonperformance. (*Cochran v. Ward*, 229.)

5. STATUTE OF FRAUDS.—THE MEMORANDUM required by the statute of frauds need not be formal, or in one writing or paper, or

be made directly between the parties to the contract. (*Singleton v. Hill*, 868.)

6. **CONTRACT TO PROCURE LEGISLATION.**—An agreement by which one party agrees with another to put him into possession of land belonging to the United States, not then in the market, nor subject to entry, and to keep him in possession until it can be purchased from the government, and, for a consideration to be paid by such party, agrees to procure such legislation from Congress as will enable such party in possession to secure the land in preference to any other party, is a lobbying contract and void as against public policy. (*Houlton v. Dunn*, 493.)

7. **CONTRACT IN VIOLATION OF A LAW** which seeks only the collection of revenue is not void. It is otherwise when the design of the law-making power is to protect the public from fraud in the contract or for the promotion of some object of public policy. (*Banks v. McCosker*, 478.)

8. **ON A CONTRACT THE MAKING OF WHICH IS PUNISHABLE BY STATUTE**, by the imposition of a penalty, there can be no recovery, although such statute does not, in express terms, prohibit the contract, nor pronounce it void. (*Sandage v. Studebaker Bros. Mfg. Co.*, 165.)

9. **A CONTRACT IN RESTRAINT OF TRADE**, if inimical to the public interest, must be held hostile to public policy, and therefore void. (*Consumers' Oil Co. v. Nunnemaker*, 193.)

10. **RESTRAINT OF TRADE.**—If a person engaged in the business of selling and delivering oil and gasoline by retail within a city sells his business and the goodwill thereof, and agrees not to engage in the same business in the state, except in another city named in the agreement, such agreement is an unreasonable restraint of trade, and cannot be enforced even as to the trade in the town or city in which it was made, though the agreement limited to that city would have been reasonable and valid. (*Consumers' Oil Co. v. Nunnemaker*, 193.)

11. **THE RESTRAINT OF TRADE** involved in the sale of the property and goodwill of a business will be sustained as to the future engagements of the seller so far only as appears to be a reasonable space of interdicted territory; and what was a reasonable limit is a question of law for the court. (*Consumers' Oil Co. v. Nunnemaker*, 193.)

See **Conflict of Laws**; **Evidence**, 3; **Wills**, 1.

CORPORATIONS.

1. **INSOLVENT CORPORATIONS—PREFERENCES.**—The right of a creditor of an insolvent corporation in the hands of a receiver to have a preference over bondholders under a first mortgage is strictissimi juris. (*Farmers' Loan etc. Co. v. Bankers' etc. Tel. Co.*, 690.)

2. **INSOLVENT CORPORATIONS—PRIORITIES OF BONDHOLDERS OVER OTHER CREDITORS.**—One loaning money to an embarrassed corporation, subsequently adjudged to be insolvent, and taking security therefor, is not in a position which entitles him, in equity, to have a lien on the mortgaged property of the corporation or its proceeds, in preference to a bondholder under a mortgage existing when the loan was made; and it is immaterial for what purposes the loan was made, or how the money received therefrom was applied, provided the bondholders were not parties to the transaction. (*Farmers' Loan etc. Co. v. Bankers' etc. Tel. Co.*, 690.)

3. **INSOLVENT CORPORATIONS.—CLAIMS NOT REPRESENTED BY RECEIVER'S CERTIFICATES** cannot take precedence over the rights of bondholders. (*Farmers' Loan etc. Co. v. Bankers' etc. Tel. Co.*, 690.)

4. **CORPORATIONS—DIRECTORS, IMPUTING KNOWLEDGE TO.**—WHATEVER ENTRIES IN THE BOOK OF A CORPORATION, made in the ordinary course of its business, would have disclosed, the

jury are warranted in finding had come to the knowledge of its directors, who were charged with the duty of reasonable supervision of the conduct of its officers. (*Hanover Nat. Bank v. American Dock etc. Co.*, 721.)

5. CORPORATIONS.—THE IGNORANCE BY THE DIRECTORS of a corporation of the acts of a president does not exempt it from liability for such acts, unless such directors were reasonably diligent in the method and details of conducting the business under their control. (*Hanover Nat. Bank v. American Dock etc. Co.*, 721.)

6. CORPORATION, AUTHORITY OF OFFICER TO ACT FOR HIMSELF.—The president of a warehouse company having authority to issue its receipts and certificates has no authority to issue them in his own favor even for property actually deposited by him. (*Hanover Nat. Bank v. American Dock etc. Co.*, 721.)

7. CORPORATIONS—IMPLIED AGENCIES.—An officer of a corporation, in whose possession surrendered certificates of stock are, and whose duty it is to cancel them, has no implied agency to reissue them, nor to sell or transfer them, and if he does so, his act is not the act of the corporation. (*Knox v. Eden Musee etc. Co.*, 700.)

8. CORPORATIONS—PLEDGE OF STOCK—DIVIDENDS.—If stock of a corporation is pledged as collateral security, the pledgee has a right to collect the dividends on the stock, and apply them to the debt for which it is pledged, or to hold them as trustee for the pledgor, unless, by special contract, the pledgor reserves the right to collect the dividends himself. (*Guarantee Co. v. East Rome Town Co.*, 150.)

9. CORPORATIONS—PLEDGE OF STOCK—DIVIDENDS.—A corporation, having notice that a pledge of its stock has been made, is liable to the pledgee for dividends paid by it to the pledgor, although the transfer of the stock has not been entered on the books of the corporation. (*Guarantee Co. v. East Rome Town Co.*, 150.)

10. CORPORATIONS—PLEDGE OF STOCK—NOTICE—DIVIDENDS.—If the proper officers of a corporation know that certain shares of stock therein have been pledged by the party in whose name the stock stands on the corporate books, such knowledge is notice to the corporation, and it is bound thereby as to the payment of dividends on such stock. (*Guarantee Co. v. East Rome Town Co.*, 150.)

11. CORPORATIONS—PLEDGE OF STOCK—DIVIDENDS.—The pledgee of corporate stock as collateral security has a right to recover from the corporation all unpaid dividends thereon accruing prior to the satisfaction of his debt by a sale of the stock; and he holds such dividends as trustee for the pledgor. (*Guarantee Co. v. East Rome Town Co.*, 150.)

12. CORPORATIONS—PLEDGE OF STOCK—DIVIDENDS.—In an action by the pledgor of corporate stock against the corporation to recover unpaid dividends thereon accruing prior to the satisfaction of his debt, the corporation is liable, unless, in addition to showing that the debt has been satisfied, it also shows that it has paid such dividends to the pledgor. (*Guarantee Co. v. East Rome Town Co.*, 150.)

13. CORPORATIONS.—CERTIFICATES OF STOCK IN BUSINESS CORPORATIONS have been given most of the elements of negotiability. A transferee in good faith and for value holds his title free from latent equities between prior parties in the line of transmission. (*Knox v. Eden Musee etc. Co.*, 700.)

14. CORPORATIONS.—THE NEGOTIABILITY OF STOCK CERTIFICATES does not extend so far as to prevent the owner of stock which has been lost or stolen without his negligence, from claiming it from the hands of any person into whose possession it subsequently comes, although the holder may have taken it in good faith and for value. (*Knox v. Eden Musee etc. Co.*, 700.)

15. A CORPORATION IS NOT LIABLE WHEN CERTIFICATES OF ITS STOCK, which have been surrendered, but not canceled, are

taken from its custody by its servant and sold to a purchaser in good faith, though the by-laws require such certificate to be canceled when a new one is issued, and the defendant was afforded an opportunity for committing the fraud by the leaving of the surrendered certificate in his possession without seeing that he performed the duty of canceling it, if nothing had come to the knowledge of the corporation that raised any doubt of the honesty or faithfulness of the servant. (*Knox v. Eden Musee etc. Co.*, 700.)

16. CORPORATIONS—NEGLIGENCE.—THE VIOLATION OF A BY-LAW of a corporation in a single instance by issuing a new certificate of stock without first canceling the old certificate which has been surrendered, is not actionable negligence so as render the corporation liable for injuries suffered by a purchaser from purchasing in good faith, from a servant of the corporation, the surrendered certificate without notice that it had ceased to be a valid outstanding certificate. (*Knox v. Eden Musee etc. Co.*, 700.)

17. CORPORATIONS—NEGLIGENCE.—The omission of the officers of a corporation for the period of three weeks to ascertain whether a certificate of stock which had been surrendered had been canceled by an agent whose duty it was to cancel it, is not sufficient to support a charge of negligence. (*Knox v. Eden Musee etc. Co.*, 700.)

18. CORPORATIONS—STOCK CERTIFICATE.—BAD FAITH on the part of a broker who receives a stock certificate from the transfer clerk of a corporation, and subsequently sells it for his account, is not established by proving that the same broker had acted for the clerk in some previous similar transactions, and had there taken the precaution of first sending the certificate to the office of the corporation, and procuring a transfer to be made, which precaution had not been adopted in the case before the court, if it further appears that the broker had sent the certificate to the proper officers, and had received information that it had been duly issued and registered. (*Jarvis v. Manhattan Beach Co.*, 727.)

19. CORPORATION, FRAUDULENT ISSUE OF STOCK, LIABILITY FOR.—If the transfer clerk of a corporation, having possession of stock bearing the genuine signatures of its officers, makes out such certificate in the name of a fictitious person, and forges his indorsement thereon, himself witnessing the signature, and presents such certificate to brokers to be sold, and they, upon due inquiry of the officers of the corporation, did not discover anything to impugn the genuineness and validity of the certificate, and therefore sold it on account of the clerk, giving their guaranty of genuineness, the corporation is answerable to them for the loss suffered through their guaranty. (*Jarvis v. Manhattan Beach Co.*, 727.)

20. A STOCKHOLDER'S LIABILITY FOR THE DEBTS OF A CORPORATION cannot be said to arise upon contract when he has paid in the full amount of his subscription, and the liability sought to be enforced against him is one imposed by statute, dependent upon the insolvency of the corporation. (*Marshall v. Sherman*, 654.)

21. FOREIGN CORPORATIONS—CONFLICT OF LAWS.—A creditor of a foreign corporation seeking to enforce against its stockholders in the courts of this state a right secured by the statutes of the state in which the corporation has its domicile, is not entitled to here pursue a form of action different from that which a creditor of a domestic corporation might pursue against a domestic stockholder; and if such a suit must, if in favor of a creditor of a domestic corporation, be brought by or in behalf of all its creditors, and against all its stockholders, then part of the creditors of a foreign corporation will not be permitted to here maintain suit against part of its stockholders. (*Marshall v. Sherman*, 654.)

22. CONFLICT OF LAWS—FOREIGN CORPORATIONS.—The doctrine of comity does not compel the courts of one state to enforce the

laws of another, creating a personal liability against the stockholders of a corporation organized and doing business in the latter state, when such liability is not founded upon contract, but is dependent upon the statute creating it and prescribing the remedy for its enforcement. (*Marshall v. Sherman*, 654.)

23. THE STATUTORY LIABILITY OF STOCKHOLDERS IN A FOREIGN CORPORATION cannot, as a general rule, be enforced, except in the domicile of the corporation, where the law of that domicile is the one which creates the right and the remedies for its enforcement. (*Marshall v. Sherman*, 654.)

24. CORPORATIONS.—LIABILITY OF STOCKHOLDERS OF A CORPORATION CREATED IN ANOTHER STATE cannot be enforced in this when it is patent from the whole scope and structure of the statutes of the other state, upon the subject, that they were intended to be enforced only within its jurisdiction. If it appears that the whole scheme of such statutes cannot be given full effect in this state, its courts will not detach some particular provision from the original context, with a view to ascertaining whether it is enforceable beyond the local jurisdiction. (*Marshall v. Sherman*, 654.)

See Constitutions; Limitations of Actions, 2.

COTENANCY.

1. TENANTS IN COMMON OF A NATURAL OYSTER BED have an equal right to enter thereon, and to remove natural oysters. (*Mott v. Underwood*, 711.)

2. A TENANT IN COMMON OF AN OYSTER BED cannot, by draining it, and scattering a few seed oysters over it, deprive any of his cotenants of the right to take natural oysters therefrom, though in so doing, the latter must, to some extent, disturb the planted oysters. (*Mott v. Underwood*, 711.)

3. COTENANT'S RIGHT TO THE USE OF THE COMMON PROPERTY.—A court of equity will not interfere between cotenants, even to restrain waste, unless it be of a malicious character or so unusual or unreasonable as to constitute a wanton destruction of the estate. (*Mott v. Underwood*, 711.)

4. COTENANCY—LIABILITY TO ACCOUNT.—There is no implied obligation on the part of a cotenant in possession to account to his cotenant for mere use and occupation. (*Enterprise Oil Co. v. National Transit Co.*, 746.)

5. COTENANCY—ASSIGNMENT OF LEASE.—If several cotenants of an oil lease assign it to an operator, who is to deliver a part of the product to them as royalty, and one cotenant does not join in the assignment, but notifies the assignee not to deliver any oil to his cotenants, he cannot recover his share of the oil without proof that his cotenants have received more than their share. If he affirms the assignment, he must take his share with the others upon a distribution of the royalty after deducting all proper charges and expenses. If he disaffirms the assignment, he has no claim to any share in the royalty, and must look to the assignee as a cotenant, who has not acquired his title. (*Enterprise Oil Etc. Co. v. National Transit Co.*, 746.)

See Husband and Wife, 12.

COURTS.

1. JURISDICTION.—COURTS OF PROBATE ARE CREATED by statute and possess special and limited jurisdiction only. The record of their proceedings must show their jurisdiction. Nothing is to be presumed in favor of the right to divest an heir of his title. (*Tracy v. Roberts*, 394.)

2. GUARDIAN AND WARD—PETITION TO SELL—JURISDICTION.—A petition to the probate court, by a guardian, for leave to sell the real estate of his ward is the foundation upon which to base the jurisdiction of the court, and must allege sufficient facts to give the court power to authorize the sale. (*Tracy v. Roberts*, 394.)

See Naturalization.

COVENANTS.

See Deeds.

CRIMINAL CONVERSATION.

See Husband and Wife, 8.

CRIMINAL LAW.

See Embellishment; Forgery; Former Jeopardy; Municipal Corporations, 16; Robbery.

CROPS.

See Trespass.

CROSSINGS.

See Railroads, 14-16.

DAMAGES.

1. DAMAGES—FUTURE PAIN AND SUFFERING.—In an action for personal injuries, the future pain and suffering for which a recovery may be had is that only which the plaintiff is reasonably certain to endure. (*Smith v. Milwaukee Builders' etc. Exchange*, 912.)

2. DAMAGES—WRONGFUL DISCHARGE OF EMPLOYE BEFORE TERM OF SERVICE HAS EXPIRED.—The measure of damages for the wrongful discharge of an employé before his term of service has expired, where he elects to treat the contract of hire as continuing in force, and sues the master for breach of the contract, is the amount of wages he would have earned under the contract, deducting such sums as he earned, or, by reasonable diligence, might have earned, elsewhere, allowance being made for the expense of obtaining other employment. The burden of proof is on the defendant to show that the plaintiff might have obtained other employment. (*Pennsylvania Co. v. Dolan*, 289.)

3. EXEMPLARY DAMAGES ARISE from the malicious doing of an act, and need not be specially pleaded and claimed when malice is shown. (*Davis v. Seeley*, 356.)

4. THE MEASURE OF DAMAGES RECOVERABLE FOR THE DESTRUCTION OF SHADE TREES on the plaintiff's premises is the difference between the value of such premises before and after such destruction. (*Evans v. Keystone Gas. Co.*, 681.)

See Banks, 5; Malicious Prosecution; Master and Servant, 1-3; Municipal Corporations, 24, 25; Trespass; Waters, 5.

DEATH.

See Limitations of Actions, 1; Negligence, 6; Witnesses, 2.

DEBTOR AND CREDITOR.

See Assignment for the Benefit of Creditors; Corporations, 20-24; Executors and Administrators, 5; Partnership, 5-16; Subrogation.

DEBTS.

See Corporations, 20.

DEEDS.

1. **DEEDS—COVENANT AGAINST ENCUMBRANCES.**—An encumbrance upon property at the time the grantor acquired the title to it is not within his covenant against "encumbrances done or suffered" by him. (*Smith v. Eigerman*, 281.)

2. **DEEDS—ENCUMBRANCES "SUFFERED" BY GRANTOR.** An encumbrance upon property "suffered" by the grantor means one within his power and duty to have avoided. "Suffer," in that connection, implies reasonable control, and it cannot be held to apply to a thing not caused by the act of the party, nor within his power to prevent. (*Smith v. Eigerman*, 281.)

3. **DEEDS—ENCUMBRANCE "SUFFERED" BY GRANTOR.**—Taxes which were a lien upon land at the time of its conveyance, though not payable until afterward, are not an encumbrance within the scope of a covenant in deed of conveyance, limiting the liability of the grantors to encumbrances resulting from their acts, or things "suffered" by them, where it is not shown that they were under any personal obligation to discharge the tax lien. (*Smith v. Eigerman*, 281.)

See Executors and Administrators, 1; Pleading, 3.

DEFINITIONS.

DEFINITION.—**PUBLIC POLICY** IS that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public and against public good. (*Consumers' Oil Co. v. Nunnemaker*, 193.)

"Assets." (*Thayer v. Humphrey*, 887.)

"Boat." (*Flanders v. Cobb*, 410.)

"Contents therein." (*Farmers' etc. Fire Assn. v. Kryder*, 284.)

"Contractor." (*Smith v. Milwaukee Builders' etc. Exchange*, 912.)

"Fraud or false swearing." (*Linscott v. Orient Ins. Co.*, 431.)

"Not more hazardous." (*Faust v. American etc. Ins. Co.*, 876.)

"Railroad." (*Bloxham v. Consumers' Electric Light etc. Co.*, 44.)

"Steady and permanent employment." (*Pennsylvania Co. v. Dolan*, 289.)

"Suffer." (*Smith v. Eigerman*, 281.)

DELIVERY.

See Gifts, 5.

DEMAND.

See Accord and Satisfaction, 2.

DEPARTURE.

See Pleading, 6.

DEPOSITIONS.

A DEPOSITION cannot be used on the trial of a case against defendants who were not parties to the action when the deposition was taken. (*Smith v. Milwaukee Builders' etc. Exchange*, 912.)

DESCENT AND DISTRIBUTION.

See Husband and Wife, 9.

DESERTION.

See Marriage and Divorce, 1.

DETECTIVES.

See Injunctions, 9.

DEVISE.

See Husband and Wife.

DIRECTING VERDIOT.

See Trial, 5, 6.

DIRECTORS.

See Corporations, 4, 5.

DISSOLUTION.

See Partnership, 11.

DIVIDENDS.

See Corporations, 8-12.

DIVORCE.

See Marriage and Divorce.

DOMICILE.

See Elections, 15-20.

DOWER.

DOWER, ESTOPPEL TO CLAIM.—A wife who has procured a decree of divorce in another state, which is regarded as void by the courts of South Carolina, is not there estopped from claiming her right of dower in the lands of her husband. (*McCreery v. Davis*, 794.)

DRAFTS.

See Assignment, 1.

ELECTION.

See Wills, 9-11.

ELECTIONS.

1. **ELECTIONS.**—Statutes requiring that ballots on account of want of conformity to any particular of the law, shall not be counted, are mandatory. (*Lankford v. Gebhart*, 585.)

2. **ELECTIONS—BALLOT REGULATIONS.**—It is within the power of the legislature to prescribe reasonable regulations which the voter must follow in preparing his ballot; and, unless he conforms to such regulations, his ballot is void. (*Whittam v. Zahorik*, 317.)

3. **ELECTIONS—AUSTRALIAN BALLOT LAW.**—If several candidates for a similar office are to be elected, and are placed on both the democratic and the republican ticket on the same ballot, and a cross is placed in the circle at the head of the democratic ticket, and one or more crosses are placed in squares before the name or names of republican candidates for such office, the ballot must be counted, under the "Australian Ballot Law," for the republican candidate or candidates only. (*Whittam v. Zahorik*, 317.)

4. ELECTIONS—AUSTRALIAN BALLOT LAW—CONSTRUCTION.—When a cross is placed in the circle preceding the party appellation, the ballot so marked must be counted as cast for all of the candidates named after that title, excepting that, when only the name or names of one or more candidates on another ticket are also marked, the ballot is to be counted for the candidate so marked, to the exclusion of candidates for the same office on the ticket whose party appellation is marked, whether their names are also marked or not. (*Whittam v. Zahorik*, 317.)

5. ELECTIONS—BALLOTS—OPPOSING CANDIDATES.—If there is more than one candidate on each political ticket for an office, each voter decides for himself whom he regards as opposing candidates. It cannot be said, as a matter of law, that one person is a candidate against another, simply from the fact that their names are printed in the same order, and opposite each other, on the ballot. (*Whittam v. Zahorik*, 317.)

6. ELECTIONS—UNDER THE "AUSTRALIAN BALLOT LAW," a ballot which is not marked with a cross or crosses made substantially thus, "X," and placed substantially within the circle or square or squares printed on the ballot at places designated by the statute, is void. (*Whittam v. Zahorik*, 317.)

7. ELECTIONS—CROSS-MARKS.—UNDER THE "AUSTRALIAN BALLOT LAW," a ballot which is not marked substantially within a circle or square with a character which is substantially a cross (X), or which has no cross in any circle or square, is void, and should not be counted. (*Whittam v. Zahorik*, 317.)

8. ELECTIONS—INTENTION OF VOTER.—In casting a ballot under the "Australian Ballot Law," it is not sufficient that the intent of the voter is plain and clear; it must also be expressed in the manner provided by law. (*Whittam v. Zahorik*, 317.)

9. ELECTIONS—IDENTIFICATION OF VOTER.—Parol evidence is not admissible to show that a ballot duly numbered was cast by a person other than the one whose name is recorded on the poll-books opposite the corresponding number, especially when the names are not idem sonans. (*Lankford v. Gebhart*, 585.)

10. ELECTIONS—IDENTITY OF VOTER—EVIDENCE.—If a ballot is numbered and recorded on the election poll-book without any name being written opposite thereto to designate the person who voted the ballot, parol evidence is not admissible to identify, nor to supply the name of, the voter. (*Lankford v. Gebhart*, 585.)

11. ELECTIONS—AUSTRALIAN BALLOT LAW—IDENTIFICATION MARKS.—The fact that the name of a voter is placed upon his ballot after it is delivered to him does not invalidate it under the Australian ballot law, provided the name so written on the ballot could not be seen by anyone, and was not written there for the purpose of identifying it. (*Lankford v. Gebhart*, 585.)

12. ELECTIONS.—IF IDENTIFYING MARKS ARE PLACED on a ballot without the knowledge or consent of the voter, it does not render the ballot void, nor prevent it from being counted; but if it is done by the voter in preparing his ballot, it is a violation of law, and the ballot should not be counted. (*Whittam v. Zahorik*, 317.)

13. ELECTIONS—IDENTIFICATION MARKS.—If an unauthorized mark is inadvertently placed upon a ballot by a voter, and it is not of a character to be used readily for the purpose of identification, the ballot should be counted; but if it is made deliberately and may be used as a means of identifying the ballot, it should be rejected. (*Whittam v. Zahorik*, 317.)

14. ELECTIONS—BALLOTS—MARKS NOT INVALIDATING.—A ballot containing the word "yes," written under the name of one candidate, and the word "no" under the name of another candidate for the same office, is not invalid as to other candidates for other offices to which the words written do not apply. (*Lankford v. Gebhart*, 585.)

15. **ELECTIONS—RESIDENCE OF VOTER.**—If a father removes from one state to another, while engaged in the civil service of the United States, taking his minor son with him, but retaining his residence for the purpose of voting in the state from which he removes, the residence of the son continues the same as that of the father, during the minority of the former, and also thereafter until he acquires one of his own. (*Lankford v. Gebhart*, 585.)

16. **ELECTIONS—RESIDENCE OF VOTER.**—One who purchases a farm, and takes possession of it with the intention of making it his permanent home, acquires a residence at the place where the farm is situated for the purpose of voting from the time he takes possession, although he does not bring his entire family there until a short time afterward. (*Lankford v. Gebhart*, 585.)

17. **ELECTIONS—PLACE OF RESIDENCE.**—A permanent member of a soldiers' home, who is not permitted to leave it without a license or furlough, has a residence at such home for the purpose of voting. (*Lankford v. Gebhart*, 585.)

18. **ELECTIONS—PLACE OF RESIDENCE.**—A person in the United States railway mail service, whose established home and residence are with his father, can vote legally only in the township in which his father resides. (*Lankford v. Gebhart*, 585.)

19. **ELECTIONS—CHANGE OF RESIDENCE.**—A voter who leaves the state for the purpose of securing a homestead elsewhere, with the intention of there remaining if successful, and if not, of returning, and who selects a homestead claim, but shortly thereafter abandons it, does not lose his residence as a voter in the state from which he removed, although he resided with his family for a few months in another state before returning to the former. (*Lankford v. Gebhart*, 585.)

20. **ELECTIONS—RESIDENCE OF VOTER.**—A finding by the trial court that a person was a resident voter cannot be disturbed on appeal, if no declarations of law were asked or given, nor specific findings of fact made. (*Lankford v. Gebhart*, 585.)

21. **ELECTIONS—PREMATURE CLOSE OF POLLS.**—Under a statute declaring that the election polls shall remain open until a certain hour, a ballot cast and accepted by the judges before that hour should be counted, although the polls were closed without authority before the ballot was cast, and although it was prepared secretly in a place other than one of the election booths. (*Lankford v. Gebhart*, 585.)

22. **ELECTIONS—NOTICE OF CONTEST.**—The manner of the service of the writ directing the clerk of court to recount the ballots in an election contest, and of notice to the contestee when the recount is to be made, though irregular, is valid, if the clerk obeys the writ and the contestee is present at the recount. (*Lankford v. Gebhart*, 585.)

23. **ELECTIONS.—EVIDENCE IS ADMISSIBLE ON AN ELECTION CONTEST** to show that a mutilated ballot was intact when voted. (*Lankford v. Gebhart*, 585.)

ELECTRICITY.

See Telephone Companies, 2.

EMBEZZLEMENT.

1. **EMBEZZLEMENT.—AN INDICTMENT** for the embezzlement of goods need not allege by whom they were delivered to the accused. (*State v. Crosswhite*, 571.)

2. **EMBEZZLEMENT—GOODS CONSIGNED ON COMMISSION.** A commission merchant may be held criminally liable for the embezzlement of goods consigned to him on commission; and it is no defense that he paid the money arising from their sale to his partner. (*State v. Crosswhite*, 571.)

3. EMBEZZLEMENT—SEPARATE OFFENSES—EVIDENCE.—

The embezzlement of personalty and of the proceeds arising from its sale are two separate and distinct offenses; and evidence in proof of one is not permissible for the purpose of proving the other. (*State v. Crosswhite*, 571.)

4. EMBEZZLEMENT—INSTRUCTIONS.—Under an indictment simply charging the embezzlement of goods, and not the proceeds thereof, it is error to instruct that if the accused sold the goods with intent to appropriate the proceeds of the sale, he was guilty. (*State v. Crosswhite*, 571.)

ENCUMBRANCES.

See Deeds; Insurance, 5.

ENTIRETIES.

See Attachment, 3; Husband and Wife, 10, 11.

EQUITY.

1. EQUITY.—THE FACT THAT THERE IS A REMEDY AT LAW will not prevent the claimant from resorting to equity, unless such remedy is plain and adequate. Therefore, he is entitled to maintain a suit in equity to cancel a contract and to enjoin its enforcement, though he could also urge the same matters in defense to actions brought against him under such contract, if, by waiting until such suits were begun, he might be harassed by, and subjected to, repeated and vexatious litigation. (*Sandage v. Studabaker Bros. Mfg. Co.*, 165.)

2. GAMBLING CONTRACTS—ENFORCEMENT.—Equity does not interfere in gambling transactions, either to aid the winner to compel payment of his unpaid gains, or to enable the loser, who has paid his losses, to recover them back, whether paid in cash, or in negotiable securities. (*Albertson v. Laughlin*, 777.)

3. GAMBLING CONTRACTS—RECOVERY OF NOTE.—If a negotiable note is pledged to a broker to secure him against loss in stock transactions, and is negotiated by him in payment of such loss, equity will not compel the return of the note, as against an innocent purchaser without notice, on the ground that it was pledged for a gambling debt. (*Albertson v. Laughlin*, 777.)

4. MISTAKE OF LAW.—The equity that affords a complete defense to an unjust claim will not always authorize or support an action for money voluntarily paid in satisfaction of it, nor will a distribution be disregarded or set aside to the prejudice of a party who has, in good faith, acted upon it. (*Wilson v. Ott*, 767.)

5. MISTAKES OF LAW MAY, IN SOME CASES, afford good cause for relief in equity. (*Wilson v. Ott*, 767.)

6. WATERCOURSES—PARTITION OF WATER.—EQUITY HAS JURISDICTION to make partition of the use of water between opposite riparian proprietors when necessary to secure an equal use or enjoyment in their rights, and will exercise such power upon a bill properly framed and presented for that purpose. (*Warren v. Westbrook Mfg. Co.*, 372.)

7. ESTOPPEL, EQUITABLE—VOID SALE OF WARD'S REAL ESTATE.—The doctrine of equitable estoppel is legally available in an action at law as well as in equity. Hence, if a guardian has made a void sale of his ward's real estate, but in good faith, there being no fraud or mistake, and the ward has received the benefit of the proceeds of such sale, and has, by his conduct, ratified and affirmed it after he becomes of age, with full knowledge of the facts, the doctrine of equitable estoppel applies, and neither the ward, nor those claiming under him, can afterward recover the land itself. (*Tracy v. Roberts*, 394.)

See Cloud on Title, 2; Cotenancy, 3; Injunctions; Insane Persons, 1; Pleading, 2; Setoff, 1.

ESTOPPEL.

ESTOPPEL.—ONE WHO INTRUSTS HIS PROPERTY TO HIS SERVANT OR AGENT, and thereby gives him an opportunity for theft, is not estopped from claiming such property, though the servant sells it to a purchaser in good faith. (*Knox v. Eden Musee etc. Co.*, 700.)

See Equity, 7.

EVIDENCE.

1. EVIDENCE OF HABIT.—Although a witness may have no distinct independent recollection of the details of a fact occurring in the course of the routine of his business, he may testify to his fixed and uniform habit in such cases, and state that he knows that what he did in a given transaction was in accordance with that habit. The probative value of such evidence is for the jury, and it is error for the court to charge the jury to disregard it altogether, especially when such evidence is admitted without objection. (*Leonard v. Mixon*, 134.)

2. INSURANCE — PAROL EVIDENCE — “WATCHMAKER’S MATERIALS.”—If a policy of insurance, after covering “watches, diamonds, clocks,” etc., specifically, includes “watchmaker’s materials,” and there is nothing in the policy to indicate what that term means, it must be classed as an ambiguous expression, which may be explained by parol evidence, in order to apply the policy to the subject of the insurance. (*Maril v. Connecticut etc. Ins. Co.*, 102.)

3. CONTRACT.—PAROL EVIDENCE is not admissible to show what was the consideration of a contract and the understanding of the parties thereto, if the object of such evidence is to contradict a written obligation, and to give it an effect inconsistent with its terms. (*Sundage v. Studabaker Bros. Mfg. Co.*, 165.)

4. A PROMISSORY NOTE CANNOT BE CONVERTED BY PAROL EVIDENCE from a special into a conditional contract. (*Middleton v. Griffith*, 617.)

5. PAROL EVIDENCE is not admissible to prove a contemporaneous agreement which varies or alters the terms of a promissory note, unless it be respecting the mode of payment, and the evidence further shows that such agreement has been executed, and the note thereby transferred. Such evidence is admissible, because it establishes payment, and does not vary the terms of the note. (*Middleton v. Griffith*, 617.)

6. EVIDENCE—FOREIGN STATUTE—PRESUMPTION.—After the existence of a foreign statute has been proved, it will be presumed to remain in force. (*Cochran v. Ward*, 229.)

7. EVIDENCE—PROOF OF LAW OF ANOTHER STATE.—Under a statute authorizing it, the law of another state may be proved by reading it from the statute book of that state, which purports to have been printed by authority. (*Cochran v. Ward*, 229.)

8. EVIDENCE.—ENTRIES MADE BY A CLERK in the regular course of business, he having no interest at the time in the state of the entries, should be received in evidence, if he is beyond the state or otherwise beyond the jurisdiction of the court. (*Heiskell v. Rollins*, 455.)

See Appeal, 3; New Trial; Robbery; Trial, 1-3.

EXCEPTIONS.

See Appeal, 1, 2.

EXECUTION.

1. EXECUTION SALES—INNOCENT PURCHASER.—A judgment creditor who purchases land at a sheriff’s sale under his judgment, without notice, actual or constructive, of a prior unrecorded deed by the

judgment debtor conveying the property thus purchased, is entitled to protection as an innocent purchaser. (*Lusk v. Reel*, 32.)

2. EXECUTION SALES—INNOCENT PURCHASERS—MISTAKE.—As against one who holds land under an unrecorded deed, a judgment creditor, or other party who purchases the land at execution sale, against one to whom the land had previously been conveyed by mistake, is entitled to protection as an innocent purchaser, if, at the time of purchase, he was without notice, actual or constructive, of such unrecorded deed. (*Lusk v. Reel*, 32.)

3. EXECUTION SALES.—EXECUTION PURCHASERS, equally with subsequent innocent purchasers, are protected against unrecorded deeds. (*Lusk v. Reel*, 32.)

4. EXECUTION SALES.—POSSESSION UNDER AN UNRECORDED DEED, RELIED ON AS NOTICE to a purchaser at an execution sale, to be effective, must be such actual possession as to give notice thereof at the time that the judgment under which the sale is made, was rendered. (*Lusk v. Reel*, 32.)

See Sales, 2.

EXECUTORS AND ADMINISTRATORS.

1. AN ADMINISTRATOR is, in law, the personal representative, or substitute, of the deceased; and it is his duty to prosecute suits in favor of, and to defend suits against, the estate he represents. (*Morris v. Murphey*, 81.)

2. EXECUTORS AND ADMINISTRATORS.—DEEDS MADE AND SIGNED by "A B, executor," sufficiently show that they were executed by him in his representative capacity. (*Babcock v. Collins*, 503.)

3. WILLS, FOREIGN—POWER OF SALE—NECESSITY OF ADMINISTRATION.—An executor under a foreign will who has duly qualified at the foreign domicile may, subject to the rights of local creditors, make a sale, under a power in the will, of land in Minnesota which becomes effectual when the will is admitted to probate in the courts of the latter state, if the admission of the will to probate in the foreign state conclusively establishes the will and entitles such executor to letters testamentary in Minnesota under then existing statutes. The admission of the will to probate by the court of the latter state relates back, and perfects the sale made under the power. (*Babcock v. Collins*, 503.)

4. EXECUTORS AND ADMINISTRATORS—CONCLUSIVENESS OF JUDGMENT AGAINST.—Unless there is fraud or collusion between an administrator and a creditor of an estate, a judgment regularly rendered in a court of competent jurisdiction, in favor of the creditor and against the administrator, is conclusive as to all matters adjudicated thereby upon legatees, and all other creditors of the estate. (*Morris v. Murphey*, 81.)

5. EXECUTORS AND ADMINISTRATORS—CREDITORS—PURITY.—All creditors of an estate are so far in privity with the administrator thereof that a judgment against him in favor of one of such creditors is conclusive, upon all questions adjudicated thereby, as between himself and other creditors. (*Morris v. Murphey*, 81.)

EXEMPTIONS.

See Injunctions, 5, 7.

FALSE REPRESENTATIONS.

See Agency, 5-7.

FEEES.

See Witnesses; Mandamus.

FELLOW-SERVANTS.

See Master and Servant, 7.

FINDINGS.

See Appeal, 4.

FIXTURES.

1. **FIXTURES, TESTS OF.**—The fact that chattels may be removed and sold for other uses, or that they were not made with special adaptation to the building in which they are placed, is not conclusive of the question whether they have become fixtures; but such and the like facts are circumstances proper to be considered in deciding the question. (*Feder v. Van Winkle*, 628.)

2. **FIXTURES.—AN INTENTION** at the time of annexing chattels to realty that it shall be perpetual is not essential, but there must be an intention to incorporate the chattels with the real estate for a use to which the real estate is appropriate, and there must be the presence of such facts and circumstances as do not lead to, or repel, the inference that it is intended to be a temporary annexation. (*Feder v. Van Winkle*, 628.)

3. **FIXTURES.—TO THE ANNEXATION TO REAL PROPERTY** which is essential to convert chattels into fixtures it is not indispensable that they be fastened or bolted to the building or soil; this is only one method of annexation. (*Feder v. Van Winkle*, 623.)

4. **FIXTURES—INSTANCES OF.—HEAVY MACHINES** weighing from one to three tons fastened by bolts to large timbers laid in the earth, and other machines of less weight bolted to timbers and adapted and intended for use in carrying on the business of manufacturing bridge iron, are fixtures, and pass by a real estate mortgage in which they are described. It is not material that such machines might have been removed and utilized elsewhere, if they were intended to be used in the business, and such use would have been continued had the business remained prosperous. (*Feder v. Van Winkle*, 628.)

5. **FIXTURES.—A STEAM ENGINE** set upon a brick foundation laid in the earth without any attachment to the building is a fixture. (*Feder v. Van Winkle*, 623.)

6. **FIXTURES.—AS BETWEEN A MORTGAGEE OF REAL PROPERTY** and the receiver of the mortgagor, the former is entitled to chattels which were annexed to the real estate, or to something appurtenant thereto, if they were applied to the use or purpose to which that part of the realty to which they were annexed was appropriate, and they were annexed with an intention to make a permanent accession to the realty. (*Feder v. Van Winkle*, 623.)

FORECLOSURE.

See Mortgages, 9.

FORGERY.

FORGERY—CHANGE OF MIDDLE NAME.—Forgery may be committed by changing, with intent to defraud, the middle initial "F" to the letter "J" in the name "M. F. Higgins," inserted in a contract and signed thereto, making it read "M. J. Higgins." (*State v. Higgins*, 490.)

See Banks, 12; Corporations, 19.

FORMER JEOPARDY.

CRIMINAL LAW.—A PERSON IS NOT PUT TWICE IN JEOPARDY for the same offense if punished for violating a statute,

and also for disregarding an injunction to prevent such disregarding. The two offenses are not the same. (*State v. Roby*, 174.)

FRAUD.

1. **FRAUD—FALSE AND FRAUDULENT STATEMENTS.**—A false statement intentionally and knowingly, or fraudulently, made, constitutes fraud; and the statement of a fact as true, which a party does not know to be true, and which he has no reasonable ground for believing to be true, is fraudulent. (*Linscott v. Orient Ins. Co.*, 435.)

2. **FRAUD—FALSE AND FRAUDULENT MISREPRESENTATIONS.**—In a case where the plaintiff and defendant traded horses, and the defendant turned out a negotiable promissory note signed by a third party, as "boot" between the horses, and the note was indorsed by the defendant in blank, but was not paid when it became due, or the defendant seasonably notified so as to hold him as an indorser, the plaintiff cannot recover against the defendant in an action of deceit for false representations made by the defendant in reference to the financial responsibility of the maker of the note, where the evidence fails to show that the plaintiff was, in some way, deceived by the alleged misrepresentations. (*Flanders v. Cobb*, 410.)

See Agency, 8; Insurance, 23, 24; Negotiable Instruments, 7-10; Vendor and Purchaser, 5.

FRAUDULENT CONVEYANCE.

1. **A VOLUNTARY CONVEYANCE IS CONCLUSIVELY PRESUMED to be fraudulent as against debts existing when it was executed.** (*Severs v. Dodson*, 641.)

2. **VOLUNTARY CONVEYANCE—CREDITORS WHO MAY ATTACK.**—One who is an accommodation indorser of a note whose maker executes a voluntary conveyance is not, before the dishonor of the note, a creditor in favor of whom such conveyance is presumed to be fraudulent and void. (*Severs v. Dodson*, 641.)

FREIGHT.

See Railroads, 8.

GAMBLING.

See Equity, 2, 8.

GAME LAWS.

GAME LAWS—CONSTRUCTION OF.—Under a statute providing that no person shall take, kill, destroy, or have in possession, between the first days of October and January, more than three deer, under a stated penalty, and that one having such possession shall be deemed to have killed or destroyed the deer in violation of law, it is no crime merely to have in one's possession, on December 12th, the carcasses of eighty-nine deer. The context of the statute must be considered in determining its whole scope and meaning. Its object is to prevent the decimation of game by limiting the time when it may be taken or killed, and not to interfere with foreign game, dead or alive, brought within the state, at any time, or with game lawfully taken or killed within the state. But one penalty for killing, having in possession, and transporting could have been intended; and that applies to the illegal capture of the game. The other provisions were intended to aid in the enforcement of that one, by making the possession evidence of illegal capture, and compel the person charged to explain his possession of what would directly point to an illegal taking of the game. Game illegally taken or killed subjects the possessor of it to the penalty for its illegal

taking, just as if he had illegally taken it himself. (*State v. Bucknam*, 408.)

GARNISHMENT.

See Attachment, 3, 4.

GAS COMPANIES.

1. A GAS COMPANY, though it has the right to use the public streets, is bound to conduct its operations so as not to inflict injury upon neighboring property. (*Evans v. Keystone Gas Co.*, 681.)

2. IF A GAS COMPANY PERMITS ITS PIPES in the public streets to be out of repair, so that gas escaping therefrom kills shade trees standing in such streets, the owner thereof is entitled to recover compensation from the gas company. (*Evans v. Keystone Gas Co.*, 681.)

3. EVIDENCE THAT TREES OTHER THAN THOSE for the killing of which plaintiff is seeking to recover from a gas company were also injured by gas escaping from its pipes is admissible, because it tends to show that the same causes which killed plaintiff's trees similarly affected others in the same neighborhood and exposed to the same peril. (*Evans v. Keystone Gas Co.*, 681.)

GIFTS.

1. A GIFT INTER VIVOS must be complete. The donor must divest himself of all dominion over the thing given, and the title to it must pass absolutely and irrevocably to the donee. (*Bath Sav. Inst. v. Hathorn*, 382.)

2. GIFT AND TRUST—HOW EXECUTED.—A gift must be executed by delivery; a trust by declaration. A voluntary trust is a gift, and requires all the essentials of a plain gift to sustain it. (*Bath Sav. Inst. v. Hathorn*, 382.)

3. GIFT CAUSA MORTIS—TERMS AND QUALIFICATIONS.—The fact that the donee of a gift takes it upon the terms and qualifications annexed to it as prescribed by the donor will not defeat it, or affect its validity as a gift causa mortis. (*Larrabee v. Hascall*, 440.)

4. GIFT CAUSA MORTIS—REQUISITES—IN EXTREMIS.—It is essential to the validity of a gift causa mortis that it be made under apprehension of death from some present disease, or other impending peril, though it is not necessary that the donor should die of the disease from which he apprehended death. Neither is it necessary that the gift should be made in extremis, when there is no time or opportunity to make a will; and there is no limit of time within which the donor must die to make such a gift valid. The only rule is, that he must not recover from that illness. (*Larrabee v. Hascall*, 440.)

5. GIFT CAUSA MORTIS—DELIVERY.—Actual delivery of property as a gift, so far as the nature of it will admit of delivery, together with a delivery of the evidence and means of reducing the gift to possession, is sufficient, so far as the element of delivery is concerned, to pass the title as a gift causa mortis. (*Larrabee v. Hascall*, 440.)

6. GIFT CAUSA MORTIS—PASS-BOOK AND ORDER ON BANK.—The delivery of a savings bank pass-book, with an order upon the bank to pay a specific part of the deposit represented by the pass-book to the payee of the order, though accompanied by a declaration of trust, is a valid gift causa mortis, when made during the donor's last sickness. (*Larrabee v. Hascall*, 440.)

7. GIFT CAUSA MORTIS—PASS-BOOK AND ORDER ON BANK FOR PART OF DEPOSIT.—If one, during his last sickness, six weeks before his death, delivers to his nurse and attendant a savings bank pass-book, with an order upon the bank to pay a specific part of the deposit represented by the pass-book to the payee of the order, saying: "Take this, Jim; when I am gone, draw the money, put a monument over my brother Stillman's grave, pay my funeral ex-

penses, and the rest is yours"; and the payee, two days after the donor's death, draws the amount of the order, and surrenders the book, representing the remainder of the deposit, to the administrator, the order, accompanied by a delivery of the bank-book, constitutes an equitable assignment and valid transfer of the amount represented by the order, though it is not for the full amount, and the donee, having executed the trust, is not liable to the administrator for the money drawn on the order. (*Larrabee v. Hascall*, 440.)

See Trusts, 1, 2, 4.

GOODWILL.

See Contracts, 10, 11.

GUARDIAN AND WARD.

1. **GUARDIAN AND WARD—INVALID SALE OF REAL ESTATE.**—Under a statute requiring a petition, license, oath, bond, and notice of sale, a guardian's sale of his ward's real estate is void where there was no petition or license covering the premises conveyed, where no oath was taken, and where there was not given any bond or notice of such sale: and the five years' limitation within which an action may be brought by the ward, or those claiming under him, to avoid such sale does not apply to such a case, for the court had no jurisdiction over the subject matter. That limitation applies to a defective sale under a license from a court having jurisdiction, but does not apply where there was no petition or license. (*Tracy v. Roberts*, 294.)

2. **GUARDIAN AND WARD—INVALID SALE OF REAL ESTATE—RATIFICATION.**—If a sale of a ward's real estate, by his guardian, under license, is invalid for want of a compliance with some requirement of law by the guardian, it is competent for the ward, when he becomes of age, to affirm the sale, or he may avoid it within a reasonable time. If he affirms it, he becomes bound by it; and his receiving and retaining the proceeds amounts to such affirmation. (*Tracy v. Roberts*, 394.)

See Courts, 2; Equity, 7; Insane Persons.

HABIT.

See Evidence, 1.

HEALTH.

See Municipal Corporations, 11, 12.

HIGHWAYS.

See Turnpike Companies.

HORSERACING.

See Statutes, 7-10.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS—WIFE'S RIGHT OF ACTION.**—A married woman can maintain an action against a third person for the alienation of her husband's affections. (*Reed v. Reed*, 310.)

2. **HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS—COMPLAINT.**—It is a necessary averment, in a complaint by a married woman against her mother in law for alienating the affections of plaintiff's husband, that the acts were done maliciously, as all

legal presumptions. in such cases, are that the parent will act only for the best interests of the child. (*Reed v. Reed*, 310.)

3. HUSBAND AND WIFE—ALIENATION OF AFFECTION—JOINT LIABILITY.—If the parents of a husband act in concert to bring about a separation between him and his wife, they are jointly liable to her for the alienation of his affection, although each of them does not participate in all of the acts of the other. (*Price v. Price*, 360.)

4. HUSBAND AND WIFE—ALIENATION OF AFFECTION.—EVIDENCE OF AMOUNT OF DEFENDANT'S PROPERTY is admissible in an action by a wife to recover for the alienation of her husband's affection, to show the weight of threats by defendant to disinherit the husband unless he separated from his wife. (*Price v. Price*, 360.)

5. HUSBAND AND WIFE—ALIENATION OF AFFECTION—EVIDENCE.—In an action by a wife against the relatives of her husband to recover for the alienation of his affection, conversations between him and the defendants while husband and wife were residing with them are admissible in evidence to explain the relation of the parties to the suit, and the motives which induced them to act. (*Price v. Price*, 360.)

6. HUSBAND AND WIFE—ALIENATION OF HIS AFFECTION. Proof that a separation between husband and wife has been caused by the unwarranted interference of his relatives, accompanied by threats to disinherit him, is sufficient to enable a wife to maintain an action against, and to recover from, such relatives for alienation of her husband's affection. (*Price v. Price*, 360.)

7. HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTION.—A statute placing the wife upon an equality with her husband with respect to the protection of her property and personal rights, entitles her to maintain an action for the alienation of her husband's affections, and loss of his support and companionship. (*Price v. Price*, 360.)

8. HUSBAND AND WIFE—CRIMINAL CONVERSATION.—A MARRIED WOMAN cannot maintain an action in the nature of criminal conversation against another woman. (*Kroessin v. Keller*, 533.)

9. DEVISE—HUSBAND AND WIFE—DESCENT—DISTRIBUTION.—If a testator, by the residuary clause of his will, gives to his daughter and her husband the residue and remainder of his estate "in equal shares and proportions, and so to their respective heirs and assigns forever," but the husband dies before the testator, leaving a minor son and wife surviving, the daughter does not take the whole as tenant by the entirety. She takes only one-half of the residuary estate, and the other half, which the husband would take if he had survived, descends to the heirs of the testator, and is properly distributed to them. (*Robinson, Appellant*, 367.)

10. HUSBAND AND WIFE—TENANCY BY ENTIRETY—STATUTES—SEPARATE PROPERTY.—Tenancy by entirety is sui generis. It had its origin in the marital relation, and was founded upon the legal fiction of the absolute oneness of husband and wife; but the universal tendency of modern legislation has been to abrogate this theoretical unity of husband and wife, to recognize and maintain the legal identity of the wife, and to secure to her a separate, distinct, and independent right to the acquisition and enjoyment of property. (*Robinson, Appellant*, 367.)

11. HUSBAND AND WIFE—TENANCY BY ENTIRETY—CHANGE OF LAW.—The rule of the common law, by which a devise or grant to husband and wife constituted them tenants by the entirety, the survivor taking the whole, has been changed in the state of Maine by legislation enlarging the rights of married women respecting the ownership of property. (*Robinson, Appellant*, 367.)

12. HUSBAND AND WIFE—COTENANCY.—A husband and wife may hold property as tenants in common. (Robinson, Appellant, 367.)

See Banks, 3; Dower; Insane Persons; Wills, 9.

INDEPENDENT CONTRACTORS.

See Master and Servant, 9; Negligence, 5.

INDICTMENT.

See Embezzlement, 1; Robbery, 1, 2, 4.

INDORSEMENT.

See Negotiable Instruments, 2-4; Suretyship, 2.

INJUNCTIONS.

1. INJUNCTION.—EQUITY WILL NOT INTERFERE except to protect property rights. (Chappell v. Stewart, 476.)

2. INJUNCTION IS AN INDEPENDENT GROUND OF EQUITY JURISDICTION, by which courts may prevent municipal corporations from transcending their powers, to prevent vexatious litigation, and a multiplicity of suits. (Sylvester Coal Co. v. St. Louis, 566.)

3. INJUNCTION AGAINST VOID ORDINANCES.—The enforcement of a void municipal ordinance may be enjoined in equity, although its invalidity has not been determined in an action at law. (Sylvester Coal Co. v. St. Louis, 566.)

4. INJUNCTION.—ONE WHO VIOLATES AN INJUNCTION by issuing and levying an attachment will not be permitted to gain any advantage thereby. (Farmers' Loan etc. Co. v. Bankers' etc. Tel. Co., 690.)

5. EXEMPTIONS—EQUITY—INJUNCTIONS.—A bill in equity alleging that complainant therein is the head of a family residing in the state; that he does not own personalty exceeding the statutory limit of exemption; that a distress warrant for rent has been levied upon his personalty other than farm products raised upon the land for the use of which rent is due; that the property levied upon is exempt to him under the constitution, and praying for an adjudication of his right of exemption, and that such property be set apart to him as exempt, and that an injunction be granted to restrain the sale of such property under the warrant, is sufficient to entitle a court of equity to grant the relief prayed for. (Smith v. Gufford, 37.)

6. SLANDER OF TITLE.—INJUNCTION DOES NOT LIE to restrain the libeling or slandering of title to land, if there is no breach of trust or contract right involved, and the mere alleged insolvency of the libelant does not authorize the interference of a court of equity. In such cases the remedy, if any, is at law. (Reyes v. Middleton, 17.)

7. INJUNCTIONS TO RESTRAIN FORCED SALES of property claimed to be exempt under the constitution are not injunctions to stay proceedings at law, within the meaning of a statute merely prohibiting the granting of injunctions to stay proceedings at law unless bond is given. In the former proceeding, no bond is absolutely required, although it may be exacted by the chancellor in his discretion. (Smith v. Gufford, 37.)

8. JURISDICTION—SUITS IN ANOTHER STATE—INJUNCTIONS AGAINST.—A citizen of a state may be enjoined from commencing or prosecuting suits against his fellow-citizen thereof in the courts of another state for the purpose of obtaining an advantage which he is not entitled to in the state of their common domicile. (Sandage v. Studabaker Bros. Mfg. Co., 165.)

9. INJUNCTION TO PREVENT DEFENDANT FROM EMPLOYING DETECTIVES to follow and watch plaintiff will not issue, though

the conduct of defendant in so employing them was alleged to have caused plaintiff great inconvenience and annoyance, and to have interfered with his social intercourse, business, and credit, and to have caused great suspicion to be entertained about him. (*Chappell v. Stewart*, 476.)

See Statutes, 3; Taxes, 2.

INNUENDO.

See Libel, 7.

INSANE PERSONS.

1. **GIFT OF THE USE OF LAND, EQUITABLE AID OF.**—If a father, after devising land to his daughter, and placing her and her husband in possession, and stating that he wished them to have the use of it during his life, becomes insane, they having remained in possession, and made improvements, a court of equity will not permit his guardian to revoke the license, and dispossess them of the property. The court will, in these matters, do what it is reasonable to suppose the lunatic would do if he retained his capacity to act. (*Potter v. Berry*, 626.)

2. **LUNATIC, CARRYING OUT INTENTIONS OF.**—If, after devising land to his daughter, the devisor puts her and her husband in possession of it expressing a desire that they shall retain such possession during his life, and he then becomes insane, and a guardian is appointed for him, a court of equity will not permit such guardian to dispossess the daughter, but, will carry out what it believes would have been done by the lunatic had he continued of sound mind. (*Potter v. Berry*, 626.)

INSOLVENCY.

SETOFF AFTER INSOLVENCY—UNPRESENTED CHECK. If a bank has become insolvent, and has assigned for the benefit of creditors before a check drawn upon it has been presented for payment, the holder of the check is not entitled to any preference, nor to offset the unpresented check against his indebtedness to the insolvent bank. (*Northern Trust Co. v. Rogers*, 526.)

See Corporations, 1-3; Partnership, 5-16; Set off.

INSTRUCTIONS.

1. **INSTRUCTIONS—REQUESTS FOR.**—It is not error to refuse requests for instructions which are not applicable to the facts disclosed by the evidence. (*Corniff v. Cook*, 55.)

2. **NEGLIGENCE—MISLEADING INSTRUCTION.**—In an action for personal injuries, it is misleading to instruct the jury that the plaintiff, being in a place of danger, is not chargeable with contributory negligence because he did not use the best means of escaping, when warned, where he denies having received any warning, and the evidence shows that he did not understand, or know, that he was in any danger, and did not adopt any course of action in the presence of imminent danger or sudden peril. (*Smith v. Milwaukee Builders' etc. Exchange Co.*, 912.)

3. **APPELLATE PRACTICE—ERRONEOUS INSTRUCTIONS.**—It is reversible error to submit a material question of fact to the jury which is not presented by the pleadings, and upon which there is no evidence, when the jury might have found a different verdict had the instruction complained of not been given. (*Negley v. Cowell*, 344.)

4. **WITNESSES—NEGATIVE TESTIMONY—ERRONEOUS INSTRUCTION.**—Testimony which is positive in form may amount merely to negative testimony. Hence, an instruction that negative testimony is confined to that of a witness who, though present at a transaction, says that he did not see or did not hear, is erroneous, as such a rule is too limited. (*Smith v. Milwaukee Builders' etc. Exchange Co.*, 912.)

5. WITNESSES—POSITIVE AND NEGATIVE TESTIMONY—ERRONEOUS INSTRUCTION.—It is erroneous to charge that the positive testimony of a witness to the existence of a certain thing and the testimony of another witness that such a thing did not exist, are equally credible. (*Smith v. Milwaukee Builders' etc. Exchange*, 912.)

See Appeals, 5; Embezzlement, 4.

INSURANCE.

1. INSURANCE—WRITTEN AND PRINTED CONDITIONS.—If a contract of insurance, by the written portion, covers property to be used in conducting a particular business, the keeping of an article necessarily used in such business does not avoid the policy, although it is expressly prohibited in the printed conditions of the contract. (*Faust v. American etc. Ins. Co.*, 876.)

2. INSURANCE—WRITTEN AND PRINTED CONDITIONS.—If, in a policy of insurance, there is a conflict between the written statement of the subject of insurance and the printed conditions of the policy, the former must prevail. (*Maril v. Connecticut etc. Ins. Co.*, 102.)

3. INSURANCE POLICY, ENTIRETY OF.—If a policy of insurance covers both a building and personal property therein contained, and contains a condition making it void if the building becomes vacant and unoccupied, it becomes wholly void on breach of the condition, and therefore no recovery can be had thereunder as to the personal property. (*Agricultural Ins. Co. v. Hamilton*, 457.)

4. INSURANCE—CHANGE OF INTEREST—NOTICE OF.—If property is insured for the benefit of the mortgagee, as his interest may appear, after the mortgage on the property has been duly foreclosed, and before the time for redemption has expired and the premium is paid by the mortgagee, the expiration of the time in which redemption may be made from the mortgage sale does not work an alienation of the premises so as to avoid the policy, although the policy provides that the mortgagee shall notify the insurer of any change of ownership of the insured property, and that such change shall be noted on the policy. (*Washburn Mill Co. v. Fire Assn.*, 500.)

5. INSURANCE—INTEREST OF INSURED—ENCUMBRANCES. A condition in a policy of insurance that it shall be void in case the interest of the insured be other than unconditional and sole ownership, has reference only to the quality of the estate or interest, and is not avoided by any sort of an encumbrance. (*Caplis v. American etc. Ins. Co.*, 535.)

6. INSURANCE—NEGLIGENCE OF INSURED.—In the absence of fraud or design, a fire insurance company is not relieved from liability on its policy by reason of loss by fire through the negligence of the insured, or his servants. (*Pool v. Milwaukee Ins. Co.*, 919.)

7. INSURANCE—AGENT'S REPRESENTATION AS TO PROPERTY COVERED.—The liability of an insurance company is not affected by its agent's representation to the insured, while writing a policy upon a barn and "contents therein," that his horses will be within the protection of the policy, whether in the barn or out. (*Farmers' etc. Fire Assn. v. Krydee*, 234.)

8. INSURANCE—IMPLIED AUTHORITY TO OBTAIN ADDITIONAL.—If an insurance policy provides, in terms, that it shall be void, if the insured thereafter procures other insurance on the property, unless otherwise provided by agreement indorsed on the policy, or added thereto, and there is a written statement, signed by the company's agent, bearing even date with the policy, and attached thereto as a part thereof, to the effect that if, at the time of a fire, the whole amount of insurance on the property shall be less than eighty per cent. of the actual cash value thereof, the company shall be liable for only such proportion of the loss or damage as the amount insured by the policy shall bear to said eighty

per cent of said actual cash value, such statement gives implied authority to procure additional insurance, and, if procured within the prescribed limits, it does not vitiate the policy, especially where it is obtained by the same agent who issued the first policy. (*Pool v. Milwaukee etc. Ins. Co.*, 919.)

9. INSURANCE—CHATTEL MORTGAGE.—An insurance policy containing a condition that it shall be void if the building "be or become encumbered by a chattel mortgage" must be construed as meaning and guarding against only the common ordinary chattel mortgage and instruments of that general nature, use, and purpose. (*Caplis v. American etc. Ins. Co.*, 535.)

10. INSURANCE.—LIEN FOR RENT NOT CHATTEL MORTGAGE. A covenant in a lease providing that the lessor shall at all times have a first lien upon all buildings for any unpaid rental or taxes, does not create a chattel mortgage, within the meaning of a condition in a policy of insurance on such buildings that it shall be void if the buildings "be or become encumbered by a chattel mortgage." (*Caplis v. American etc. Ins. Co.*, 535.)

11. INSURANCE—ASSIGNMENT OF LEASE—CONCEALMENT OF MATERIAL FACT.—If the assignee of a lease takes out a policy of insurance on the leased premises the day after the assignment to him, and such policy contains a clause prohibiting assignment of the lease without first obtaining the consent of the lessor, the fact of such assignment does not avoid the lease, although consent is not first obtained; nor in such case is the insurer relieved from liability by a condition in the policy that it shall be void if any material fact or circumstance concerning the risk has been misrepresented or concealed, nor if the interest of the insured is not truly stated. (*Caplis v. American etc. Ins. Co.*, 535.)

12. INSURANCE—PRESUMPTION OF KNOWLEDGE AS TO NATURE OF BUSINESS.—An insurance company is presumed to be acquainted with the business it insures, and with the materials necessarily used in prosecuting it, and to have included such materials in the risk, the same as if each article had been particularly mentioned in the written portion of the policy; and the written portion, in that regard, will control the printed portion prohibiting the keeping of such articles. (*Faust v. American etc. Ins. Co.*, 876.)

13. INSURANCE—PROHIBITED ARTICLES—CONSTRUCTION OF POLICY.—If insurance is effected with reference to an established and current business, whose protection is really the object of the insurance, the printed portion of the policy prohibiting the keeping of certain articles, will not be so construed as to seriously embarrass or suspend a business which is expressly permitted in the written portion of the policy. (*Faust v. American etc. Ins. Co.*, 876.)

14. INSURANCE—CONSTRUCTION OF PHRASE "NOT MORE HAZARDOUS."—In a policy of insurance upon a building "occupied as a furniture store and repair shop," a written clause covering "the stock of furniture, upholstery goods, and other merchandise not more hazardous, usual to a retail furniture store, while contained therein," applies to merchandise kept in the trade in the store, and the words "not more hazardous" refer to such merchandise only, and have no reference to the necessary articles kept for use in the repair shop. (*Faust v. American etc. Ins. Co.*, 876.)

15. INSURANCE—INCREASE OF HAZARD—QUESTION OF FACT.—If a policy of insurance, on a stock of goods, contains a clause that the policy shall be void "if the hazard be increased by any means within the control or knowledge of the insured," the question, in an action upon the policy, after a loss by fire, as to whether the seemingly necessary use, by the insured, of inflammable sulphur candles to fumigate his store building was an increase of the hazard by means within his "control or knowledge" is a question of fact to be determined by a jury from the evidence; and the trial court's refusal to submit to the jury

the question whether the hazard was increased by the use of such fumigators is error, although it does submit the question as to whether the fire was caused by the fault or negligence of the insured, as the latter question is not equivalent to the former one. (*Pool v. Milwaukee etc. Ins. Co.*, 919.)

16. INSURANCE—CONDITIONS—INFLAMMABLE SUBSTANCES.—A recovery, in case of loss, may be had upon a policy of fire insurance which covers a stock of material used in a particular business, and which contains a printed condition that prohibited the keeping and use of certain inflammable substances upon the premises, although they were, in fact, there kept and used, if it appears that their use was a necessary, usual, and customarily incident to such business, and that they were kept only in such quantities, and used only in such a manner, as must necessarily have been in contemplation of the parties at the time the policy was issued. (*Maril v. Connecticut etc. Ins. Co.*, 102.)

17. INSURANCE—INFLAMMABLE SUBSTANCES.—In an action upon a policy of fire insurance, covering the materials of a certain business, where the policy contains a printed condition prohibiting the keeping and use of certain inflammable substances, a recovery may be had if the business insured was of such a character that some of such substances constituted component parts of the stock of materials used in such business, as the policy itself would then cover such inflammable substances, notwithstanding the condition. (*Maril v. Connecticut etc. Ins. Co.*, 102.)

18. INSURANCE—BARN AND "CONTENTS THEREIN"—HORSES KILLED OUTSIDE OF BARN.—No liability accrues in case of loss, under a policy of insurance covering a barn and "contents therein," except for such property as was actually in the barn when damaged or destroyed. Hence, there can be no recovery for the loss of horses, killed by lightning, which were not in the barn at the time they were killed. (*Farmers' etc. Fire Assn. v. Kryder*, 284.)

19. INSURANCE.—THE VACANCY of a house alone does not avoid a policy of insurance prohibiting vacancy of the "premises" and covering both such house and a barn. (*Worley v. State Ins. Co.*, 334.)

20. INSURANCE—VACANCY.—A policy of insurance for several years on premises to be occupied by tenants prohibiting the vacancy of the premises is not rendered void by short vacancies caused by the lapse of a reasonable time in changing tenants. (*Worley v. State Ins. Co.*, 334.)

21. INSURANCE, CONDITION AGAINST PREMISES BECOMING VACANT.—A condition in a policy of insurance against loss by fire that the policy shall be void if the building therein described be or become vacant or unoccupied, and so remain for ten days, is broken, and the policy made inoperative, if, such building being a dwelling, the insured moves his family to another building, taking all the furniture, except a few beds and some trifling household articles, a trunk containing clothing, and some provisions in a pantry, and the only occupancy of the house is by laborers in the employment of the insured sleeping therein part of the time, and his wife going there every day to get provisions. (*Agricultural Ins. Co. v. Hamilton*, 457.)

22. AN INSURED DWELLING MUST BE DEEMED VACANT and unoccupied unless it is used as a place of abode or habitation. Though used otherwise than as a place of abode, it must be regarded as vacant and unoccupied. Casual sleeping in the house does not constitute an occupancy of it. (*Agricultural Ins. Co. v. Hamilton*, 457.)

23. INSURANCE—FRAUD—FALSE SWEARING.—In an action upon a policy of insurance containing a clause that it shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning the insurance, or in case of any fraud or false swearing touching any matter relating to the insurance or the subject thereof, where the fraud relied on by the defense is "false swearing," the ex-

pression "fraud and false swearing," taken in connection with this issue, has the same significance as "fraud or false swearing." "False swearing" is fraud, and consists in knowingly and intentionally stating upon oath what is not true. (*Linscott v. Orient Ins. Co.*, 435.)

24. **INSURANCE—AVOIDANCE OF POLICY BY FALSE STATEMENTS.**—If a policy of insurance contains a provision that it shall be void in case the insured makes any misrepresentation as to a material matter, and the insured, knowingly and purposely, makes a false statement on oath concerning the subject matter, it vitiates the policy and bars his right of recovery, whether his purpose was to deceive the company or not. (*Linscott v. Orient Ins. Co.*, 435.)

25. **INSURANCE—PLEADING—MISREPRESENTATIONS.**—If an insurance company desires to rely upon the defense of concealment or misrepresentation by the insured as avoiding the policy, such defense must be set forth in the answer, and proved upon the trial, together with the materiality of the concealments or misrepresentations. The materiality of the facts is a question for the jury. (*Coplis v. American etc. Ins. Co.*, 535.)

26. **INSURANCE.—MORTGAGEE** to whom loss is made payable cannot re-over if there has been a breach by the assured of a condition rendering the policy void. (*Agricultural Ins. Co. v. Hamilton*, 457.)

27. **INSURANCE.—A MORTGAGEE** to whom a policy of fire insurance is assigned as security, who appears in an action to recover for a loss under the policy, and disclaims all interest in it, estops himself from ever claiming under the policy, and enables the insured to maintain the action. (*Worely v. State Ins. Co.*, 334.)

28. **INSURANCE—WAIVER OF PROOFS OF LOSS.**—There is a denial of liability, under a policy of fire insurance, upon the ground of a violation of the clause prohibiting the use of benzine, and a waiver of the provisions of the policy requiring proofs of loss, where the adjuster of the insurance company visits the premises insured, soon after a loss by fire, and receives from the insured a list of the property destroyed, but, upon learning that benzine had been kept on the premises, tells the insured that the policy was thereby rendered void, that he can do nothing for him, and that he must present his claim to the company, if the list is retained, and the company refuses to communicate with the insured respecting the loss. (*Faust v. American etc. Ins. Co.*, 876.)

29. **INSURANCE—WAIVER OF FORFEITURE—QUESTION OF FACT.**—If a policy of fire insurance contains a provision that the company shall not be held to have waived any provision or condition of the policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to an appraisal of the loss, or any examination of the insured therein provided for, the question, in an action upon the policy, as to whether a forfeiture had been waived by other acts not so provided for, whereby it had put the insured to expense or disadvantage, is a question of fact, to be determined by the jury from the evidence. (*Pool v. Milwaukee Ins. Co.*, 919.)

30. **INSURANCE—PREMATURE SUIT.**—A policy of fire insurance providing for payment within sixty days after notice and proof of loss, is controlled as to the time of commencing an action for the loss by a statute providing that no action shall be begun on any policy within ninety days after notice of loss; and, unless proof of loss is waived, an action begun before the expiration of the ninety days is prematurely brought. (*Worley v. State Ins. Co.*, 334.)

31. **INSURANCE—ACCIDENT.**—A provision in a policy of life insurance exempting the insurer from liability for death or disablement arising from accidents that bear no external and visible marks, and from anything accidentally taken, administered, or inhaled, contact with poisonous substances, inhaling gas, or any surgical operation, does not exempt the insurer from liability from death by the accidental inhaling of illuminating gas. (*Menneiley v. Employers' etc. Corp.*, 716.)

82. INSURANCE—ACCIDENTS—MARKS OF.—A provision in a policy of insurance that, to render the insurer liable, the death or disablement must not be from an accident that bears no external or visible marks, means that there must be some external and visible evidence that the death was accidental, and not that there must be external and visible marks on the person of that decedent. (*Menneiley v. Employers' etc. Corp.*, 716.)

83. INSURANCE.—THE INHALING OF GAS within the exemptions of insurance policies means a voluntary and intelligent act of the insured, and not a voluntary and unconscious act. (*Menneiley v. Employers' etc. Corp.*, 716.)

See Evidence, 2; Receivers.

INTERSTATE COMMERCE.

1. INTERSTATE COMMERCE.—AN AGENT of a nonresident firm who has received, and is engaged in distributing, goods which have been sold by another agent, orders for which have been forwarded by him to his principal in another state, is engaged in interstate commerce, and is not subject to an ordinance of a municipality prohibiting peddling within its limits without a license. (*Huntington v. Mahan*, 200.)

2. CONSTITUTIONAL LAW—TELEGRAPH COMPANIES—INTERSTATE COMMERCE—PENALTY.—That provision of the federal constitution which confers upon Congress the power to regulate commerce among the several states, does not prohibit a state legislature from enacting a law subjecting telegraph companies to penalties for acts of negligence occurring entirely within the limits of that state, although such acts may be committed in dealing with messages to be transmitted to points in other states. (*Western Union Tel. Co. v. Howell*, 68.)

JEOPARDY.

See Former Jeopardy.

JUDGMENT.

1. RES JUDICATA—PARTIES.—If one made a defendant to a bill in chancery is afterward dismissed, a decree rendered after such dismissal is not binding upon him, because by such dismissal he ceased to be a party to the suit. (*Babcock v. Standish*, 633.)

2. JUDGMENT RENDERED IN ANOTHER STATE may be attacked in this state for want of jurisdiction either of the person or the subject matter. (*McCreery v. Davis*, 794.)

3. JUDGMENT, FOREIGN—CONCLUSIVENESS OF.—A judgment which is conclusive in the state where it was rendered is conclusive here. Hence, the decree of a court of competent jurisdiction in another state, levying an assessment upon the premium notes of a mutual insurance company in the hands of a receiver, being conclusive, in that state, upon all members of the company, until attacked in a direct proceeding, is conclusive in this state in an action to recover such assessment. (*Parker v. Stoughton Mill Co.*, 881.)

See Executors and Administrators, 4.

JUDICIAL SALES.

1. JUDICIAL SALES—INADEQUACY OF PRICE.—If land worth eight thousand dollars is sold at partition sale for one thousand five hundred dollars, the sale is for a price so grossly inadequate as to raise an inference of unfairness, and should be set aside. (*Johnson v. Avery*, 529.)

2. JUDICIAL SALES—INADEQUACY OF PRICE.—If land is sold at partition sale for a price so grossly inadequate as to raise an in-

ference of unfairness, the sale should be set aside, especially when the interests of minors are involved. (*Johnson v. Avery*, 529.)

JURISDICTION.

THE COURTS OF THIS STATE HAVE NO JURISDICTION over a person who is not a resident thereof, and who has never submitted himself to their jurisdiction. (*McCreery v. Davis*, 794.)

See Courts; Marriage and Divorce, 4-6.

JURORS.

See Trial, 4.

JUSTICES OF THE PEACE.

TRIAL—AFFIDAVIT OF ILLEGALITY.—If an issue is formed, in a justice's court, upon an affidavit of illegality, and the affiant fails to appear to prosecute it, the proper practice is for the court to dismiss the affidavit, and not to adjudicate upon its merits. Where, however, a judgment upon the merits is rendered, it is not void, but simply erroneous, and, if acquiesced in by the affiant, becomes conclusive upon him and his privies. (*Morris v. Murphey*, 81.)

KNOWLEDGE.

See Corporations, 4, 5; Municipal Corporations, 21, 23; Trial, 4.

LACHES.

See Mortgages, 3.

LANDLORD AND TENANT.

LANDLORD AND TENANT—LEASE—STATUTE OF FRAUDS—PART PERFORMANCE.—The occupancy, by a lessee under a parol lease, of a part of the land demised, and payment of rent for such part, do not amount to such part performance as will arrest the operation of the statute of frauds, and give the lessee a right to the remainder of the land. (*Cochran v. Ward*, 229.)

LEASE.

See Insurance, 11; Landlord and Tenant.

LEGISLATURE.

See Elections, 2; Interstate Commerce, 2.

LETTERS.

See Banks, 1.

LEVY.

See Attachment, 2.

LIBEL.

1. LIBEL.—MATTERS OF PUBLIC INTEREST AND CONCERN are legitimate subjects of newspaper criticism. Every one has a right to comment on such matters, so long as he does so fairly and with an honest purpose. Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously. They are not libelous without the averment and proof of special damage, unless

they go further and attack some individual connected with such matters. (Bearce v. Bass, 446.)

2. LIBEL—MATTERS OF PUBLIC INTEREST—PRIVILEGED COMMUNICATION.—In regard to matters of public interest, all that is necessary to render the words spoken or published privileged is, that they should be communicated in good faith, without malice, to those who have an interest in the subject matter to which they refer, and in an honest belief that the communication is true, such belief being founded on reasonable and probable grounds. (Bearce v. Bass, 446.)

3. LIBEL—PRIVILEGED COMMUNICATION—BURDEN OF PROOF.—If the matter complained of as libelous is privileged, the burden of proving malice lies on the plaintiff, and the defendant cannot be called on to prove that he was not actuated by malice until some evidence of malice, more than a mere scintilla, has been adduced by the plaintiff. (Bearce v. Bass, 446.)

4. LIBEL—LEGITIMATE MATTER FOR PUBLIC DISCUSSION. The character of the construction of a public building, such as a city hall, is a matter of public importance and interest to the inhabitants and taxpayers, and is, therefore, a legitimate matter for public discussion by newspapers, as well as all others interested in the construction of such an important public work. (Bearce v. Bass, 446.)

5. LIBEL—CONSTRUCTION OF CITY HALL—PRIVILEGED COMMUNICATION.—The plaintiffs had contracted to build the Bangor city hall, a public building designed to be used and occupied by the government of the city for public purposes, estimated to cost one hundred thousand dollars, but ultimately costing considerably more than that amount. During the construction of the building, and while an election for mayor was pending, the defendants published what was claimed to be a libelous article in their paper. That portion of it claimed to be libelous was as follows: "The mason work is of the poorest quality, and it should not be accepted by the city. Too much sand has been used in the mortar, and to such an extent that it does not prevent the alkali, which is the life of the mortar, from running out, as can be seen by the white appearance of the building. Very many of the bricks are loose, the mortar being too lifeless to hold them together, and the contractors should be obliged to take down and replace the imperfect sections of the walls. The doings of the old Tweed ring, in New York, were no worse than much that has been done in connection with our city building." This language was held to be a privileged communication, and not libelous, as it was but a fair and reasonable criticism upon the work which entered into the construction of the building, and did not attack the character of the plaintiffs, either as individuals or in their business as contractors. (Bearce v. Bass, 446.)

6. LIBEL—CRITICISM OF PUBLIC WORK—DEFAMATION OF PERSON.—So long as comment and criticism upon a public work are confined to it, and are fair and reasonable, there is no libel, because there is no defamation of the individual who performed the work, and it cannot be made libelous by any attack upon the private or business reputation of some other person, however much malice may exist; but when it becomes an attack upon the private or business character of the one who performed the work, the element of malice comes in and stamps the language as libelous. (Bearce v. Bass, 446.)

7. LIBEL—INNUENDO.—The office of an innuendo is to explain what has already been expressed; but not to enlarge or change the sense of the previous words. (Bearce v. Bass, 446.)

LIENS.

See Attorney and Client, 2, 3; Contempt; Deeds, 3; Mortgages, 6; Taxes, 4-6.

LIMITATIONS OF ACTIONS.

1. LIMITATIONS OF ACTIONS—CLAIM FOR SERVICES.—If compensation for services does not become due until the death of the person for whom they are rendered, the statute of limitations does not run against the claim until the death of such person. (*Kauss v. Rohner*, 762.)

2. STATUTE OF LIMITATIONS, AMENDMENT TO CORRECT A MISNOMER.—Where two corporations have nearly the same name, and the one intended to be sued was designated by the name of the other, and process was served upon an officer who represented both, and the plaintiff, after discovering the misnomer, asked and obtained leave to designate the defendant under its proper name, and amended his pleadings accordingly, such amendment does not operate as the bringing in of a new party or as the commencement of a new action, so as to entitle the defendant to the defense of the statute of limitations, which was not perfect when the action was begun. (*Western Union Tel. Co. v. State*, 744.)

3. LIMITATIONS OF ACTIONS—NEW PROMISE.—An acknowledgment sufficient to remove the bar of the statute of limitations, must contain a clear and unequivocal acknowledgment of the debt, a specification of the amount of it, or a reference to something by which the amount can be definitely and certainly ascertained, and an express or implied promise to pay it. (*Ward v. Jack*, 744.)

LOBBYING.

See Contracts, 6.

LUNATICS.

See Insane Persons.

MALICE.

See Damages, 3.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION—DAMAGES FOR MENTAL ANGUISH.—In an action for malicious prosecution, the plaintiff may show, on the question of mental anguish as an element of actual damage, that when arrested he had a dependent family, one of whom was sick, crippled, and in need of his care and attention. (*Davis v. Seeley*, 356.)

2. MALICIOUS PROSECUTION.—EXEMPLARY DAMAGES may be recovered in actions for malicious prosecution without special plea, whenever malice is charged and proved. (*Davis v. Seeley*, 356.)

3. MALICIOUS PROSECUTION—EVIDENCE TO ENHANCE DAMAGES.—In an action for malicious prosecution, evidence that an excessive bail bond was required of the plaintiff at the time of his arrest is inadmissible to enhance his damages, without proof that defendant induced the exaction of such bond, especially when plaintiff immediately gave bond and regained his liberty. (*Davis v. Seeley*, 356.)

MANDAMUS.

MANDAMUS, AND NOT ASSUMPSIT, is the proper remedy when the county commissioners refuse to make provision for the payment of a person entitled to fees as a witness for the state. (*Hall v. County Commrs.*, 484.)

MARRIAGE AND DIVORCE.

1. MARRIAGE AND DIVORCE—DESERTION—CONTINUITY OF AOT.—If a wife deserts her husband, and remains away from him

for three consecutive years, and, during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete under a statute making "utter desertion continued for three consecutive years," a cause for divorce, and cannot be defeated by proof that on one occasion, within the three years, he visited his wife, and, for two or three nights, occupied the same bed with her, as this did not interrupt the continuity of her desertion. (*Danforth v. Danforth*, 380.)

2. MARRIAGE IS, by the laws of South Carolina, a civil contract, which neither the parties nor the courts can absolutely dissolve. (*McCreery v. Davis*, 794.)

3. DIVORCE GRANTED IN ANOTHER STATE, EFFECT OF. Where a resident of South Carolina married in New York, and took his wife to the former state, in which she afterward left him, and removed to a third state, where she procured upon constructive service of process, a decree of divorce on the ground of cruelty, that not being recognized as a ground of divorce either in New York or South Carolina, the husband, never having been in the state where it was entered, such decree will be treated as void in South Carolina, and the husband as incompetent to give a perfect title to real estate unless his wife releases her claim of dower. (*McCreery v. Davis*, 794.)

4. JURISDICTION, DIVESTING BY PROCEEDINGS IN ANOTHER STATE.—If during the pendency of a suit by a wife against her husband for maintenance, he commences suit against her in another state for divorce, in which she appears and answers, and he obtains a decree in his favor, it is conclusive against her when pleaded in the first suit. The pendency of the suit in this state could not deprive the court of the other state of its jurisdiction to entertain the suit therein for a divorce. (*Fairchild v. Fairchild*, 650.)

5. A DECREE OF DIVORCE entered against a wife in a state in which she has never been, and without serving any process on her, or notifying her of the pendency of the proceedings against her, although her place of residence was known to the plaintiff, is without extraterritorial effect. (*Fairchild v. Fairchild*, 650.)

6. A DECREE OF DIVORCE GRANTED IN ANOTHER STATE by a court having jurisdiction of the parties is conclusive, and its effect cannot be avoided in this state upon any ground which it was necessary for the plaintiff to disprove to entitle him to the divorce, such, for instance, as that he had abandoned his wife without justifiable cause, and was not an actual resident of that state in good faith for the time required by its laws. (*Fairchild v. Fairchild*, 650.)

See Dower.

MASTER AND SERVANT.

1. MASTER AND SERVANT—DAMAGES FOR WRONGFUL DISCHARGE OF EMPLOYE—SUCCESSIVE ACTIONS.—If, under a contract for personal service with wages payable in installments, the employé is discharged without his fault before his term of service has expired, the responsibility of the master to the servant is not an absolute liability for wages for constructive service during the balance of the term, but a contingent liability of indemnity for loss of wages. Such liability accrues by installments or successive contingencies, each of which consists in the failure of the servant without his fault to earn, during an installment period, the amount of wages which he would have earned had the contract been performed, and the deficiency is the measure of damages. The original breach is not total, and the failures to pay the successive installments constitutes successive breaches, for which successive actions may be brought. (*McMullan v. Dickinson*, 511.)

2. MASTER AND SERVANT—DAMAGES FOR WRONGFUL DISCHARGE OF EMPLOYE.—If, under a contract for personal service with wages payable in installments, an employé is wrongfully discharged,

he may consider the breach of contract total, and bring an action for and recover all damages accruing up to the time of the trial, but prospective damages beyond that time are too contingent and uncertain to be allowed. (*McMullan v. Dickinson*, 511.)

3. **CONTRACTS—MASTER AND SERVANT—BREACH OF CONTRACT OF EMPLOYMENT—DAMAGES.**—If a servant, hired for a definite period, is discharged by the master before the expiration of such term, he has his remedy in an action for damages for the breach of the contract. (*Pennsylvania Co. v. Dolan*, 289.)

4. **NEGLIGENCE, CONTRIBUTORY.**—AN EMPLOYÉ IS ENTITLED TO ASSUME that his employer has exercised due care in furnishing proper appliances and in keeping them in a safe condition, and is not chargeable with contributory negligence for so assuming. (*Nord Deutscher Lloyd S.S. Co. v. Ingebregeten*, 604.)

5. **IF A MASTER DELEGATES TO AN AGENT THE DUTY OR AUTHORITY** of furnishing proper appliances and machinery for a business in which the servant is engaged, or of keeping such machinery and appliances in repair, and of making proper tests and inspection thereof, he is answerable to his servants and employés for injuries received by them from the negligence of the agent to whom these duties have been delegated. (*Nord Deutscher Lloyd S. S. Co. v. Ingebregeten*, 604.)

6. **A MASTER'S DUTY TO HIS SERVANT** requires the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business in which the servant is employed, and in keeping such machinery and appliances in repair, including the duty of making inspection and test at proper intervals. (*Nord Deutscher Lloyd S. S. Co. v. Ingebregeten*, 604.)

7. **MASTER AND SERVANT, FELLOW-SERVANTS, WHO ARE NOT.**—If one servant is injured through the negligence of another in failing to discover defects in machinery or appliances, and the latter is not engaged in using the apparatus in a common employment with the servant injured, then the former in his duty represents the master, who is chargeable with his defaults and answerable for injuries suffered by the other servant therefrom. The chief justice dissents. (*Nord Deutscher Lloyd S. S. Co. v. Ingebregeten*, 604.)

8. **AN EMPLOYER OR MASTER IS NOT TO BE DEEMED NEGLIGENT**, because he does not anticipate, or provide against, the possibility of criminal acts on the part of his servants and employés. He is not, therefore, answerable for a loss sustained by a third person in purchasing property in good faith, which has been left under the control of a servant, and which the latter has fraudulently disposed of to an innocent purchaser. (*Knox v. Eden Musee etc. Co.*, 700.)

9. **MASTER AND SERVANT—INDEPENDENT CONTRACTORS.** Contractors who have agreed to erect a building, of certain materials, and according to fixed plans and specifications, are independent contractors, although the work is to be performed under the inspection, and to the satisfaction, of architects, acting as agents of the owner. The owner of the building is not liable for the negligence of the employés of the contractors, whereby a brick falls from the uncompleted building and injures one who is passing. (*Smith v. Milwaukee Builders' etc. Exchange*, 912.)

See Contracts, 1-3; Damages, 2; Estoppel; Municipal Corporations, 12, 27; Release.

MECHANICS' LIENS.

1. **MECHANIC'S LIEN—INTERPRETATION.**—A statute giving a mechanic's lien, is to be liberally interpreted, so as to make the remedial purpose of the legis ature effectual. (*Vilas v. McDonough Mfg. Co.*, 925.)

2. **MECHANIC S LIEN, ATTACHES TO WHAT.**—If a mechanic's lien is given on a building itself, there can be no lien upon the details

or constituent parts of the building. The greater includes the less. (*Vilas v. McDonough Mfg. Co.*, 925.)

3. **MECHANIC'S LIEN—RIGHT TO, BECOMES VESTED, WHEN—STATUTES.**—The right to hold a mechanic's lien becomes vested at the time the material is furnished; and in determining whether or not such right exists, the courts will look only to the statute in force at that time. (*Taylor v. Dahu*, 312.)

4. **MECHANIC'S LIEN—STATUTES—REPUGNANCY—CONSTRUCTION.**—If a new act concerning mechanic's liens makes no change and contains no provision respecting the subject of actual notice to the owner of the furnishing of materials to the contractor, and does not, therefore, cover the entire subject matter of the old statute, which does require such notice, the new statute is not repugnant to the old one, and does not repeal it by implication. In such a case, it is the duty of courts to construe the statutes so as to give effect to both. (*Taylor v. Dahu*, 312.)

5. **SEVERAL BUILDINGS.**—If labor and materials are furnished for several houses on different lots under a single contract, a general mechanic's lien may be filed against all of the houses and lots; and the plaintiff may, on proper plea, prove what part of the labor and material was used in each building, and obtain separate liens therefor. (*Williams v. Judd-Wells Co.*, 350.)

6. **MECHANIC'S LIEN—NOTICE TO OWNER, OF MATERIALS FURNISHED.**—In an action to enforce a mechanic's lien, the materials having been furnished to the contractor, for the purpose of being used in a certain structure, while a statute requiring the owner to be given actual notice of that fact was still in force, the complaint is insufficient if it does not allege that such notice was given. (*Taylor v. Dahu*, 312.)

7. **MECHANIC'S LIEN—FURNISHING MACHINERY IS FURNISHING MATERIALS.**—One who furnishes machinery for the construction of a new mill furnishes materials for the construction of a building. The machinery, when attached, becomes a part of the building, and is real estate. The building without the machinery is no mill. The building with the machinery attached becomes a mill, but still is described by the generic term "building," and is subject to the lien which the statute gives to such as furnish materials for the construction of a building. (*Vilas v. McDonough Mfg. Co.*, 925.)

8. **MECHANIC'S LIEN—PRIORITY OF, OVER MORTGAGE.** Under a statute giving a lien to persons who furnish materials for the construction of a building, and to persons who erect machinery on the lands of others, and making the lien for materials furnished prior to any other lien which originates subsequent to the commencement of the construction of the work or building, one who furnishes the machinery for the construction of a new mill has a right to a lien upon the mill building and the freehold, upon the ground that he has furnished materials for its construction; and this lien is prior and paramount to any other lien originating subsequently to the commencement of the construction of the mill. (*Vilas v. McDonough Mfg. Co.*, 925.)

9. **MECHANICS' LIENS.**—AN ARCHITECT WHO PREPARES PLANS and specifications for a building that is not erected, or an improvement that is not made, is not entitled to a mechanic's lien therefor, although he does some work upon the land needed for information in preparing his plans. (*Foster v. Tierney*, 343.)

MEMORANDUM.

See Actions; Contracts, 5; Sales, 1; Vendor and Purchaser, 2.

MENTAL ANGUISH.

See Malicious Prosecution, 1.

MISREPRESENTATIONS.

See Agency, 5-7; Fraud; Insurance, 25.

MISTAKE.

1. MISTAKE—RECOVERY OF MONEY PAID BY.—If one claiming to be the owner of a party-wall declines a tender of the cost price thereof made by an adjoining lotowner, and fails in an attempt to compel the latter, by legal proceedings, to pay, in addition to such cost price, the costs in another legal proceeding concerning such wall, to which he was not a party, and he afterward pays for the wall, he may recover the price paid, on the ground that it was paid under a mutual mistake of fact, and not as a compromise, or in settlement of litigation, if it is subsequently ascertained that the party claiming title, and to whom the price was paid, has no title to the wall. (*McKibben v. Doyle*, 785.)

2. MISTAKE—RECOVERY OF MONEY PAID BY.—Money erroneously paid under a mutual mistake of fact may be recovered; and the mere omission to take advantage of means of knowledge within the reach of the party paying does not prevent a recovery. (*McKibben v. Doyle*, 785.)

See Equity, 4, 5.

MORTGAGES.

1. THE STATUTE OF FRAUDS does not permit a mortgage to be created on land without a writing, and it therefore does not permit a mortgage which has been paid to be revived or reissued by subsequent oral agreement. (*Bogert v. Bliss*, 684.)

2. A MORTGAGE TO SECURE FUTURE ADVANCES, may, by agreement of the parties, be made to include money advanced before the execution of the mortgage. (*Farabee v. McKerrihan*, 734.)

3. MORTGAGES—MISTAKE IN TITLE—LACHES.—If a mortgage is given in payment for land under a misapprehension as to the grantor's title, and the mistake is not discovered by the grantee until suit is brought to foreclose the mortgage, laches cannot be imputed to the mortgagor so as to bar his defense. (*Wilson v. Ott*, 767.)

4. MORTGAGE—RECORD OF.—A mortgage left at the recorder's office to be recorded, but actually recorded in the deed-book, and indexed in the index of deeds, is sufficiently recorded to constitute a lien from the time it was left for record. (*Farabee v. McKerrihan*, 734.)

5. MORTGAGES—ASSIGNMENT—DEFENSES—ESTOPPEL.—The assignee of a mortgage holds it subject to all equities with which it was affected in the hands of the mortgagee; and, if he claims to be a purchaser for value, he has the burden to show this affirmatively, and must also show, in order to recover, acts or declarations of the mortgagor by which he is estopped from interposing, as against such assignee, his equitable defense. (*Wilson v. Ott*, 767.)

6. WHERE A MORTGAGE IS A LIEN MERELY, its payment necessarily discharges the lien and extinguishes the mortgage. (*Bogert v. Bliss*, 684.)

7. A MORTGAGE CANNOT, AFTER PAYMENT, BE REISSUED so as to secure another loan, where the lender knows of such payment, though there is an oral agreement that the mortgage shall be assigned to him. (*Bogert v. Bliss*, 684.)

8. MORTGAGEE, REVIVING A SATISFIED MORTGAGE AS AGAINST.—A MORTGAGEE, taking his mortgage while a prior paid mortgage remains unsatisfied of record, cannot be compelled to occupy the position of a second mortgagee by proof of an oral agreement that the first mortgage should remain in force for the purpose of securing a loan made after it has been discharged by payment. (*Bogert v. Bliss*, 684.)

9. MORTGAGES—FORECLOSURE.—ATTORNEY'S COMMISSION on foreclosure of a mortgage is in the nature of a penalty, and its enforcement is within the discretion of the court. It cannot be enforced on a purchase-money mortgage, when the title to the greater portion of the land has failed, and recovery is sought on the part that has failed. (*Wilson v. Ott*, 767.)

10. MORTGAGES—SALES UNDER POWERS.—Under a mortgage conferring a power upon the mortgagee to sell the property in satisfaction of the debt secured thereby, a sale thereunder need not be conducted by the mortgagee in person. It may be made through the instrumentality of an auctioneer or any similar agent with the sanction and approval of the mortgagee. (*Palmer v. Young*, 136.)

11. MORTGAGES—RIGHT OF MORTGAGEE TO PURCHASE.—An unauthorized purchase by a mortgagee of the mortgaged property, at a sale thereof under a power contained in the mortgage, if made fairly and without fraud, is not void, but merely voidable at the election of the mortgagor or his successor to redeem at any time before final judgment of eviction. Such a purchase is good for all purposes, except that it does not bar the mortgagor's equity of redemption. (*Palmer v. Young*, 136.)

See Building and Loan Associations; Fixtures, 6; Insurance, 4, 26, 27; Mechanic's Lien, 8; Vendor and Purchaser, 3.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS CAN EXERCISE ONLY SUCH POWERS as are expressly granted, and those necessarily or fairly implied in or incident thereto, and those essential and indispensable to the declared objects and purposes of the corporation. Any fair reasonable doubt concerning the existence of the power is to be resolved against the corporation, and the power denied. (*Jacksonville Electric Light Co. v. Jacksonville*, 24.)

2. MUNICIPAL CORPORATIONS AND THEIR OFFICERS CANNOT DO ANY ACT, make any contract, or incur any liability not authorized by their charter, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted or forbidden are void. (*Jacksonville Electric Light Co. v. Jacksonville*, 24.)

3. MUNICIPAL CORPORATIONS.—ALL POWERS CONFERRED upon a municipal corporation should be construed with a view of carrying out the purposes of its creation as a public agency. (*Jacksonville Electric Light Co. v. Jacksonville*, 24.)

4. MUNICIPAL CORPORATIONS.—WHILE STRICT CONSTRUCTION should be applied to grants of power to municipal corporations which may result in imposing public burdens, or are out of the usual range, yet if a power is necessarily or fairly implied in or incident to those clearly given, it is not to be impaired by strict construction. (*Jacksonville Electric Light Co. v. Jacksonville*, 24.)

5. MUNICIPAL CORPORATIONS—IMPLIED POWERS—GENERAL WELFARE.—A charter conferring upon a city council power to provide for lighting the city by gas or other illuminating material, or in any other manner, authorizes the erection and maintenance, at public expense, of an electric plant of sufficient power to light, not only the streets and public places in the city, but also to supply, in connection therewith, electric lights for the inhabitants of the city in their private houses. (*Jacksonville Electric Light Co. v. Jacksonville*, 24.)

6. MUNICIPAL CORPORATIONS.—SUPPLYING INHABITANTS OF CITIES WITH ELECTRIC LIGHT is such a municipal purpose as authorizes its delegation by the legislature to municipal corporations. (*Jacksonville Electric Light Co. v. Jacksonville*, 24.)

7. MUNICIPAL CORPORATIONS.—DISTINCTION BETWEEN THE PUBLIC AND THE PRIVATE POWERS CONFERRED upon municipal corporations is generally clear enough. If the power has relation to public purposes and is for the public good, it is classed as governmental. When it relates to the accomplishment of private corporate purposes in which the public is concerned but indirectly, it is private in its nature; and a municipality in respect to its exercise is regarded as a legal individual. With respect to the exercise of its governmental powers, a municipality is exempt from liability in an action by a private person. It is otherwise with the exercise of powers of a private and nongovernmental character. (*Springfield etc. Ins. Co. v. Keeseville*, 667.)

8. MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE MANAGEMENT OF WATERWORKS.—A municipality in assuming the duty of providing and maintaining a system of waterworks to furnish water for private and domestic purposes, and also for public purposes, such as extinguishing fires, acts for the benefit of the public, and, therefore, in its governmental capacity, though it receives compensation for the water furnished its citizens and property holders. It therefore is not answerable in an action to recover compensation for damages alleged to have been suffered from the loss of plaintiff's property by fire through the inadequacy of the water supply, attributable to the negligence or mismanagement of the municipal authorities having charge of the waterworks. (*Springfield Ins. Co. v. Keeseville*, 667.)

9. A MUNICIPAL CORPORATION DOES NOT SUSTAIN IMPLIED CONTRACTUAL RELATIONS to the public within its boundaries with respect to the construction of public waterworks, so as to be responsible for a failure to exercise reasonable care and diligence in the management of such works. (*Springfield Ins. Co. v. Keeseville*, 667.)

10. MUNICIPAL CORPORATIONS—WATERWORKS.—The fact that water rents are paid by the inhabitants of a municipality does not show that in the maintenance of its system of waterworks it acts in a private capacity, and is therefore answerable for negligence in their management. (*Springfield Ins. Co. v. Keeseville*, 667.)

11. MUNICIPAL CORPORATIONS—EXERCISE OF GOVERNMENTAL FUNCTIONS.—The preservation of the public health is one of the duties that devolves upon the state as a sovereign power, and, if this duty is delegated to a city, all steps and measures taken by it toward that end are in the exercise of a purely governmental function. (*Love v. Atlanta*, 64.)

12. MUNICIPAL CORPORATIONS—PRESERVATION OF PUBLIC HEALTH—NONLIABILITY FOR TORT OF SERVANT.—If the charter of a city imposes upon its board of health the duty of keeping its streets clear of putrid and other substances offensive to the sense of smell, and which tend to imperil the public health, and a private citizen is injured by the negligence of its servants in and about such work, as in allowing a mule attached to a garbage cart to run away and collide with a person's buggy, the city is not liable, because, in discharging such duty, it is simply exercising a governmental function. (*Love v. Atlanta*, 64.)

13. MUNICIPAL CORPORATIONS—ORDINANCES RESPECTING CONSTRUCTION OF BUILDINGS.—A municipality has authority, under a city charter giving the common council power "to control and regulate the construction of buildings," "to control and regulate streets," "to regulate the manner of using the streets and pavements," etc., to pass an ordinance that "any owner or contractor who shall hereafter build, or cause to be built," any building abutting on a public sidewalk shall, after the completion of the first story, cause a roofed passageway to be built in front of the building, upon the sidewalk, under pain of a certain fine or imprisonment. Such an ordinance is reasonable, and has the force of a law requiring both the owner and con-

tractor to construct the covered way when it is required. (*Smith v. Milwaukee Builders' etc. Exchange*, 912.)

14. MUNICIPAL CORPORATIONS — ORDINANCE — NEGLIGENCE.—All persons who are required by an ordinance to construct a covered way next to a building which is being erected adjacent to a sidewalk in a city, are guilty of negligence, if they fail to do so, and are liable to one traveling on the sidewalk, in the exercise of ordinary care, who is injured by reason of such negligence. (*Smith v. Milwaukee Builders' etc. Exchange*, 912.)

15. MUNICIPAL ORDINANCES, THOUGH PENAL, are not criminal statutes, so as to prevent their validity from being tested, or their enforcement restrained, in the civil courts. (*Sylvester Coal Co. v. St. Louis*, 566.)

16. MUNICIPAL ORDINANCES—VALIDITY.—A city ordinance requiring coal dealers to have their coal officially weighed, to pay a small fee therefor, and to furnish official certificates of weights to consumers, is valid under a charter authorizing the city to provide for weighing coal and to regulate retailers thereof. (*Sylvester Coal Co. v. St. Louis*, 566.)

17. MUNICIPAL CORPORATIONS—DESTRUCTION OF PROPERTY AS A NUISANCE—BURDEN OF PROOF.—If property in a city constitutes a nuisance endangering the public health and safety, the city may, in cases of emergency, if authorized by its charter to abate nuisances, destroy such property without making compensation to the owner, and without first obtaining a judicial determination that the property is a nuisance; but, unless the property is first condemned as a nuisance by appropriate proceedings, its destruction will be at the peril of the municipal authorities, and, when sued for its value, the burden is upon them of showing that it was in fact a nuisance, and that its destruction was really necessary for the public health and safety. (*Mayor v. Mulligan*, 86.)

18. MUNICIPAL CORPORATIONS—DESTRUCTION OF PROPERTY AS A NUISANCE.—If the sanitary inspector of a city, under orders of its health officer, destroys a feather bed, pillows, and a mattress as a nuisance, the owner of the property cannot recover their value from the city, where it is empowered by its charter to abate nuisances, and where the evidence shows that the bedding had been used by a person having scarlet fever, a highly contagious disease. Such property being, in fact, a nuisance endangering the public health, its destruction is lawful. (*Mayor v. Mulligan*, 84.)

19. MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECT IN SIDEWALK.—In the absence of actual or implied notice of the defective condition of a coalhole in a sidewalk, a city is not bound to examine it in order to ascertain its condition; nor can notice of its defective condition be implied, if the defect could not be seen without removing the cover and making an examination. In the absence of notice, the city is not liable for injury received by a traveler on the sidewalk from falling into such hole. (*Duncan v. Philadelphia*, 780.)

20. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS. It is the duty of a municipality to exercise reasonable supervision over its sidewalks; but as the first duty in relation to them rests upon the property owner, and that of the city is secondary only, it is not liable for defects without notice, actual or implied, of their existence. (*Duncan v. Philadelphia*, 780.)

21. MUNICIPAL CORPORATIONS—KNOWLEDGE OF COUNCILMAN AS NOTICE TO COUNCIL.—Knowledge, as a private individual, of a lotowner, who is a city councilman, of an obstruction negligently left in the street in front of his premises while a sidewalk is being constructed, is not notice to the city council of which he is a member. (*Frazier v. Butler Borough*, 739.)

22. MUNICIPAL CORPORATION — STREETS — OBSTRUCTIONS DURING IMPROVEMENT.—The temporary obstruction of the public

streets for purposes of improvement, if a reasonable necessity exists therefor, is not unlawful, and the municipal authorities are not answerable in damages for permitting it. Whether such obstruction is reasonably necessary is a question of fact for the jury to determine. (*Frazier v. Butler Borough*, 739.)

23. MUNICIPAL CORPORATIONS—NUISANCE IN STREET—KNOWLEDGE OF COUNCILMAN AS NOTICE TO MUNICIPALITY.—Knowledge by a member of a municipal council of a nuisance in a street is not of itself notice to the municipality, although express notice to such councilman in his official capacity is notice to the municipality and its council charged with the duty of supervising the streets; but his knowledge and acts as an individual are not notice to the municipality of which he is an official representative. (*Frazier v. Butler Borough*, 739.)

24. MUNICIPAL CORPORATIONS—STREETS—CHANGING GRADE OF.—The measure of damages to abutting property arising from a change in the grade of a street is the actual diminution in the market value of the land resulting from such change. (*City Council v. Schrameck*, 146.)

25. MUNICIPAL CORPORATIONS—DAMAGES FOR CHANGE OF GRADE OF STREET—EVIDENCE.—In ascertaining whether there has been an actual diminution in the market value of abutting property, arising from a change in the grade of a street, facts which may show that such value has actually decreased, such as that certain expenditures are necessary to bring the property to its former conditions, or the necessity of filling the lot and raising the buildings thereon, with the probable cost of such work, although they do not authorize a recovery of the cost of such changes as independent items of special damage, are admissible as throwing light upon the general question of diminution of market value. (*City Council v. Schrameck*, 146.)

26. MUNICIPAL CORPORATIONS—STREETS, CHANGE OF GRADE.—If, under the authority of municipal legislation, very considerable change is made in the grade of a driveway or street, rendering necessary considerable change in the sidewalks, involving peril to the passing public, the municipal authorities are required to exercise close supervision of the conduct of property owners to prevent injury to the traveling public. (*Frazier v. Butler Borough*, 739.)

27. MUNICIPAL CORPORATIONS—WHEN NOT LIABLE FOR TORTS OF SERVANTS.—In the discharge of its purely governmental functions, a municipal corporation, to which has been delegated a portion of the sovereign power, is not liable for torts committed in the discharge of such duties and in the execution of such powers. (*Love v. Atlanta*, 64.)

28. MUNICIPAL BONDS cannot be avoided on the ground that the building for the erection of which they were issued was not erected solely for municipal purposes, where the building was, in fact, erected to supply the needs of the municipality, though portions not necessary for public purposes were appropriated to other uses, from which a small income was derived, not sufficient to meet the insurance on the building and the interest on the moneys expended in its erection. (*Jones v. Camden*, 819.)

29. IF MUNICIPAL BONDS are authorized to be issued for the purpose of procuring a suitable site, and the erection thereon of a suitable building for a town hall, in such manner as to the town council may seem expedient and for the best interest of the town, the bonds cannot be avoided in the hands of innocent purchasers on the ground that their proceeds were misapplied by the erection of a building for purposes not contemplated by the statute. (*Jones v. Camden*, 819.)

30. MUNICIPAL BONDS VALID WHEN ISSUED are not rendered void by the misapplication of the moneys received from their sale. (*Jones v. Camden*, 819.)

See Attachment, 4; Injunctions, 2.

MUTUALITY.

See Contracts, 1, 2.

NAMES.

1. **NAME—MATERIAL PART.**—The middle name or initial of a person is material, if it appears that with the exception of such middle names or initial, two persons have each the same name, and can only be distinguished by the middle name or initial of each. (*State v. Higgins*, 490.)

2. **NAME—INITIAL MATERIAL.**—The middle initial of a person's name is material, when only the initial of the first name is given. (*State v. Higgins*, 490.)

See Forgery.

NATURALIZATION.

1. **NATURALIZATION—STATE COURTS.**—There is no provision of the federal constitution which requires the courts or judges of a state to perform any duties respecting the admission of aliens to citizenship. They may, if they choose, exercise the power conferred upon them by Congress, unless prohibited by state legislation, but this is a naked power, and imposes no duty respecting the naturalization of aliens. (*Gilroy, Petitioner*, 392.)

2. **NATURALIZATION.**—A state statute prohibiting all courts of the state, except certain designated courts of record, from entertaining any jurisdiction over the naturalization of aliens is not in conflict with any provision of the federal constitution. (*Gilroy, Petitioner*, 392.)

NEGLIGENCE.

1. **NEGLIGENCE.—TO ENTITLE PLAINTIFF** to recover in an action alleging his injury by the negligence of the defendant, there should be a stated right on the part of the plaintiff, and duty on the part of the defendant in respect to that right, and a breach by him of such duty, whereby the plaintiff suffered injury. (*Western Union Tel. Co. v. State*, 464.)

2. **NEGLIGENCE.—THE CONSEQUENCE FOR WHICH A NEGLIGENCE PERSON IS ANSWERABLE** must be the natural result of the alleged negligent act, or one which might reasonably have been anticipated. (*Knox v. Eden Musee etc. Co.*, 700.)

3. **NEGLIGENCE—PROXIMATE CAUSE.**—To render negligence aggravated by no element of malice the proximate cause of an injury, it must be the natural and probable consequence of the negligence—such consequence as, under the surrounding circumstances, might and ought to have been foreseen by the wrongdoer. (*Yoders v. Amwell*, 750.)

4. **NEGLIGENCE, PRESUMPTION OF.**—Where it is the duty of persons to do their best to keep premises or structures in proper condition, and they are found out of condition, and an accident occurs therefrom, it may fairly be presumed, in the absence of evidence, that they used that care and diligence that they were bound to use, and that there was a defect from which the accident arose. (*National Union Tel. Co. v. State*, 464.)

5. **NEGLIGENCE—PLEA OF INDEPENDENT CONTRACT.**—The nonperformance of a duty imposed by an ordinance requiring builders to construct a covered way next to a building, which is being erected adjacent to a sidewalk in a city, cannot be excused by the plea of an independent contract whereby another agrees to perform the duty. (*Smith v. Milwaukee Builders' etc. Exchange*, 912.)

6. **NEGLIGENCE.—ON A MOTION TO NONSUIT**, in order to withdraw the case from the jury, the contributory negligence must appear as a conclusion of fact, or by necessary inference from the evidence.

adduced by the plaintiff. If the action is one for causing the death of a human being, it must appear that he, by some act or omission on his part, contributed to the accident which resulted in his death. (*Pennsylvania R. R. Co. v. Middleton*, 597.)

See Carriers, 8; Corporations, 13, 16, 17; Insurance, 6; Instructions, 2; Master and Servant, 4; Pleading, 4; Railroads, 12-16; Telegraph Companies; Towns.

NEGOTIABLE INSTRUMENTS.

1. **NEGOTIABLE INSTRUMENTS.**—The negotiable character of a note in common form is not affected by the addition of the words, "the payment of this note is secured by deed of trust of even date herewith on real estate," nor by the fact that it is made payable by its terms on or before a future day therein named. (*Albertson v. Laughlin*, 777.)

2. **NEGOTIABLE INSTRUMENT. — AN INDORSEMENT IN BLANK** of a negotiable instrument by the payee does not necessarily establish that he has ceased to be an owner, if it remains in his possession. Hence, he may recover thereon against the maker by producing it at the trial, and proving that it is still his property. (*Middleton v. Griffith*, 617.)

3. **NEGOTIABLE INSTRUMENTS. — THE INDORSEMENT OF A NOTE BY A PAYEE** does not become effectual until he delivers the note to a third person. (*Middleton v. Griffith*, 617.)

4. **NEGOTIABLE INSTRUMENTS. — INDORSEMENT** upon a negotiable instrument may be stricken out by the original payee upon his regaining possession in a bona fide manner, and he may recover upon such instrument as if it had never been indorsed. Especially is this true when the indorsement was for collection. (*Middleton v. Griffith*, 667.)

5. **NEGOTIABLE INSTRUMENTS — PLACE OF PAYMENT — PRESUMPTION.**—If no place of payment is named in a note, it is presumed to be payable at the place of residence of the maker, whether such omission to name the place of payment is intentional, or the result of mere inadvertence. (*McCruden v. Jonas*, 774.)

6. **NOTICE — DUTY OF INQUIRY.**—A purchaser of a negotiable instrument, who purchases under circumstances that throw on him the duty of inquiry as to its validity, assumes no greater risk by his failure to inquire than the burden of proving that the facts which he could have discovered had he inquired would have protected him. (*Hanover Nat. Bank v. American Dock etc. Co.*, 721.)

7. **NEGOTIABLE INSTRUMENTS — FRAUD, BURDEN OF PROOF RESPECTING.**—If fraud in the inception of a note is established, it then becomes incumbent upon the plaintiff to prove that the note came to him before maturity, bona fide, and for value. (*Banks v. McCosker*, 478.)

8. **PLEADING — FRAUD, DEFENSE OF, IN PROCURING PROMISSORY NOTE.**—Under the general issue in an action by an indorsee upon a promissory note, the defendant may inquire into the manner in which it was obtained by the plaintiff, and may be permitted to prove that the note was procured by the original payee by fraud, and that the plaintiff acquired it with notice thereof. (*Banks v. McCosker*, 678.)

9. **PLEADING.**—The signature of the payee of a note is admitted by the statutes of Maryland, if the note is filed in the case, purporting to be indorsed by him, and it is not denied by the next subsequent pleading of the opposite party. (*Banks v. McCosker*, 478.)

10. **NEGOTIABLE INSTRUMENTS — PLEADING KNOWLEDGE OF FRAUD.**—An answer to a complaint upon a promissory note acquired by an indorser before maturity, alleging that the note was procured by fraud of the original payee, must also allege that the plaintiff took it with knowledge of the fraud. (*Banks v. McCosker*, 478.)

11. **NEGOTIABLE INSTRUMENTS.—THE POSSESSION OF A NEGOTIABLE INSTRUMENT** by a payee is *prima facie* evidence of title in him, whether his name is indorsed thereon or not. (*Middleton v. Griffith*, 617.)

12. **CONTRACT FORBIDDEN BY LAW.**—If a statute forbids any hawker or peddler from buying, bartering, or selling within the state any goods, wares, or merchandise until he shall have first taken out a license for that purpose, and provides for the punishment and conviction of anyone engaged in selling without a license and the imposition of a fine as a punishment, a promissory note taken by him in payment of goods sold in violation of the statute is not void. (*Banks v. McCosker*, 478.)

13. **NEGOTIABLE INSTRUMENTS—NON-NEGOTIABLE ORDER.** An order upon a savings bank for a certain sum of money, made chargeable to the drawer's account, but with the printed words, "the bank-book of the depositor must accompany this order," upon the face of the order, below the signature of the drawer, is not a negotiable instrument, and cannot be recovered upon, as such, by an indorsee thereof, as these words make it subject to a contingency which necessarily embarrasses its circulation for commercial purposes, and imposes a restraint upon its negotiability. Such words, being upon the face of the order, in the position stated, at the time of its inception, became a substantive part of it, and qualified its terms as if they had been inserted in the body of the instrument. (*White v. Cushing*, 402.)

See Evidence, 4, 5.

NEW PROMISE.

See Limitations of Actions, 2.

NEW TRIAL.

1. **NEW TRIAL.—THERE IS NO ERROR IN DENYING a new trial**, where the evidence warrants the verdict. (*Corniff v. Cook*, 55.)

2. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—In deciding motions for new trials on account of newly discovered evidence, courts have found it necessary to apply somewhat stringent rules to prevent the endless mischief which a different course would produce. Hence, a new trial will not be granted on the ground of newly discovered evidence, unless the legitimate effect of such evidence would require a different verdict, and it is made to appear that injustice is likely to be done by refusing it. (*Linscott v. Orient Ins. Co.*, 435.)

NONSUIT.

See Negligence, 6.

NOTICE.

See Execution; Mechanic's Lien, 6; Municipal Corporations, 21, 23; Records; Telegraph Companies, 1, 2; Vendor and Purchaser, 1.

NUISANCE.

See Municipal Corporations, 17, 18, 23.

OBSTRUCTIONS.

See Municipal Corporations, 22, 23.

OFFICERS.

See Corporations, 5-7.

OIL LEASE.

See Cotenancy, 5.

ORDINANCES.

See Injunctions, 3; Municipal Corporations, 12-16.

OYSTERS.

See Cotenancy, 1, 2.

PAROL.

See Evidence, 2-5.

PARTIES.

See Judgments, 1; Witnesses, 3.

PARTITION.

See Equity, 6; Judicial Sales; Waters, 7, 8.

PARTNERSHIP.

1. PARTNERSHIP—POWER OF PARTNER TO BIND FIRM IN A PRIVATE TRANSACTION.—It is not within the scope of the authority of one member of a partnership, in a private transaction between himself and another, and in consideration of a benefit bestowed upon himself alone, and not shared in by his partner, to undertake to bind his firm to any agreement whatsoever. (Davis v. Dodson, 108.)

2. PARTNERSHIP—LAW FIRMS—POWER OF MEMBER TO BIND FIRM IN A PRIVATE TRANSACTION.—It is not within the scope of the business of a law partnership to collect choses in action without charging for services rendered in so doing. Hence, if one member of such a firm, being the owner of a promissory note, sells it to a third person, a part of the consideration being that the seller's firm will collect the note, if not paid, without charge, the contract is not binding upon the firm or another member of it, as the seller has no authority, by virtue of the partnership, to bind his partner by any such contract. (Davis v. Dodson, 108.)

3. A PARTNERSHIP CHOSE IN ACTION MAY BE ASSIGNED by any member of the firm. (Gerli v. Poidebard etc. Mfg. Co., 611.)

4. A PAYMENT OF PARTNERSHIP MONEYS to satisfy the personal debt of one partner, if made to a person having no notice of the source whence they came, does not entitle the partnership, or any member of it, to recover the moneys so paid, or any part thereof. It will be otherwise if the payment was received with such notice. (Babcock v. Standish, 633.)

5. PARTNERSHIP—INSOLVENCY—PRIORITY OF CREDITORS.—If an insolvent partnership composed of four persons gives a note to another insolvent partnership composed of three of the same persons, and the note is negotiated by the payee as collateral security for a pre-existing debt to a third person, who has knowledge of the affairs of both partnerships, the holder of the note must be postponed to the other creditors of the firm making the note. (McCruden v. Jonas, 774.)

6. PARTNERSHIP—INSOLVENCY—ASSETS.—The word "assets," in the law of partnership, is not confined to assets at law, but includes all assets applicable to the payment of the partnership debts. (Thayer v. Humphrey, 887.)

7. PARTNERSHIP—JOINT CREDITORS—LIEN—PREFERENCE.—Partnership creditors have no lien, strictly so called, on partnership assets, but must work out their preference over the creditors of

the individual members of the partnership through the equities of such members. (*Thayer v. Humphrey*, 887.)

8. PARTNERSHIP—INSOLVENCY—PRIORITY OF CREDITORS.—An insolvent partnership composed of three of the four members of another insolvent partnership, cannot, as a creditor of the latter, share equally with the latter's other creditors in the distribution of its assets. (*McCrudden v. Jonas*, 774.)

9. INSOLVENCY—PARTNERSHIP AND INDIVIDUAL CREDITORS.—Generally speaking, partnership creditors cannot prove in competition with the individual creditors of a partner. (*Thayer v. Humphrey*, 887.)

10. PARTNERSHIP—INSOLVENCY—APPLICATION OF ASSETS. In the administration of the affairs of a partnership, and of the individual members thereof, the fixed rule must be applied that joint estate goes first to joint creditors, and separate estate to separate creditors, with the exception that where there are no partnership assets, and there is no living solvent partner, partnership creditors may prove with the separate creditors of a partner in the settlement of his estate *pari passu*. (*Thayer v. Humphrey*, 887.)

11. PARTNERSHIP—OSTENSIBLE FIRM AFTER DISSOLUTION—CREDITORS OF OLD AND NEW FIRMS.—If one member of an insolvent partnership sells out, and the firm is dissolved, under circumstances justifying the court in finding an implied promise, made at the time of the sale, that the firm debts should be paid out of the firm assets, an equity is reserved which the creditors can enforce. Neither a creditor of the old firm, nor a creditor of an ostensible firm taking the place of the old one, can prove *pari passu* with the individual creditors of an ostensible member of the new firm, whose name does not appear in the title of the firm further than as represented by the "& Co.," and who has made an assignment for the benefit of creditors; but they can prove *pari passu*, with all the creditors of the new firm, in an assignment for the benefit of creditors made by the member of the new firm who really owns and conducts its business, and whose name does appear in the title of the ostensible firm. (*Thayer v. Humphrey*, 887.)

12. PARTNERSHIP—INSOLVENCY—OLD AND NEW FIRMS—PREFERENCE OF NEW FIRM CREDITORS OVER INDIVIDUAL CREDITORS OF NEW FIRM.—If one of the members of an insolvent firm sells out his interest to an outside party, or to his associates, and thereby a new firm is formed, which assumes the debts of the old firm, the intention of all the parties being that the new firm shall continue the business in substantially the same way, with substantially the same assets, and that the old debts shall be paid out of such business, and such new firm subsequently makes an assignment for the benefit of creditors, the creditors of the old and of the new firm may, in the administration of the assignment, prove their claims *pari passu*, and be preferred over individual creditors of the members of such new firm. (*Thayer v. Humphrey*, 887.)

13. PARTNERSHIP—INSOLVENCY—SALE BY OUTGOING PARTNER—APPLICATION OF FIRM ASSETS TO PAYMENT OF FIRM DEBTS.—If a member of an insolvent firm sells out with the understanding that the business is to be continued with the same assets, and the purchaser or purchasers, as consideration for the sale, are to assume and pay the old debts, and the circumstances are such as to evidence the fact that the purpose of the transaction is to pay the old firm debts, and to wind up the old partnership concern by the payment of the debts of such concern out of the partnership assets and a continuation of the business, the court is warranted in concluding that the equity of the outgoing partner to have the assets of the firm applied to the payment of the firm debts is not changed, and that the right of the creditor to enforce it continues. (*Thayer v. Humphrey*, 887.)

14. PARTNERSHIP—RIGHTS OF CREDITORS AND MEMBERS OF OSTENSIBLE FIRM AS TO APPLICATION OF ASSETS.—Those who deal with persons representing themselves to creditors, generally, as partners in a certain business, are entitled to have the property used in such business applied to the payment of the debts incurred therein in preference to the individual debts of the members of the partnership, and the ostensible member of such partnership is likewise entitled to have the assets of the ostensible firm so applied. (*Thayer v. Humphrey*, 887.)

15. PARTNERSHIP — INSOLVENCY — OSTENSIBLE FIRM — JOINT PROPERTY.—If there is an ostensible firm by holding out to creditors, generally, the property of such firm is to be considered, in equity, joint property for the administration thereof in insolvency, the same as if such property belonged to a firm in fact. (*Thayer v. Humphrey*, 881.)

16. PARTNERSHIP—CONVERSION OF PARTNERSHIP INTO INDIVIDUAL PROPERTY.—If one member of a firm sells out his interest, in good faith, to his copartner, or to another, without in any way retaining his equity to have the firm creditors paid out of the assets the property is converted into the individual property of the purchaser, free from all the equities of the seller, even if the purchaser, as the consideration for such purchase, agrees to pay the firm debts; otherwise, if the purchaser agrees, expressly or impliedly, to apply the assets to such purpose. (*Thayer v. Humphrey*, 887.)

PARTY-WALLS.

1. PARTY-WALLS.—THE RIGHT OF SUPPORT by a party-wall situated in part upon each of two adjoining parcels of land owned by different persons is an easement, a grant of which may be implied from its enjoyment for the period of prescription. (*Briggs v. Kloss*, 238.)

2. PARTY-WALLS—LIABILITY FOR REMOVAL OF SUPPORT. If the support of a party-wall, one-half of which is on the land of each of two adjoining owners, has been enjoyed by one of them for the period of prescription, he holds under an implied grant, and is entitled to his right of lateral support, and the other owner cannot, in making improvements upon his own land, remove the support of the wall without being liable in damages for resulting injuries to the other owner, unless the latter has consented to such removal. No degree of care or diligence will relieve him from liability, and he is liable, though he let a contract for the work to a third person, exercising an independent employment, where the digging, which caused the injury, was a necessary incident of the work which the owner ordered the contractor to do, and not merely collateral thereto. (*Briggs v. Kloss*, 238.)

See Mistake, 1.

PASS-BOOKS.

See Gifts, 6, 7.

PATENTS.

1. PUBLIC WORKS—PROPOSALS CALLING FOR PATENTED OR PROPRIETARY ARTICLES.—The fact that an article is patented, does not necessarily prevent any person but the patentee from contracting to supply it. An award of public work may therefore be sustained, though the notice to bidders called for the furnishing of such an article, and the right was reserved of rejecting any and all proposals, though the law requires the contract to be let to the lowest bidder. (*Newark v. Bonnell*, 609.)

2. PATENT RIGHTS, STATE LAWS RESPECTING THE SALE OF.—A statute requiring the owner of letters patent to file copies thereof in the circuit court of the county in which he makes any sale

thereof, and to insert in the obligation, given for the purchase price, that it is given for a patent right, and subjecting him to a penalty for violating the statute, is not in conflict with the constitution or laws of the United States, and, therefore, is not void. (*Sandage v. Studabaker Bros. Mfg. Co.*, 165.)

3. **PATENTS.—AN ASSIGNMENT OF ALL RIGHTS** and formulas which the assignor has, or may have, to and about a specified article includes letters-patent granted or applied for, or which may thereafter be applied for, and is available in equity, which will compel assignments to be made of all rights acquired and all patents applied for or granted, or formulas made or perfected, after the execution of the original assignment. An assignment of all right and formulas which the assignor has or may have, and all improvement for or about an article known as "Naphtha Soap" is available in equity, and entitles the assignee to all improvements thereafter made by the assignor. (*McFarland v. Stanton Mfg. Co.*, 647.)

See Sales, 7.

PAYMENT.

CONDITION—ACCEPTANCE OF.—If a check is sent to a person in full payment of his claim, and he has requested a receipt in full, his acceptance of the check is an irrevocable acceptance of the condition upon which it was thus sent, and the receiver cannot insist that it was accepted on account only. (*Nassidy v. Tomlinson*, 695.)

See Mortgages, 7; Negotiable Instruments, 5; Subrogation.

PEDDLERS.

See Interstate Commerce, 1.

PENALTIES.

See Interstate Commerce, 2; Telegraph Companies, 8.

PHYSICIANS AND SURGEONS.

See Witnesses, 5.

PLEADING.

1. **PRACTICE—PLEADING.**—Plaintiff cannot allege one cause of action, and recover upon another not stated. (*Hite v. Metropolitan etc. Ry. Co.*, 555.)

2. **CHANCERY PRACTICE—PROOF REQUIRED IN SUPPORT OF ANSWER.**—If to a suit to charge the defendant's property with the payment of a sum of money, he pleads a previous suit for the same purpose, resulting in a decree in his favor, the plea must be supported by evidence, for though an answer under oath is called for, it is not evidence of a new matter set up as a defense. (*Babcock v. Standish*, 633.)

3. **PLEADING—UNPAID TAXES—SUFFICIENCY OF COMPLAINT FOR BREACH OF COVENANT AGAINST ENCUMBRANCES.**—A complaint for the breach of a special covenant against encumbrances in a deed of conveyance, alleging that unpaid taxes constituted an encumbrance upon the land at the time of its conveyance, does not state facts sufficient to constitute a cause of action, where it does not allege that the defendants owned the property at the time the taxes accrued, this being necessary to show their personal liability. (*Smith v. Eigerman*, 281.)

4. **NEGLIGENCE—PLEADING—AVERMENT OF FREEDOM FROM NEGLIGENCE.**—In an action for damages for injuries caused by negligence, the plaintiff's general averment of his own freedom from negligence is controlling upon the question of contributory negligence,

unless the court is able to say, as a matter of law, from the facts pleaded, that the plaintiff contributed to his own injury. (*Evansville etc. R. R. Co. v. Athon*, 303.)

5. PLEADING—VARIANCE—TIME OF EMPLOYMENT.—There is no fatal variance between the proof and complaint in an action for damages for a breach of a contract of employment, where the complaint avers the time of employment to be "steady and permanent," and the plaintiffs' testimony is that he was employed for life. (*Pennsylvania Co. v. Dolan*, 289.)

6. PLEADING—DEPARTURE—OBJECTION AFTER VERDICT. If a special paragraph of reply contains any matter making the reply a departure, the pleading cannot, after verdict, be objected to for such a reason in connection with the question as to the sufficiency of the evidence presented by the motion for a new trial. (*Briggs v. Klosse*, 238.)

7. PLEADING.—AN AMENDMENT CHANGING THE FORM OR NATURE of an action is not allowable. Hence, an amendment of a declaration, against the objection of defendant, changing the nature of the action from assumpsit to an action on the case for deceit, is unauthorized. (*Flanders v. Cobb*, 410.)

8. PLEADING.—AN AMENDMENT TO A PETITION containing nothing but statements in the nature of conclusions of law, is properly stricken out. (*Gipps Brewing Co. v. De France*, 329.)

See Attorney and Client, 1; Limitations of Actions; Negotiable Instruments, 8-10; New Trial.

PLEDGE.

See Corporations, 8-12.

POLES.

See Telephone Companies, 1.

PREFERENCES.

See Assignment for the Benefit of Creditors; Corporations, 1; Insolvency; Partnership, 7, 12.

PRESENTATION.

See Checks, 6-11.

PRESUMPTIONS.

See Carriers, 3; Evidence, 6; Negligence, 4.

PRINCIPAL AND AGENT.

See Agency.

PRIVILEGED COMMUNICATIONS.

See Libel.

PROBATE.

See Courts, 1.

PROOFS OF LOSS.

See Insurance, 28-30.

PROXIMATE CAUSE.

See Negligence, 3.

PUBLIC POLICY.

See Contracts, 2, 6, 7, 9; Definitions.

PUBLIC WORKS.

See Libel; Patents, 1.

RAILROADS.

1. RAILROADS.—THE WORD "RAILROAD," IN ITS BROAD-EST SIGNIFICATION, includes a street railroad, although it extends over the streets of a single city, and is wholly located within the limits of a single county. (*Bloxham v. Consumers' Electric Light etc. Co.*, 44.)

2. RAILROADS.—WHEN THE WORD "RAILROAD" IS USED IN STATUTES, there is no definite rule of construction as to whether it includes street railroads, as it may or may not include them. The meaning of the word must depend upon the context, and the general intent of the statute in which it is used. (*Bloxham v. Consumers' Electric Light etc. Co.*, 44.)

3. RAILROADS—RIGHT TO HOLD GOODS FOR FREIGHT—NOTICE OF THROUGH BILL OF LADING.—If a connecting carrier receives from its preceding carrier goods shipped on a through contract, and pays the freight charges which have accrued up to that time, with notice that the initial carrier has issued to the consignor a through bill of lading reciting that the entire freight charges have been prepaid, although the notice is also to the effect that this recital is erroneous, such notice is sufficient to put the receiving carrier on inquiry, and it ought to have ascertained before paying the freight charges and accepting the goods for shipment whether the bill of lading had been negotiated or not, and, failing to make any inquiry, it cannot hold the goods, either for its own charges, or those paid by it, as against an innocent purchaser under the indorsed bill of lading, who, believing that the freight has been actually prepaid, has accepted as cash a draft drawn by the consignor upon the consignee, to which draft the bill of lading is attached, as is usual in such transactions. (*American Nat. Bank v. Georgia R. R. Co.*, 155.)

4. RAILROADS—AGENCY OF CONNECTING LINE.—If through coupon passenger tickets of a particular class are issued by a railway company over its own lines and those of connecting railways, including a system of railroads in the hands of a receiver, and operated by him in separate divisions, the fact that, with his knowledge, conductors in his employ have been recognizing and honoring as valid the coupons of such tickets for his lines, in connection with the fact that a coupon from the particular ticket in question has been so recognized and accepted for passage, is sufficient to establish on behalf of the holder of such ticket the agency of the initial company for the receiver in issuing the ticket. (*Spencer v. Lovejoy*, 152.)

5. RAILROADS—STOPOVER PRIVILEGES.—If a through railroad passenger ticket has attached to it separate and distinct coupons for each of several lines of railway owned by the same or different companies, or for separate divisions of the same line, the person entitled to use the ticket has, in the absence of any specific contract or restriction, the right to break his journey and stop over at the end of each of these lines or divisions, and then resume his journey again upon the next coupon of the same ticket, provided this is done within the limit of time during which the ticket is good for transportation. (*Spencer v. Lovejoy*, 152.)

6. RAILROADS—TRANSFER OF TICKET.—In the absence of terms rendering a railroad ticket nonassignable, it passes from one person to another by delivery without affecting its validity or the right to use it for transportation. (*Spencer v. Lovejoy*, 152.)

7. CARRIERS—LIMITING LIABILITY FOR BAGGAGE.—A contract by which a railway company exempts itself from liability "on baggage except for wearing apparel, and then only for a sum not exceeding one hundred dollars," not relating to loss or damage from any particular cause, does not limit the liability of the company for negligence in failing to deliver wearing apparel. (*Louisville Ry. Co. v. Nicholai*, 206.)

8. CARRIERS—REMOVAL OF BAGGAGE.—If it is customary for passengers to leave their baggage at a depot over night and for the carrier to close the depot soon after the arrival of a certain train, and heavy baggage, which the owner cannot get at once without special request and the payment of excess baggage charges, arrives on such train, it is for the jury to determine, in case such baggage is destroyed during the night, whether such owner exercised reasonable care in leaving his baggage in the depot over night. (*Ditman Boot etc. Co. v. Keokuk etc. R. R. Co.*, 350.)

9. RAILROADS—ASSISTANT OF PASSENGER IS A PASSENGER.—If the father of an invalid daughter has an agreement with a railroad company that its cars will stop long enough for him to put her aboard the cars, and to alight therefrom in safety, the relation of carrier and passenger exists between him and the company, while he is assisting her on the cars and departing therefrom. (*Evansville etc. R. R. Co. v. Athon*, 303.)

10. RAILROADS—SERVANTS.—A PULLMAN CONDUCTOR who directs or commands a passenger to alight from the cars of a railroad company is a servant of the company. (*Evansville etc. R. R. Co. v. Athon*, 303.)

11. RAILROADS—DIRECTION TO PASSENGER TO ALIGHT.—The words "instruct," "direct," and "command," used in a complaint for damages for injuries caused by the conductor of a railroad train negligently misguiding a passenger in alighting from the cars, do not necessarily indicate that the passenger was put under "duress," or that he was "coerced." They may justify the jury in finding that he acted under and pursuant to the conductor's direction. (*Evansville etc. R. R. Co. v. Athon*, 303.)

12. RAILROADS—PASSENGER ALIGHTING—CONTRIBUTORY NEGLIGENCE.—The question as to whether or not a passenger, in alighting from a train of railroad cars, in obedience to the direction or command of a conductor or brakeman thereon, is guilty of contributory negligence, depends upon the particular circumstances of each case. (*Evansville etc. R. R. Co. v. Athon*, 303.)

13. NEITHER NEGLIGENCE NOR CONTRIBUTORY NEGLIGENCE IS PRESUMED from proof of an accident on the track of a railway, resulting in personal injuries. (*Pennsylvania R. R. Co. v. Middleton*, 597.)

14. NEGLIGENCE—EVIDENCE.—IN AN ACTION TO RECOVER FOR THE DEATH of a person at a railway crossing, caused by the collision of the team he was driving, with a locomotive, the defendant has no right to demand positive evidence that the decedent did stop, look, and listen, but the jury must be left to determine from all the circumstances, in the absence of direct evidence, whether the death was the result of contributory negligence or not. (*Pennsylvania R. R. Co. v. Middleton*, 597.)

15. NEGLIGENCE, CONTRIBUTORY NOT PRESUMED.—If a person driving a team is killed at a railway crossing, and the evidence shows that the locomotive by which he was injured was not attached to a regular train, and that its bell was not rung when approaching the crossing, and there is no evidence as to what precautions, if any, were adopted by the decedent for his safety, the trial court cannot presume that he was guilty of contributory negligence, and grant a nonsuit, but

must submit the question to the jury. (*Pennsylvania R. R. Co. v. Middleton*, 597.)

16. STREET RAILWAYS—NEGLIGENCE—PRESUMPTION.—An accident to a passenger on a street railway, shown to have resulted from operating the train in such a way as to produce a jerk or lunge by which such passenger was precipitated from the car, raises a presumption of negligence on the part of the company or its servants, but such presumption may be overcome by proof that it had used the utmost care and diligence to prevent the accident, and that it was produced by some cause beyond its control, or that the passenger was guilty of contributory negligence. (*Hite v. Metropolitan etc. Ry. Co.*, 555.)

See Release; Taxes, 3.

RATIFICATION.

See Guardian and Ward, 2.

RECEIVERS.

THE RECEIVER OF A FOREIGN MUTUAL INSURANCE COMPANY, appointed by a foreign court of competent jurisdiction, may maintain an action, in the courts of this state, against a member of the company resident here, to recover an assessment levied by a decree of the foreign court, upon a premium note which was a part of the assets of the company in the hands of the receiver when the assessment was made. (*Parker v. Stoughton Mill Co.*, 881.)

See Contempt; Corporations, 1; Fixtures, 6; Building and Loan Associations, 1.

RECORDS.

1. INSTRUMENTS IN WRITING NOT REQUIRED BY LAW TO BE RECORDED in a particular book may be recorded in any book kept by the recorder. (*Farabee v. McKerrihan*, 734.)

2. INSTRUMENTS—RECORD OF.—A statute requiring recorders to prepare and keep two indexes of deeds and two of mortgages, but containing no repeal of prior legislation, nor relating to the recording of deeds and mortgages, does not create any new rule of constructive notice of recorded instruments. (*Farabee v. McKerrihan*, 734.)

3. INSTRUMENTS—RECORD OF, WHEN TAKES EFFECT.—An instrument is recorded the moment it is lodged in the proper office for record and the fees paid, although it is not actually entered in the books until months afterward, or is entered in the wrong book. (*Farabee v. McKerrihan*, 734.)

See Execution; Mortgages, 4; Vendor and Purchaser, 1.

REDEMPTION.

See Taxes, 7.

RELEASE.

1. CONTRACTS FOR PERMANENT EMPLOYMENT—NEGLIGENCE—PERSONAL INJURIES—RELEASE.—If a yard brakeman, employed by a railroad company, is injured through the negligence of the company, while performing his duties, and the company, in consideration of a written release executed by the brakeman, discharging the company from liability, pays him one hundred dollars, and promises, verbally, to give him "steady and permanent employment," at a stated compensation, such payment and promise is an acknowledgment of the company's liability, and the release is a good consideration for the verbal promise. Hence, if the company breaks such promise by discharging the employé without cause, the latter can maintain an action for

damages for breach of the contract, and need not make the release a part of his complaint, as the action is not upon a written instrument, but upon the company's parol promise. (*Pennsylvania Co. v. Dolan*, 289.)

2. EVIDENCE—MERGER—PROOF OF CONSIDERATION OF RELEASE BY EXTRINSIC FACTS.—If an employé is injured during his employment and gives his employer a written release from liability in consideration of a parol promise by the latter to employ him for a definite time, at fixed wages, and suit is brought for a breach of the verbal agreement, the parol agreement to employ is not merged in the written release, and the true consideration of the release may be shown by proof of extrinsic facts, even if it were treated as the foundation of the action, especially where it is incomplete and does not contain a stipulation for contractual consideration, nor an enforceable contract. (*Pennsylvania Co. v. Dolan*, 289.)

REPEAL.

See Statutes, 11, 12.

RESCISSION.

See Agency, 5-7; Sales, 7, 8.

RESIDENCE.

See Elections, 15-20.

RES JUDICATA.

See Judgments, 1; Witnesses, 8.

RESTRAINT OF TRADE.

See Contracts, 9-11.

RIPARIAN RIGHTS.

See Waters.

ROBBERY.

1. ROBBERY.—AN INDICTMENT for robbery, charging that the act was committed with violence, need not allege that the person robbed was put in fear. (*State v. Lawler*, 575.)

2. ROBBERY—INDICTMENT—OWNERSHIP OF PROPERTY. An indictment for robbery, alleging the ownership of the property taken to be in one having such special property or right of possession thereto as enables him to maintain an action for its recovery if taken from him, is sufficient. (*State v. Lawler*, 575.)

3. ROBBERY—EVIDENCE OF VIOLENCE.—Proof that the accused and another entered a shop in charge of two attendants, and that the accused forcibly held one of them, and disabled the other by a kick, while his accomplice took the cash drawer, when both ran away, shows violence sufficient to sustain a conviction of robbery, without proof of actual fear on the part of the parties robbed. (*State v. Lawler*, 575.)

4. ROBBERY—INDICTMENT—OWNERSHIP OF PROPERTY. An indictment for robbery must allege the ownership of the property taken to be in the party alleged to have been robbed. If it alleges that the property taken was owned by one person, and taken in the presence, and out of the possession, of another, it is bad on its face, and may be reached by motion in arrest of judgment, or on appeal without such motion. (*State v. Lawler*, 575.)

SALES.

1. STATUTE OF FRAUDS.—A MEMORANDUM ORDER FOR GOODS in which are stated all the terms of the proposed contract of purchase, signed by the buyer, or his general manager, and the written acceptance of the order signed by the seller and accepted by the buyer, constitutes a sufficient memorandum to satisfy the statute of frauds. (*Gerli v. Poidebard etc. Mfg. Co.*, 611.)

2. CONDITIONAL SALES—EXCHANGE OF PROPERTY—EXEMPTIONS.—If the vendee in a contract for the conditional sale of an animal, recovers damages from a third person for negligently killing it, and, with such damages, purchases another animal, the original vendor acquires no title to, or lien on, the animal last purchased, and, as against such vendor, the conditional vendee can hold it as exempt from execution sale under a distress warrant for rent and advancements. (*Smith v. Gufford*, 37.)

3. CONDITIONAL SALES—TORT TO PROPERTY—RIGHT TO RECOVER.—If a person holds an animal under a contract of conditional sale, and such animal is negligently killed by a third person, either the vendee or the vendor may sue and recover for the loss, but a recovery by either is a bar to further recovery. If, in such case, the vendee recovers, the vendor acquires a right of action against him for money had and received for his use and benefit to the extent of the amount originally agreed to be paid by the vendee for the animal. (*Smith v. Gufford*, 37.)

4. SALES—IMPLIED WARRANTY.—An executory sale, by a manufacturer, of a specific article of a well recognized kind or description in the market, as a good quality of bricks of the grade known as "common," carries an implied warranty that the goods shall conform to the description, be of good material, and well made according to the description, but none that they shall answer the purpose for which they are purchased. As to this the rule of *caveat emptor* applies. (*Wisconsin etc. Brick Co. v. Hood*, 539.)

5. SALES—LATENT DEFECTS.—If a manufacturer knowingly uses unsuitable and defective material in the manufacture of an article sold in the market by description, he is liable for any latent defect not disclosed to the purchaser. (*Wisconsin etc. Brick Co. v. Hood*, 539.)

6. SALES—LATENT DEFECTS—EVIDENCE.—If the goods delivered are not of the kind which the manufacturer agreed to deliver, and do not conform to the conditions of his contract as to kind, quality, or grade, by reason of latent defects of such character as to mislead and deceive, evidence of such latent defects is admissible as a defense in an action to recover the price of the goods sold. (*Wisconsin etc. Brick Co. v. Hood*, 539.)

7. RESCISSION.—ONE PURCHASING PATENT RIGHTS which are subsequently adjudged to be invalid is entitled to rescind the contract of purchase, and thereupon, on tendering a reassignment of such rights, to be relieved from payment of such of the purchase price as remains unpaid, and to recover back that part which has been paid. (*Sandage v. Studabaker Bros. Mfg. Co.*, 165.)

8. UPON A SALE OF GOODS DELIVERABLE IN INSTALLMENTS there is no right of rescission by the purchaser for a failure to deliver one of the installments, unless the seller, by his conduct, indicates his intention to abandon the contract, or a desire no longer to be bound by its terms. Hence, under a contract to sell thirty bales of silk, to be delivered in specified installments, at times designated, the failure or inability of the seller to deliver the first installment at the time agreed upon does not release the purchaser from the whole contract. He remains under obligation to receive the other installments when tendered to him, if the usefulness to him of any installment did not depend on prompt delivery of the prior installments, and full indemnity for the failure to deliver the first installment could be secured by action based thereon. (*Gerli v. Poidebard etc. Mfg. Co.*, 611.)

9. SALE.—THE REFUSAL OF A PURCHASER TO RECEIVE GOODS PURCHASED at a time when they were agreed to be delivered to him does not entitle the seller to recover damages, if it was impossible for him on his part to have made the delivery at the time stipulated. (*Gerli v. Poidebard etc. Mfg. Co.*, 611.)

See Execution; Guardian and Ward.

SERVICES.

See Contracts, 3; Wills, 1.

SERVITUDES.

See Telephone Companies. 1.

SETOFF.

1. SETOFF—ASSIGNMENT FOR CREDITORS.—Equity will, as against an assignee for the benefit of creditors, enforce a right of setoff expressly given by statute. (*Johnson v. Humphrey*, 873.)

2. SETOFF AGAINST INSOLVENT BANKER.—One who owes an insolvent banker may, for a valuable consideration, and before notice of his assignment for the benefit of creditors, purchase the bankers' certificates of deposit, and become the owner thereof in good faith, within the meaning of the statute governing the allowance of setoff, although prior to such purchase the bank has closed its doors. (*Johnson v. Humphrey*, 873.)

3. SETOFF—INSOLVENCY—WHEN RIGHT OF DEBTOR BECOMES FIXED.—If a banker becomes insolvent, and makes an assignment for the benefit of creditors, the right of his debtor as to setoff does not become fixed at the time the bank closes its doors, but when the assignment is completed. (*Johnson v. Humphrey*, 873.)

See Insolvency.

SIDEWALKS.

See Municipal Corporations, 19, 20.

SLANDER OF TITLE.

See Injunctions, 6.

STARE DECISIS.

See Appeal, 7.

STATES.

1. CONFLICT OF LAWS—STATUTE OF FRAUDS.—An agreement voidable by the statute of frauds in the state in which it was made cannot be enforced in another state, though, had it been made in the latter state, it would have been valid and enforceable therein. (*Cochran v. Ward*, 229.)

2. CONFLICT OF LAWS.—THE STATUTES OF ANOTHER STATE have, *ex proprio vigore*, no force or effect in this, and if enforced at all in its courts, such enforcement is dependent upon the adoption of the doctrine of comity. Each state must determine for itself whether it can enforce a foreign law without at the same time neglecting a duty which it owes to its own citizens, and if it cannot, such enforcement must be denied. (*Marshall v. Sherman*, 654.)

See Conflict of Laws; Jurisdiction.

STATUTE OF FRAUDS.

See Auctions; Contracts, 3-5; Landlord and Tenant; Mortgages, 1; Sales, 1; States 1; Vendor and Purchaser, 2.

LIMITATIONS OF ACTIONS.

See Limitations of Actions.

STATUTES.

1. **STATUTES.—IN CONSTRUING** an act, the court ought to examine the history of the times so as to relieve from the mischief and accomplish the purpose of the act. The legislative intention, as collected from the whole act, must prevail over the literal import of particular terms, and control the strict letter of the statute, where an adherence to the strict letter would lead to absurdity, injustice, or contradictory provisions. (State v. Roby, 174.)

2. **STATUTES, CONSTRUCTION.—BESIDES JUDICIAL CONSTRUCTION** of statutes, there exists what is called practical construction, having especial application to statutes for the regulation of the different departments of the government, and it consists in the interpretation put upon them by the actual administration of them by such departments. Such construction, while not of such high authority as judicial construction, is, when not in conflict with the constitution or the plain intent of the statute, of great persuasive force and efficacy. (Bloxham v. Consumers' Electric Light etc. Co., 44.)

3. **INJUNCTIONS.—A statute** authorizing the issuing of an injunction or restraining order to prevent acts declared to be unlawful by such statute, without exacting a bond, does not deprive a party of the use of his property without redress or remedy, though the injunction should be subsequently dissolved because improvidently or wrongfully issued, if, notwithstanding the injunction, the owner of the property is still at liberty to use it for all lawful purposes. (State v. Roby, 174.)

4. **STATUTES, CONSTRUING.—THE TITLE** of an act may be considered to aid in determining the legislative intent. (State v. Roby, 174.)

5. **CONSTITUTIONAL LAW.—IF THERE IS DOUBT** in the mind of the court respecting the validity of the statute, it must be sustained. (State v. Roby, 174.)

6. **CONSTITUTIONAL LAW.—THE CONSTRUCTION OF A STATUTE** should, if possible, be such as to sustain it from objections urged against its constitutionality. (State v. Roby, 174.)

7. **CONSTITUTIONAL LAW.—IF THE TITLE** of an act declares it to be an act regulating horseracing at certain seasons, prescribing a penalty for a violation of the provisions of the act, prescribing rules of procedure, giving certain civil remedies, authorizing the institution of suits, and declaring emergencies, a section of such act making it unlawful to hold, or advertise for, race meetings oftener than three times in a year, fixing the maximum length of race meetings, naming periods when they shall not be held, and providing a penalty for violating the act, is within the title. (State v. Roby, 174.)

8. **CONSTITUTIONAL LAW.—A STATUTE REGULATING HORSERACING** and race meetings, providing penalties to be suffered by persons found to be guilty of its violation, and authorizing injunctions to issue to prevent the use of property in violation of the act, does not conflict with the clauses of the state constitution prohibiting the passage of local and special laws regulating practice in courts of justice, and declaring that no person shall be put in jeopardy twice for the same offense. (State v. Roby, 174.)

9. **CONSTITUTIONAL LAW.—AN ACT PROHIBITING HORSE-RACING** and race meetings, except at intervals stated therein, is a legitimate exercise of the police power of the state. (State v. Roby, 174.)

10. CONSTITUTIONAL LAW.—IF THE TITLE OF AN ACT SHOWS that it is to limit, restrict, and prohibit horseracing, a section purporting to deal with races and race meetings must be construed as referring to horseracing, when to construe it as referring to races of a different character would require the court to declare it to be unconstitutional for including subjects not embraced within its title. (*State v. Roby*, 174.)

11. STATUTES—REPEAL.—If the title of an act declares one section of a former statute to be repealed, and the body of the act declares another section to be repealed, the repeal fails as to the section mentioned in the title. (*Taylor v. Dahu*, 312.)

12. STATUTES — AMENDMENTS—REPEAL.—If a new law is amendatory of an old one, the sections of the old law not amended will stand. It is only where the sections, as amended, contain such new matter as to cover the subjects embraced in all the old sections, including those not amended, and where such sections as amended are positively repugnant to the provisions in the sections not amended, and the entire new act is evidently intended to supersede and take the place of the old one, that the latter repeals the former. (*Taylor v. Dahu*, 312.)

See Evidence, 6, 7; Game Laws; Mechanic's Lien, 1, 4; Patents, 2.

STOCK.

See Corporations, 8-19.

STOCKHOLDERS.

See Constitutions; Corporations, 20-24.

STOPOVER.

See Railroads, 5.

STREETS.

See Municipal Corporations, 19.

SUBROGATION.

1. SUBROGATION—PARTIAL PAYMENT.—Subrogation rests upon purely equitable grounds, and cannot be enforced against superior equities. Unless a surety pays the debt in full, he is not entitled to subrogation, and, until this is done, the creditor must be left in full possession and control of the debt and the remedies for its enforcement. (*Musgrave v. Dickson*, 765.)

2. SUBROGATION.—A SETTLEMENT BETWEEN SURETY AND DEBTOR fixes the amount of the liability of the latter, and the extent of the right to indemnity; but it does not affect the right to subrogation, which is never allowed to the prejudice of a creditor. (*Musgrave v. Dickson*, 765.)

SURETYSHIP.

1. SURETYSHIP—SETTLEMENT WITH PRINCIPAL—ESTOPPEL AGAINST SURETY.—If, at the end of an officer's first term, a settlement is made with him by the obligor in the first bond, without the production of any money, and by the acceptance of a worthless draft, while facts exist which should put the obligee on inquiry as to a prior defalcation by the officer, the sureties on such officer's bond for a second term are not estopped from showing that a defalcation for which they are sought to be charged occurred prior to the making and approval of their bond; and upon making such proof they are not liable. (*Milford v. Morris*, 338.)

2. SURETYSHIP—INDORSEMENT ON BOND—NOTICE TO SURETY.—An indorsement or recital not on a bond at the time it is

signed by sureties, but put on afterward, is not notice to them. (*Millford v. Morris*, 338.)

TAX DEEDS.

See Taxes, 7.

TAXES.

1. **TAXES UPON REAL ESTATE** constitute a personal liability against the person owning it at the time they accrued, but not against a subsequent purchaser thereof. (*Smith v. Eigerman*, 281.)

2. **TAXATION.—COLLECTION OF TAXES BY AN AUTHORIZED OFFICER CANNOT BE ENJOINED** merely because he might adopt a mode which would be fairer and more equitable, if the mode pursued by him is authorized. It is only when the tax is illegal, or is being illegally collected, that an injunction can be granted. (*Bloxham v. Consumers' Electric Light etc. Co.*, 44.)

3. **TAXATION OF RAILROADS—STATUTORY CONSTRUCTION.** If, after the enactment of a statute requiring the executive department of the state to assess all railroads for taxation, such department, for a series of years, has, under such act or acts of similar import, assessed all railroads for taxation, including street railroads, and such taxes have been paid to the state without objection or question as to the validity of such acts, the courts may take judicial knowledge of the practical construction thus placed upon such statutes, and if it does not defeat the manifest purpose of the statutes, should not interfere therewith, when, after the lapse of such period, it is contended for the first time that a street railroad is not a railroad within the meaning of such statutes. (*Bloxham v. Consumers' Electric Light etc. Co.*, 44.)

4. **TAXATION—LIEN FOR TAXES.**—If property assessed for taxes by the state is sold under a decree, to which the state is not a party, ordering a sale thereof free from all encumbrances and liens, the lien of the state is not thereby divested. (*Bloxham v. Consumers' Electric Light etc. Co.*, 44.)

5. **TAXATION.—LIENS FOR TAXES** do not stand upon the footing of ordinary liens, and are not displaced by a sale under a pre-existing judgment or decree, unless so directed by statute. (*Bloxham v. Consumers' Electric Light etc. Co.*, 44.)

6. **TAXATION — LIEN FOR TAXES — POWER OF COURT TO DIVEST.**—Private parties have no right, in proceedings in which the state is not a party, to have a decree entered by consent, which will divest it of its statutory tax lien upon property involved in the suit, and force it to collect its taxes in some other manner than that prescribed by a constitutional statute. No court has jurisdiction or authority to enter a decree having such effect. (*Bloxham v. Consumers' Electric Light etc. Co.*, 44.)

7. **TAX DEEDS—NOTICE TO TERMINATE REDEMPTION.**—A tax deed issued by an officer who has no evidence on file in his office to show that the person serving notice to redeem from the tax sale is the holder of the certificate of sale or his agent or attorney is void. (*Stevens v. Murphy*, 348.)

See Deeds, 3; Pleading, 3.

TELEGRAPH COMPANIES.

1. **TELEGRAPH COMPANIES—NOTICE FROM MESSAGE.**—A telegraphic message reading "Have work, come at once," is sufficient to put the telegraph company on notice of the damages which would probably result to the sender of the message from negligence in failing to deliver it promptly. (*Western Union Tel. Co. v. Hines*, 159.)

2. **TELEGRAPH COMPANIES—WAIVER OF NOTICE OF CLAIM FOR DAMAGES.**—If the sender of a telegraphic message

promptly notifies the agents of the telegraph company of a claim against it for damages caused by failure to promptly deliver the message, and of his intention to sue, a promise by the company's agent to look into the matter, and report to him, and to "arrange" it, if followed by a failure to keep such promise, constitutes a waiver by the company of the sixty days' written notice of the sendee's claim for damages, stipulated for upon the blank on which the message was written. (*Western Union Tel. Co. v. Hines*, 159.)

3. TELEGRAPH COMPANIES—NONDELIVERY OF MESSAGE—BURDEN OF PROOF.—If a telegraph company receives a prepaid message for transmission to a point in another state, which is not delivered, it is liable for the statutory penalty for negligence in not transmitting the message, unless it shows that the message was, in fact, transmitted from the receiving office with due diligence, and that its nondelivery to the sendee was due to some default, or other cause, arising beyond the limits of the state in which it was received for transmission. (*Western Union Tel. Co. v. Howell*, 68.)

4. TELEGRAPH CORPORATIONS—PRESUMPTION OF NEGLIGENCE.—If a wire fastened to a telegraph pole falls upon and crosses the feed-wire of an electric railway, and remains swinging there for two weeks, becoming charged with so much electricity that it inflicts serious injuries to a person with whom it comes in contact, the jury is justified in finding that it became so charged by swinging and rubbing so long against the feed-wire that it wore off the insulating matter. (*Western Union Tel. Co. v. State*, 464.)

5. TELEGRAPH AND TELEPHONE CORPORATIONS ARE ANSWERABLE IN DAMAGES to a person injured by a wire suspended from one of their poles by their permission, and which, becoming broken, falls across the feed-wire of an electric railway company, and remains there two weeks, and, becoming charged with electricity, is thrown against a person lawfully using a public street, inflicting on him great personal injury. (*Western Union Tel. Co. v. State*, 464.)

TELEPHONE COMPANIES.

1. TELEPHONE COMPANIES—POLES IN HIGHWAY—ADDITIONAL SERVITUDE.—The erection and maintenance under legislative authority of poles and wires in a rural highway for a telephone line for public use is not an additional servitude, for which the abutting landowner, who is also the owner of the fee in the highway subject to the public easement, is entitled to compensation. (*Cater v. Northwestern Teleph. etc. Co.*, 543.)

2. TELEPHONE AND OTHER CORPORATIONS and persons using electricity in the public streets owe a duty to all persons lawfully using such streets that the use shall be substantially as safe as before the telephone or other electric plant was placed therein. (*Western Union Tel. Co. v. State*, 464.)

See *Interstate Commerce*, 2.

THEFT.

See *Banks*, 17-19.

TICKETS.

See *Carriers*, 4; *Railroads*, 4-6.

TORTS.

See *Municipal Corporations*, 27; *Sales*, 3.

TOWNS.

1. TOWNSHIPS—NEGLIGENCE—PROXIMATE CAUSE.—Township authorities are bound to know that a bridge may be crossed by a spirited horse in the night-time, and that such horse may take fright; and if, by neglecting to place a guardrail upon such bridge, an injury results from the fright of such horse, their neglect is the proximate cause of the injury, and the township is liable therefor. (*Yoders v. Amwell Tp.*, 447.)

2. TOWNSHIPS—NEGLIGENCE—PROXIMATE CAUSE.—If township authorities neglect to place guardrails upon a bridge in the highway, and a horse drawing a vehicle passes safely over the bridge, and then taking fright backs the vehicle onto and off of the bridge over its side, thereby causing injury to its occupants, such neglect is the proximate cause of the accident, and the township is liable therefor. (*Yoders v. Amwell Tp.*, 447.)

3. TOWNSHIPS—NEGLIGENCE—PROXIMATE CAUSE.—Township authorities are bound to foresee, and reasonably provide against, common dangers to ordinary travel on the highway. The fright of a spirited horse, and that his conduct when in fright may be unreasoning, insane, and unlooked for, are common dangers which should be expected. Such authorities cannot excuse their negligence in failing to erect a guardrail upon a bridge, or make it the remote cause of an injury, by asserting that they could not foresee a particular freak of conduct in a frightened horse. (*Yoders v. Amwell Tp.*, 447.)

TRESPASS.

TRESPASS.—MEASURE OF DAMAGES for willful trespass in cultivating the land of another is the fair market value of the crop thus produced. (*Negley v. Cowell*, 344.)

TREES.

See Damages, 4; Gas Companies, 3.

TRIAL.

1. EVIDENCE—ATTACK ON PAPER AFTER IT IS ADMITTED. If a party, calling for a paper, inspects and puts it in evidence after he has announced that he contends that it is not the original of the paper called for, he does not lose his right to subsequently attack it on the ground stated, although he has given no formal notice of an intention to do so. (*Western Union Tel. Co. v. Hines*, 159.)

2. EVIDENCE—ATTACK ON PAPER AFTER IT IS ADMITTED. If a party, calling for and inspecting a paper produced in response to notice, does not, at or before the time of introducing it, mention any objection to it, or give any notice of an intention to attack it, he cannot afterward impeach it, unless he has been in some way misled, imposed upon, or deceived, after the exercise on his own part of proper diligence. (*Western Union Tel. Co. v. Hines*, 159.)

3. PRACTICE.—AN OFFER OF EVIDENCE tending to defeat a recovery should be of facts, clear and distinct in their character, and not of doubtful or uncertain import; and if, from the offer, it does not necessarily appear that the facts offered to be proved would constitute a defense, the trial court is justified in refusing to receive the evidence. (*Middleton v. Griffith*, 617.)

4. JURY TRIAL—PERSONAL KNOWLEDGE OF JURORS.—THE JURORS ARE NOT entitled to find their verdict on their personal knowledge of the defendant's mental condition, he being on trial for perjury and his condition being a material fact in issue. (*State v. Gaymon*, 861.)

5. VERDICT—RIGHT OF COURT TO DIRECT.—If the evidence clearly establishes the right of the plaintiff to recover, and no defense is proven, it is proper for the court to direct a verdict for plaintiff, but not otherwise. (*Moore v. Baker*, 203.)

6. PRACTICE DIRECTING VERDICT.—If the evidence is of such character that the trial judge would have a plain duty to perform in setting aside the verdict as unsupported by the evidence, it is his duty and prerogative to interfere before submission to the jury, and direct the verdict. (*Hite v. Metropolitan etc. Ry. Co.*, 553.)

TRIAL.

See New Trial.

TRUSTS.

1. AN EXPRESS TRUST OF PERSONAL PROPERTY may be created or declared by parol; but its terms must be clearly established and show an executed gift, so that the equitable title shall have passed as effectually to the donee as in the case of a gift *inter vivos*. (*Bath Sav. Inst. v. Hathorn*, 382.)

2. TRUSTS—GIFTS—DISTINCTION.—A voluntary trust is an equitable gift, and, like a legal gift *inter vivos*, must be complete. The distinction between them is of a technical nature. In a trust the real title vests in the donee, but the legal title, perhaps carrying control of the property, may be placed elsewhere; while in a gift, both the equitable and legal title instantly fall to the donee. (*Bath Sav. Inst. v. Hathorn*, 382.)

3. TRUSTS, VOLUNTARY—SAVINGS BANK DEPOSIT—EVIDENCE.—An entry on the books of a savings bank in the name of a donor, "in trust for" the donee, with the expressed wish that the deposit should go to the donee upon the donor's decease, is sufficient to create a *prima facie* trust, though the donee had no notice of it. Such entry is not conclusive evidence, by itself, of an absolute, indisputable gift, and may be controlled by extrinsic evidence to show a contrary intention; but where such evidence is wanting, and all the declarations, acts, and conduct of the donor are consistent with the presumption arising from the entry itself, and show a completed trust in favor of the donee, it will be upheld as such. (*Bath Sav. Inst. v. Hathorn*, 382.)

4. TRUSTS—PERSONALTY.—A DECLARATION OF TRUST as effectually passes the equitable title of the fund to the cestui as a gift *inter vivos* passes the legal title to the donee, if the donor creates an estate for his cestui that is no longer his own. The donor may retain the legal title, giving him the control, but for the benefit of the cestui, according to the terms of the contract. The trustee, though he retains the legal title, is merely an agent to administer the trust, and his control is subject to the direction of a court of equity. (*Bath Sav. Inst. v. Hathorn*, 382.)

See Gifts, 2.

TURNPIKE COMPANIES.

1. HIGHWAYS.—THE TITLE TO THE WATER OF a spring within the right of way of a turnpike company is in the owner of the fee, who has a right to use the whole of it, to conduct it by pipes wherever he desires to consume, sell, or waste it, so long as he does not inflict injury to the roadbed. (*Upper Ten Mile etc. Road Co. v. Braden*, 759.)

2. HIGHWAYS—RIGHT TO WATERS THEREIN.—A turnpike company has no easement in a spring within its right of way. It has a right of way for public travel only over the land upon which the waters of such spring descend, and, for the purpose of preserving its roadbed in a condition suitable for travel, it may drain the water off; but it has

no right to appropriate, or to take exclusive possession of the spring, or to exclude the owner therefrom. (*Upper Ten Mile etc. Road Co. v. Braden*, 759.)

VENDOR AND PURCHASER.

1. **VENDOR AND VENDEE—RECORD OF DEED AS NOTICE.** The recital of a nominal consideration in an executor's deed, duly recorded, and unquestioned for a long period of time, during which the property has been conveyed many times in reliance upon the deed, is not sufficient to put a purchaser upon inquiry as to the consideration; and want of a sufficient consideration does not defeat the title of such purchaser without notice, as against devisees not discovering the fraud of the executor until shortly before such purchase. (*Babcock v. Collins*, 503.)

2. **STATUTE OF FRAUD—LETTERS AS MEMORANDUM.**—A letter to a vendor from his agent conveying an offer for land, and his letter in reply to the agent accepting such offer, constitute a sufficient memorandum of a contract for the sale of the land to satisfy the statute of frauds. (*Singleton v. Hill*, 868.)

3. **VENDOR AND VENDEE—MISTAKE AS TO GRANTOR'S TITLE AS DEFENSE TO FORECLOSURE.**—If a grantee in a deed gives a mortgage for the value of the land granted upon other land, under a misapprehension that the grantor, as recited in the deed, owns the land in fee, while in fact he owns only a life estate therein, the grantee cannot be compelled to pay, in a suit to foreclose the mortgage, more than the value of the life estate. (*Wilson v. Ott*, 767.)

4. **VENDOR AND VENDEE—FAILURE OF TITLE AS DEFENSE.**—In an action for the purchase price of land, the vendee may set up as a defense a defect in, or failure of, title in whole or in part. (*Wilson v. Ott*, 767.)

5. **VENDOR AND VENDEE—FRAUD ON JOINT PURCHASER—COMMISSIONS.**—If two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that certain property can be purchased for a certain price, which he procures to be paid by his associates, when, in fact, he receives a difference between said sum and a less one as commissions, unknown to them, he may be compelled to account to them for such difference, without rescission of the contract, and although the property may be worth all or more than was paid for it. In such case, the parties are not partners, and no resort need be had to equity for an accounting in order to recover. (*Seehorn v. Hall*, 562.)

VACANT AND UNOCCUPIED.

See Insurance, 19-22.

VARIANCE.

See Pleading, 5.

VERDICT.

See Appeal, 6.

WAGERS.

See Equity, 2, 3.

WAIVER.

See Insurance, 28, 29; Witnesses, 4, 5.

WAREHOUSEMEN.

1. A WAREHOUSE OR STORAGE CORPORATION IS ANSWERABLE for certificates or receipts issued by one of its officers in his own favor, if it had knowledge that he was in the habit of issuing such certificates, and did not put an end to his acts of that nature after having a reasonable time to do so. (*Hanover Nat. Bank v. American Dock etc. Co.*, 721.)

2. A STORAGE OR WAREHOUSE COMPANY failing to produce goods called for in its receipt must assume the burden of accounting for them, or pay their full value. (*Hanover Nat. Bank v. American Dock etc. Co.*, 721.)

3. A CERTIFICATE OR RECEIPT ISSUED BY A WAREHOUSE AND STORAGE company is negotiable, and a purchaser thereof in good faith, and without notice of any fact to put him on inquiry, is entitled to receive from the company the property described on payment of lawful charges. (*Hanover Nat. Bank v. American Dock etc. Co.*, 721.)

4. WAREHOUSE CERTIFICATES—NOTICE.—If a warehouse certificate purporting to be for goods deposited shows on its face that it is in favor of an officer of the corporation, and that he, as such, issued it, a purchaser of the certificate, in order to charge the corporation, must show that it authorized the officer to act for it in cases in which he was personally interested. (*Hanover Nat. Bank v. American Dock etc. Co.*, 721.)

See Corporations, 6.

WARRANTY.

See Sales, 4-6.

WATERS.

1. WATERCOURSES—RIPARIAN RIGHTS.—If the natural channel of a watercourse lies along the lands of different proprietors, the water therein is the common and indivisible property of all. Their privileges therein are in all respects equal, and, except in so far as the right may be qualified by grant, prescription, or otherwise, each has, equally with the others, a right to the use of it for domestic or business purposes. Each has a right to have the water come to his land in its natural and usual flow, subject only to such detention or diminution as may be caused by a reasonable use of it by other proprietors. (*White v. East Lake Land Co.*, 141.)

2. WATERCOURSES—RIPARIAN RIGHTS—EVIDENCE.—In an action to recover for an unreasonable diversion of the water of a natural stream, if one of the questions at issue is whether the plaintiff's mill lost custom because it stopped grinding on account of an insufficient supply of water, statements of customers that they had withdrawn their custom for this reason are admissible in evidence. (*White v. East Lake Land Co.*, 141.)

3. WATERCOURSES—REASONABLE USE.—Each riparian proprietor is entitled to a reasonable use of a natural stream. Whether such use is reasonable or not must depend upon the character and size of the stream, the uses to which it is subservient, and the other circumstances of each particular case. The question is always one of fact for the jury. (*White v. East Lake Land Co.*, 141.)

4. WATERCOURSES—UNREASONABLE USE.—If an upper proprietor, by placing a dam across a natural stream running through his land, obstruct it so that the water accumulates in an artificial lake or pond, and by means of percolation or evaporation is diminished in quantity to such an extent as to deprive the lower proprietor of the reasonable use of the water, such obstruction is an unreasonable diversion of

the water for which the lower owner is entitled to recover damages. (*White v. East Lake Land Co.*, 141.)

5. **WATERCOURSES—UNREASONABLE USE—DAMAGES.**—If, by an unreasonable use of the water of a natural stream on the part of an upper proprietor, a lower proprietor is deprived entirely of his enjoyment of the water, he is entitled to recover full compensation in damages for the loss; if the diversion is merely partial, the damages should be proportioned. (*White v. East Lake Land Co.*, 141.)

6. **WATERCOURSES—DIVISION OF STREAM BY ISLAND.—RIPARIAN OWNERSHIP** of three out of four shores of two channels upon the same river does not of itself establish a right to use three-fourths of all the water of the whole river. (*Warren v. Westbrook Mfg. Co.*, 372.)

7. **WATERCOURSES—DIVISION OF STREAM BY ISLAND—MILLS—PARTITION OF WATER—BILL IN EQUITY—AMENDMENT.**—If water in a river is divided into two channels by a natural island, each channel having a dam across it, in line with each other, and falls affording valuable water power, and there is a controversy, between riparian owners, about a division of the water for the purpose of propelling the machinery of mills, the plaintiffs owning three out of four shores of the two channels, and the defendants owning the other shore, a court of equity can and should make such division of the use of the flow of water between the opposite riparian proprietors as will secure to each a use or enjoyment equal to his rights, where the plaintiffs allege such ownership; that a dam, one across each channel, has existed for a hundred years; that for a long period the defendants used only their proper proportion of water, but that they have increased their use of the water far beyond their just proportion; that such increased use renders the whole power insufficient for the mills of all the riparian owners; and that, unless they can be assured of the steady and regular use of their full, rightful proportion of the water power, they cannot profitably operate their mills, and cannot venture to undertake further operations, by reason of the cloud thus thrown over their rights; and where the court is asked to partition the water in one of the channels, especially where the case has been before the court on two former occasions, without the rights of the parties having been adjusted; where the interests of the riparian proprietors upon both channels appear to be intertwined, if not amalgamated; where the interest, as thus intertwined, of each proprietor upon either channel spans the whole river across both channels; and where each has an interest in the regulation of the whole flow of all the water, into whichever channel it may turn; but the bill must be so amended as to present all claims of right in any part of the falls, and waters, arising from riparian ownership, contract, prescription, or any other source; and the prayer must be so amended as to include a division of the use of the water in each channel and the whole river, and any other action of the court necessary to finally and completely adjust the controversy. (*Warren v. Westbrook Mfg. Co.*, 372.)

8. **WATERCOURSES—DIVISION OF STREAM BY ISLAND—MILLS—PARTITION OF WATER.**—If water in a river is divided into two channels by a natural island, each channel having a dam across it in line with each other, and falls affording valuable water power, and there is a controversy, between riparian owners, about a division of the water for the purpose of propelling the machinery of mills, the plaintiff, owning three out of four shores of the two channels, and the defendants owning the other shore, a court of equity will not undertake to divide, either wholly or partially, the water of the whole river, so that the plaintiffs may use three-fourths of the water, and the defendants only one-fourth of it, but will leave the parties to accommodate themselves to the division made by nature, where the plaintiffs' claim is based exclusively upon their riparian ownership, and without invoking any statute, contract, or prescriptive right. (*Warren v. Westbrook Mfg. Co.*, 372.)

See Equity, 6; Turnpike Companies.

WATERWORKS.

• See Municipal Corporations, 8-10.

WILLS.

1. WILLS—CONTRACT TO MAKE—RECOVERY FOR SERVICES.—If a girl who has lived in the family of a decedent, occupying the relation of daughter to him, proves a contract by the decedent to leave her all his property, such proof does not entitle her to recover all of his estate; but it overcomes the presumption arising from the family relation that her services were performed without the expectation of reward, and enables her to recover on a quantum meruit the reasonable market value of her services. (*Kauss v. Rohner*, 762.)

2. WILLS, BANK-BOOKS AS—The changing of an account in a bank from the name of a husband to that of a husband and wife, and the writing of an agreement at the head of a pass-book, to which the husband and the bank both assent, that the moneys were to be subject to the order of either the husband or the wife, the balance at the death of either to belong to the wife, do not constitute a will of personal property. (*Metropolitan Sav. Bank v. Murphy*, 473.)

3. WILLS—SIGNATURE BY MARK AND WRONG CHRISTIAN NAME.—The signing of a will by the mark of the testator is sufficient, though the christian name signed with the mark and intended for his was incorrectly written as James, while his name was Samuel. (*Rook v. Wilson*, 163.)

4. WILLS, ERROR IN DESCRIPTION.—A will purporting to devise "my real estate, to wit, the southeast quarter of the southwest quarter of section 8," operates as a devise of the north east quarter of the southeast quarter of that section, if that was the only land owned by the testator. (*Rook v. Wilson*, 163.)

5. WILLS, PROOF OF—COMPETENCY OF WITNESS.—A statute providing that an illiterate or infirm witness is competent to attest a will by his mark, "provided he can swear to the same," means, that, to be so competent, he must be competent as a witness to testify in a court of law at the time of attesting the will, and not that he must be competent to swear to or identify his mark at the time the will is offered for probate. His competency at the latter time is immaterial. (*Gillis v. Gillis*, 121.)

6. WILLS.—THE COMPETENCY OF ATTESTING WITNESSES to a will is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation. (*Gillis v. Gillis*, 121.)

7. WILLS—ATTESTING WITNESSES.—If a sufficient number of witnesses attest a will, and are at that time competent, it remains valid, although death or supervening disability may render any or all of them incapable, in fact, of testifying when the will is offered for probate. (*Gillis v. Gillis*, 121.)

8. WILLS—ATTESTING WITNESSES.—If, at the time of the probate of a will, a subscribing witness is incompetent, from any cause, or unwilling to testify to its attestation by himself or the other subscribing witnesses, or to the due execution of the will by the testator while mentally capable, or if the witness denies any of these facts, they may be proved by competent witnesses having knowledge thereof, although not subscribing witnesses to the will. (*Gillis v. Gillis*, 121.)

9. WILLS—ELECTIONS.—A wife to whom her husband transfers certain bank stock in fee, and subsequently, by his will, devises the use of such stock to her for life, with remainder over, is estopped, if she elects to take under the will, from denying the testator's right to thus dispose of the stock, although the title is in her, and if, after so electing, she sells the stock, the remainderman may sue her for its conversion. (*Moore v. Baker*, 103.)

10. **ELECTION UNDER WILLS** is of equitable origin, and cannot exist unless the testator confers some benefit upon the devisee, and, by the terms of the will, assumes to dispose of some right of the latter. The party electing to take under the will is bound to give effect to all of its provisions, and perform the burdens attached to his benefit. (*Moore v. Baker*, 203.)

11. **ELECTION UNDER A WILL CONSISTS** in the exercise of a choice offered the devisee of accepting the devise and surrendering some right of his which the will undertakes to dispose of, or of retaining such right and rejecting the devise. (*Moore v. Baker*, 203.)

See Executors and Administrators, 3.

WIRES.

See Telegraph Companies, 5.

WITNESSES.

1. **A WITNESS WHO IS CONFINED IN PRISON** to insure his being present to testify in a criminal case is entitled to witness fees for each day of his confinement, if it was not due to his being contumacious, or to his having such a bad character that no one would be bound for him, but to his being unable, without fault on his part, to procure security for his appearance to testify. His detention must be treated as such a constructive attendance upon the court as entitles him to the same fees as if the attendance were actual. (*Hall v. County Commrs.*, 484.)

2. **WITNESSES—COMPETENCY—DEATH OF PARTY.**—A living witness to a conversation between a deceased party and the plaintiff having testified, the plaintiff is competent to contradict him as to such matters only as he has testified to, and to state his recollection of what was said, under a statute making a surviving party competent to testify to any relevant matter which occurred before the death of the other party, if such matter occurred between himself and a person who is living, and who testifies against him at the trial, "or if such relevant matter occurred in the presence or hearing of such other living and competent person." (*Kauss v. Rohner*, 762.)

3. **RES JUDICATA—ESTOPPEL.**—A WITNESS who is a party to a judgment or decree is not estopped in a suit between other parties from testifying to facts which he is estopped by such judgment or decree from denying as between himself and his adversaries. (*Babcock v. Standish*, 638.)

4. **WITNESS—WAIVER OF RIGHT TO INSIST UPON SECRECY.**—If two physicians are called upon to examine a person in their professional capacity under such circumstances that he has a right to insist that the knowledge gained by them shall not be disclosed, and he calls one of them to testify in his behalf at a subsequent trial, he thereby waives the right to insist upon secrecy, and the other may, therefore, be called and examined as a witness by his antagonist. (*Morris v. New York etc. Ry. Co.*, 675.)

5. **WITNESSES.**—A WAIVER OF THE PRIVILEGE that a physician shall not disclose facts ascertained by him while attending his patient takes place when the physician is called as a witness by the patient, and the waiver, once made, becomes irrevocable, and cannot be retracted. (*Morris v. New York etc. Ry. Co.*, 675.)

See Mandamus; Wills, 5-8.

WORDS AND PHRASES.

See Definitions.

